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2000 WL 433976
United States District Court, E.D. Pennsylvania.

ADAPT OF PHILADELPHIA, et al.
v.
PHILADELPHIA HOUSING AUTHORITY, et al.

No. Civ.A. 98–4609. | April 14, 2000.

**Attorneys and Law Firms**

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Stephen F. Gold, (See above), for Marie Watson, Plaintiff.

Stephen F. Gold, (See above), for Marshall Watson, Plaintiff.

Stephen F. Gold, (See above), for Diane. Hughes, Plaintiff.

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Carl Oxholm, III, Carl Oxholm, III, Alan C. Kessler, Joel M. Sweet, (See above), for Carl Greene, in his Official Capacity as the Executive Director of the Philadelphia Housing Authority, Defendant.

**Opinion**

***PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW***

BARTLE, J.

***1** Plaintiffs have brought this action against the Philadelphia Housing Authority ("PHA") and Carl Greene, in his official capacity as the executive director of the PHA, pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and certain regulations which implement § 504, including 24 C.F.R. §§ 8.23, 8.24, and 8.26. Plaintiffs seek a declaration that the defendants, who are recipients of federal funds to assist with the oversight of "scattered site" public housing units throughout the City of Philadelphia, have violated § 504 because they failed to make a sufficient number of scattered site units accessible to people with mobility impairments. They also seek injunctive relief.

A nine day non-jury trial was held. At the request of the parties, and in an effort to encourage an amicable resolution of this matter, the court makes the following partial findings of fact and conclusions of law.

## I.

Defendant PHA is the largest provider of public housing in Pennsylvania. It receives the majority of its funding from the federal government through the United States Department of Housing and Urban Development ("HUD"). Defendant Carl Greene has been executive director of PHA since March, 1998. PHA's housing program consists of two parts: (1) public housing, which PHA provides and for which it serves as landlord; and (2) a Section 8 voucher program, which allows eligible tenants to live in low-rent private housing.

PHA oversees a public housing stock of approximately 20,000 dwelling units, or apartments, located throughout the City of Philadelphia.[1] There are two basic types of dwelling units: (1) approximately 13,000 "conventional" units; and (2) approximately 7,000 "scattered site" units. Conventional dwelling units, generally, are those located in one or more buildings in a contiguous area. They include not only apartments in highrise buildings but also units in "garden style" buildings, which look much like townhouses. Scattered site dwelling units are usually located in individual row houses scattered among or surrounded by private homes, although some scattered site units are in houses that are adjacent to other PHA scattered site buildings. Most of PHA's scattered site houses have only one dwelling unit, while others are divided into two or more different apartments.

## II.

The plaintiffs in this action include two advocacy organizations, ADAPT of Philadelphia ("ADAPT") and Liberty Resources, Inc. ("LRI"). Neither ADAPT nor LRI is a membership organization. ADAPT defines its mission as "help[ing] individuals with disabilities achieve equal opportunity and, addressing institutional problems, ... eradicat[ing] discrimination against persons with

disabilities.” Stip. Testimony of Dr. Erik von Schmetterling ¶ 4. Its advocates not only address the housing needs of its clients, who are individuals with disabilities, but also its clients’ attendant care and transportation needs. The parties stipulated:

> ***2** ADAPT does not have sufficient resources to meet all the critical needs of persons with disabilities in Philadelphia. A crisis in one area requires diversion of resources from other areas.... Given the housing crisis faced by persons with disabilities, ADAPT has diverted substantial resources for individual and systems advocacy in response to PHA’s refusal to make scattered site housing accessible.... Individual advocacy means providing counseling and referral services to help people find places to live.... Systems advocacy includes efforts to persuade PHA to make its scattered site housing accessible.... While ADAPT has not calculated the amount of time, money, and energy diverted because of PHA’s refusal to make scattered site housing accessible, by any measure the amount is substantial....
>
> ADAPT also has devoted substantial effort to counseling and referrals [for clients who have urgent housing needs] ... including telephone calls, letters, meetings (with the client and with potential housing providers), and helping persons with disabilities complete application[s] for other places to live.... It is very difficult, and time consuming, to counsel a person where their options are so limited....
>
> In addition to individual advocacy, ADAPT has done extensive systems advocacy, trying to persuade PHA to make scattered site units accessible. These efforts go back at least 5 years....
>
> Had PHA made five percent of its scattered site units accessible, ... ADAPT would have had substantial additional resources freed to do other work, vitally important.

Plaintiff LRI is chartered pursuant to federal law, which requires that it promote “equal access ... to society and to all services, programs, activities, resources, and facilities” for people with disabilities. 29 U.S.C. § 796f–4(b)(1)(D). In addition, LRI “shall work to increase the availability and improve the quality of community options for independent living in order to facilitate the development and achievement of independent living goals by individuals with ... disabilities.” 29 U.S.C. § 796f–4(b)(4). Like ADAPT, LRI also addresses the transportation and attendant care needs of people with disabilities and does not have the resources to meet all of the critical needs of the population it serves. It does both individual and systems advocacy. LRI hired Elizabeth Albert to work on its community services program and not to do advocacy on housing issues. Nonetheless, she has been doing housing advocacy work for the past two to three years in an effort to create more accessible, affordable housing for people with disabilities because of the overwhelming need for such services. Within the past few years, the number of hours that she and others like her at LRI have diverted away from other activities and to LRI’s efforts to increase the affordable housing options for people with disabilities is in the hundreds. If she and others at LRI did not have to do housing advocacy, they would have time to do the jobs for which they were hired.

***3** Three years ago, the City of Philadelphia formed a Housing Crisis Coordinating Committee to address the housing needs of low-income individuals with disabilities. PHA’s § 504 accessibility coordinator participated in those meetings on behalf of PHA, and LRI and ADAPT participated, too. At those monthly meetings, ADAPT and LRI presented case studies of low-income clients who were in great need of accessible housing. They also attempted to persuade PHA to make more of its scattered site public housing accessible. According to PHA’s accessibility coordinator, ADAPT and LRI have been very active advocates on behalf of disabled people at the Committee meetings. PHA’s interim executive director from October, 1997 to March, 1998 met with representatives from ADAPT and LRI to discuss the need for more accessible public housing for persons with disabilities. In addition to the meetings with PHA’s accessibility coordinator and executive director, advocates from ADAPT and LRI have made phone calls, written letters, and created and reviewed proposals, all in an effort to persuade PHA to make more of its scattered site housing accessible to people with disabilities.

Plaintiffs Marie and Marshall Watson, mother and son, have lived together in a non-accessible PHA scattered site unit for the past seven years. Marshall has cerebral palsy and cannot move about without assistance. He typically uses a walker, but when that is not possible, he must crawl. Beginning several years ago, and on more than one occasion, Marie Watson asked the manager for her unit to move her to an accessible unit. Although she concedes that she did not formally submit the proper documents for such a request, she maintains that no one informed her that she had to submit any forms.

Diane Hughes, also a plaintiff in this action, is a resident of a first floor PHA scattered site unit that is not accessible to a person with a mobility impairment. She has lived in the unit for five years. She has severe arthritis and cannot walk unassisted. There are five steps from the sidewalk to her front door and no ramp. She requested that PHA transfer her to an accessible scattered site unit in or near her neighborhood, but she was offered a unit in another part of the City. She declined the unit because she desired to remain close to the medical and other support systems that she already had in place. At the time of trial, PHA had offered her a different accessible unit, she had

accepted, and she was waiting for the move to take place.

### III.

HUD assigns a "project number," also called a "PA number" because "PA" precedes each number, to groups of PHA's housing units. HUD designated PA numbers for PHA's conventional units when they were constructed. As HUD deeded scattered site buildings to PHA, HUD grouped together those buildings that were transferred at or around the same time and designated a PA number for each group. The scattered site units that are covered by any one PA number are not always in the same contiguous area or even in the same neighborhood. Those units assigned to a particular PA number are often dispersed throughout the City. None of the PA numbers, however, is assigned to a group of units that includes both scattered site *and* conventional units. After PA numbers are assigned by HUD, PHA may not transfer units from one number to another. Currently, there are separate PA numbers assigned to fifteen groups of scattered site units and approximately 50 groups of conventional units. The numbers assigned to the scattered site housing, and the number of units in each project as of September 30, 1998, were as follows:

| | Project number | Total project units |
|---|---|---|
| 1. | PA002004 | 1,954 |
| 2. | PA002005 | 21 |
| 3. | PA002012 | 1,012 |
| 4. | PA002025 | 43 |
| 5. | PA002060 | 173 |
| 6. | PA002067 | 423 |
| 7. | PA002069 | 967 |
| 8. | PA002078 | 14 |
| 9. | PA002080 | 646 |
| 10. | PA002081 | 525 |

| | | |
|---|---|---|
| 11. | PA002085 | 449 |
| 12. | PA002087 | 14 |
| 13. | PA002088 | 381 |
| 14. | PA002091 | 250 |
| 15. | PA002092 | 96 |
| | | TOTAL NO. OF UNITS: 6,968 |

***4** PHA uses PA numbers for both scattered site and conventional housing for identification purposes in its communications with HUD. Furthermore, HUD maintains by PA number its records of PHA's housing stock, including scattered site and conventional housing. HUD keeps track of the number of units within each PA number and the configuration of units within each PA number (the number of efficiencies, and the number of units with one, two, three, or four or more bedrooms).

Each year, PHA and HUD enter into a "Consolidated Annual Contributions Contract" in which PHA agrees to certain terms in exchange for its subsidy from HUD. The contract "covers all project(s) listed" and requires PHA to "develop and operate each project solely for the purpose of providing decent, safe, and sanitary housing for eligible families in a manner that promotes serviceability, economy, efficiency, and stability of the projects, and the economic and social well-being of tenants." In these contracts, PHA and HUD use PA numbers to identify the "project(s) listed." PHA was permitted to use the money received pursuant to the Consolidated Annual Contributions Contract for maintenance, repair, day-to-day needs, or alterations.

From 1992 to 1997, PHA participated in HUD's "Comprehensive Grant Program," which provided funds for capital improvements to its housing stock. PHA annually submitted a proposal to HUD which specified the type of work it wished to perform on each unit and the estimated cost. This information was broken down by PA number. The proposals also specified the amount PHA wished to spend on "504 Compliance" for units in each PA number. After it had received the proposal, HUD determined the amount of money that it would provide to PHA. Prior to the implementation of the Comprehensive Grant Program, PHA applied for and received money for capital improvements from HUD through the Comprehensive Improvement Assistance Program. PHA's applications for Comprehensive Improvement Assistance Program funds were similarly broken down by PA number.

PHA has managed its scattered site housing separately from its conventional housing. From at least 1993 to 1997, PHA administered its scattered site housing in three groups. Each of the three groups of scattered site units, as well as each group of conventional units, had its own manager, manager's office, and maintenance crew. Since 1998, PHA has managed its scattered site housing in ten different groups, which are still separate from conventional housing.

PHA undertook a number of alteration programs that affected only its scattered site housing and that were completed primarily between 1993 and 1997:(1) the Apartment Renovation Team program ("ART"); (2) the Job Order Contracts program ("JOC"); (3) the Philadelphia Housing & Development Corporation program ("PHDC"); (4) the Miscellaneous Contracts program; and (5) the Haddington program. Most or all of the funds for each of these modernization efforts was derived from the HUD Comprehensive Grant Program or

Comprehensive Improvement Assistance Program.

***5** For each PHA dwelling unit, HUD assigned a sum that it estimated to be the "Total Development Cost" ("TDC"). TDC varied according to the city in which units are located, the type of building in which the units were located (elevator, walk-up, etc.), and the number of bedrooms in the unit. Where two or more dwelling units were located in one building, the TDC for each unit could be different. HUD strongly encouraged PHA to spend no more than 90% of TDC when it renovated units using HUD funds.

Both the ART and JOC programs were "gut renovation" programs. The work performed included replacement of the entire electrical and plumbing systems, installation of new roofs, new front steps, new windows, new floor joists, and entirely new fronts of buildings, although all of these were not performed in every unit. In the ART program, PHA spent 75% or more of TDC on all of the 225 scattered site units renovated. For a number of the units, costs exceeded 100% of TDC. In the first phase of ART, over $21 million was spent on 179 units, for an average expenditure of over $117,318.44 per unit. Average TDC for those 179 units was only $79,522. PHA renovated 262 scattered site units in the JOC program. For 207 of those units, the expenditures were 75% or more of TDC, and as in ART, for many of the renovated units, costs exceeded 100% of TDC.

The other three modernization programs were of a smaller scale. PHA renovated 102 scattered site units in the PHDC program. It spent 75% or more of TDC on 36 of those units. In the Miscellaneous Contracts program, PHA did work on 89 total scattered site units. Expenditures were at or exceeded 75% of TDC for four of those units. The Haddington program involved renovations of at least 133 scattered site units. Although PHA's data on TDC was incomplete, for at least 13 of the 133 units, the cost of modernization was at or above 75% of TDC. In total, in all five modernization programs, PHA altered at least 485 scattered site units for which expenditures were equal to or exceeded 75% of TDC.

When the above-mentioned modernization programs began, PHA had no accessible scattered site units. PHA made fully wheelchair accessible only 22 of the scattered site units renovated in the five modernization programs. This represents merely 2.7% of the 811 units that were part of the five modernization programs and 4.5% of the 485 for which rehabilitation costs were 75% or more of TDC. Of the 22, there were ten each in the ART and JOC programs, two in the PHDC program, and none in the Miscellaneous Contracts and Haddington programs.

## IV.

Defendants challenge plaintiffs' standing. In our February 10, 1999 order denying defendants' motion to dismiss the amended complaint, we concluded that because the language of the Rehabilitation Act's enforcement provision is so broad, the prudential standing requirements are not applicable. *See ADAPT v. Philadelphia Housing Auth.,* Civ. A. No. 98–4609 (E.D.Pa. Feb. 10, 1999); *see also* 29 U.S.C. § 794a(a)(2); *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 47 (2d Cir.1997). Defendants do not dispute that conclusion. Their position is that plaintiffs have not satisfied the standing requirements of Article III of the United States Constitution.

***6** Article III requires a plaintiff to prove: (1) "injury in fact," that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) a causal connection between the injury and the conduct of which the plaintiff complains; and (3) that it is likely that the injury will be redressed by a decision in plaintiff's favor. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) (citations, internal quotation marks, and footnote omitted). These three elements "each ... must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

Defendants contend that the very missions of the organizational plaintiffs, ADAPT and LRI, are to advocate on behalf of persons with disabilities, so they have not sustained an injury by having to advocate for more accessible housing. The Supreme Court has determined that "where discriminatory 'practices have perceptibly impaired [an organization's ability to carry out its mission], there can be no question that the organization has suffered injury in fact ." ' *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers,* 141 F.3d 71, 76 (3d Cir.1998) (quoting *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982)). The organization may prove such an impairment by coming forward with evidence that it has diverted resources to one area of its effort in order to combat the alleged discrimination. *See id.* at 78. Our Court of Appeals has held that a diversion of resources in order to pursue litigation, alone, is not sufficient proof of injury in fact. *See id.* at 79.

Neither ADAPT nor LRI exists only to advocate for more widely available accessible housing. Because of PHA's alleged violation of its duties to make more scattered site housing accessible to persons with mobility impairments, ADAPT and LRI have had to divert their time and the organizations' resources away from services like transportation and attendant care advocacy in order to

address the pressing housing needs of their low-income clientele. ADAPT and LRI representatives have spent a substantial amount of time in meetings in an effort to convince PHA to make more of its scattered site housing accessible to people with disabilities. PHA's own accessibility coordinator testified that ADAPT and LRI were active advocates on behalf of their clientele in the Housing Crisis Coordination Committee meetings. The time spent trying to persuade PHA to make more accessible scattered site housing was time the advocates could have spent in individual client consultations, working to find housing that met the needs of specific clients. We conclude that ADAPT and PHA have proven that they diverted resources away from other of their day-to-day services in order to try to resolve amicably PHA's alleged failure to make more of its scattered site housing accessible to people with mobility impairments, and that this is sufficient injury in fact. *See id.* at 78–80.

***7** Defendants argue that plaintiff Hughes has accepted an accessible unit and will be transferred imminently, so she cannot prove any injury or her claims are moot. They also argue that any waiting period that she had to endure before being transferred to an accessible unit was not caused by PHA because Ms. Hughes chose to decline the first accessible unit PHA offered to her. Ms. Hughes wanted to move to an accessible scattered site unit in or near her own neighborhood where her doctors were located. This was not an unreasonable request. We do not know when she was offered the first accessible unit, how long she waited before it was offered, or how far it was from her neighborhood. If PHA had made more of its scattered site units accessible, it is a reasonable inference that Ms. Hughes would not have had to wait as long as she did before she was offered a scattered site unit near her support systems. Her wait, during which she remained in an inaccessible unit, was her injury. Although she presently may be scheduled to move to an accessible unit, the controversy is not moot. She had not yet moved at the time of trial. We conclude that she has proven all three elements of Article III standing.

Finally, defendants aver that the Watsons do not have standing because they failed to submit the proper documents to PHA to request a transfer to an accessible unit. The Watsons have proven that they have been waiting for years for an accessible scattered site unit. However, because they failed to prove that they properly requested such a unit, they failed to prove by a preponderance of the evidence a causal connection between their injury and PHA's alleged violation of § 504 of the Rehabilitation Act. *See Lujan,* 504 U.S. at 560. Accordingly, the Watsons do not have standing to pursue this action.

## V.

Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (footnote omitted). HUD has promulgated regulations that seek to implement § 504. It is plaintiffs' primary contention that PHA violated one of those regulations, 24 C.F.R. § 8 .23(a). That regulation reads:

> Alterations of existing housing facilities.
>
> (a) Substantial alteration. If alterations are undertaken to a project ... that has 15 or more units and the cost of the alterations is 75 percent or more of the replacement cost of the completed facility, then the provisions of § 8.22 shall apply.

24 C.F.R. § 8.23(a). Section 8.22 provides that "a minimum of five percent of the total dwelling units or at least one unit in a multifamily housing project, whichever is greater, shall be made accessible for persons with mobility impairments." 24 C.F.R. § 8.22(b).

***8** Under the HUD regulations, "alteration" means "any change in a facility or its permanent fixtures or equipment. It includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, changes or rearrangements in structural parts and extraordinary repairs. It does not include normal maintenance or repairs, reroofing, interior decoration, or changes to mechanical systems." 24 C.F.R. § 8.3.

A "project" is defined as "the whole of one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by a single contract for Federal financial assistance or application for assistance, or are treated as a whole for processing purposes, whether or not located on a common site." *Id.* A "facility" is defined as "all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other real or personal property or interest in the property." *Id.*

Plaintiffs and defendants sharply disagree about the definition of "project" as used in 24 C.F.R. § 8.23(a). According to plaintiffs, a "project" is a set of units that is grouped under one "PA number," and since HUD has assigned fifteen PA numbers to groups of scattered site units, PHA has fifteen scattered site projects. Under this definition, plaintiffs argue that once PHA made substantial alterations to any units classified under one PA number, it had a duty to make accessible all of the substantially altered units until 5% of the total units within that PA number were accessible. For example, if there were 100 units included within one PA number, and PHA substantially altered five units in that group, all five would have to be made accessible. If PHA subsequently substantially altered ten additional units in that PA number, none of those units would have to be made accessible because 5% of the units in the PA number would already be accessible.

The defendants take the position that a "project" is a modernization program, so that the ART, JOC, PHDC, Miscellaneous Contracts, and Haddington programs are five distinct projects. They contend that PHA had a duty to make accessible 5% of the total number of altered units in each modernization program, apparently not merely 5% of those units substantially altered.[2] According to the defendants, PHA was obliged to make accessible 5% of the 225 units in ART (12 units), 5% of the 262 units in JOC (14 units), 5% of the 102 units in PHDC (6 units), 5% of the 89 units in Miscellaneous Contracts (5 units), and 5% of the 133 units in Haddington (7 units). Thus by its own analysis, PHA should have made 44 units accessible and has fallen short by 22 units.

In support of their proffered meaning of "project," defendants cite to 42 U.S.C. § 1437a(b)(1), which provides in relevant part, "When used in this chapter .... [and w]hen used in reference to public housing, the term 'low-income housing project' or 'project' means (A) housing developed, acquired, or assisted by a public housing agency under this chapter, and (B) the improvement of any such housing." 42 U.S.C. § 1437a(b)(1). Under the definition in § 1437a(b)(1), they contend, PHA reasonably concluded that it only had an obligation to make accessible 5% of the total number of altered units. Defendants' analysis is flawed. We agree that both the Rehabilitation Act and the implementing HUD regulations utilize the term "project." Nonetheless, for purposes of the obligations set froth in the regulations to make 5% of units accessible, we look to the definition of project as set forth in the regulations.

***9** The evidence at trial was clear that HUD assigns the project numbers, or PA numbers, when the units are acquired by PHA, that HUD keeps track of PHA's housing stock by PA number, and that PHA has acquiesced in the use of those numbers by citing them whenever it wished to identify its housing in its communications with HUD. PA numbers are also used in contracts between PHA and HUD which provide PHA with its federal subsidies. Although there was no evidence that PHA uses the PA numbers internally for operational purposes, we conclude that "treated as a whole for processing purposes" under 24 C.F.R. § 8.3 means the way HUD and PHA have treated the units in their contracts and in their communications and dealings with each other. In this regard, there can be no doubt that each group of scattered site units as organized by PA numbers is treated as a whole for processing purposes. In contrast, the modernization programs which defendants seek to fit within the definition of "project" were never denominated as such by HUD.

The defendants admit that it makes sense to equate "project" and PA number for *conventional* housing. They contend, however, that HUD did not have in mind scattered site housing when it defined "project." The definition of "project" found in § 8.3 of the regulations specifically provides that it applies to those structures that are "treated as a whole for processing purposes, *whether or not located on a common site."* 24 C.F.R. § 8.3 (emphasis added). The emphasized language refutes defendants' argument. The conventional units which are assigned to the same PA number are located in a contiguous area, or common site. If HUD had in mind only conventional units, it would have had no reason to include the last clause. The language "whether or not located on a common site" demonstrates to us that HUD did indeed anticipate that the definition would apply to more than conventional housing located in a contiguous area.

While the definition of "project" found in 24 C.F.R. § 8.3 is not a model of clarity, we agree with the plaintiffs that a project means the traditional PA number groupings assigned by HUD. We concede that the way scattered site units are grouped within a particular project number is more historical than logical. Once a unit is so assigned, its assignment is permanent. PHA may not shift a unit to another project number. Regardless of how we might like to rewrite the regulations, we are not free to do so.

Section 8.23 only applies if there have been substantial alterations to units within a project. A substantial alteration occurs when "the cost of the alterations is 75 percent or more of the replacement cost of the completed facility." 24 C.F.R. § 8.23. PHA recognizes that where alteration expenses for a unit are at or above 75% of TDC, there has been a substantial alteration.

Under defendants' own interpretation of the relevant regulations and according to their own expert, PHA made accessible only half the number of scattered site units it should have. They contend that this shortfall is excused because it was not feasible to make more than 22 of the

altered scattered site units accessible. Defendants interpret 24 C.F.R. § 8.23(a) as imposing an obligation to make 5% of units accessible only to the maximum extent feasible.

***10** There is nothing in the language of 24 C.F.R. § 8.23(a), however, which provides a feasibility defense to the 5% requirement. There is language in subsection (b) of § 8.23 which speaks about feasibility, but subsection (b) covers "Other alterations," alterations that are other than "substantial." That is a subject matter different from the substantial alterations covered in subsection (a), and the language of § 8.23 does not indicate in any way that the content of (b) also applies to (a).

Even if a feasibility defense were available, plaintiffs demonstrated at trial that it was certainly feasible to make more than 22 units accessible. Indeed, PHA's accessibility coordinator, the individual whose role it has been for the past seven years to make sure PHA is in compliance with § 504 of the Rehabilitation Act, admitted that more units could have been made accessible in the ART and JOC modernization programs. PHA did not consider accessibility potential when it selected the scattered site units which would be substantially altered. It was only *after* the units were selected for modernization that PHA's accessibility coordinator reviewed the units to see which ones might be made accessible.

Most or all of PHA's scattered site units have steps from the sidewalk to the front door. In order to make the units accessible, either a ramp or an exterior mechanical lift had to be installed, both of which require a certain amount of space. PHA's accessibility coordinator looked only for those buildings for which a ramp could be constructed. Even assuming PHA was justified to exclude the possibility of using exterior lifts, the factors considered by the accessibility coordinator and her team were too restrictive. They looked for units that were on corner lots or had alleys running along the side or in back. Although they also looked for scattered site units that were next to vacant lots owned by PHA, they determined that building ramps that ran onto the vacant lots would make the lots too difficult to sell at some later, undetermined time. They did not consider using the available space in front of two or more adjacent PHA scattered site buildings in order to construct a ramp that would create wheelchair accessibility to all of the units. They did not consider reconfiguring the steps that led to front doors in order to create space for ramps. In sum, PHA could have been more flexible in its approaches to identifying potentially accessible units. Although some units clearly could not be made accessible, architectural and special considerations did not defeat the feasibility of making more than 22 accessible units.

The cost of making more units accessible also was not prohibitive. In the ART and JOC programs, PHA frequently spent more than 60% of TDC to renovate units, and it sometimes spent well over 100% of TDC. In some instances, PHA was spending the princely sum of $125,000 to $150,000 per unit. These "gut rehabilitation" programs essentially stripped the buildings of their interiors and rebuilt those interiors anew. Consequently, the added cost of constructing a ramp, creating wider hallways and lower counter tops, and making other such adjustments in order to make units accessible to those with mobility impairments was not significant. The executive director of PHA during the time most of the relevant modernization took place admitted that compared to the amount of money spent in the ART and JOC programs, in particular, the cost of adding accessibility features to more units was not substantial.

***11** In summary, we agree with the plaintiffs that, as it is used in 24 C.F.R. § 8.23(a), a "project" is a group of units to which HUD has assigned a particular PA project number. Any units PHA substantially altered within one PA number had to be made accessible until 5% of the total units within that PA number were accessible.

## VI.

As requested, we will now extend to the parties an opportunity amicably to resolve this action based upon the court's partial findings of fact and conclusions of law. Should the parties fail to do so expeditiously, the court is prepared to make additional findings of fact and conclusions of law and to enter an order granting appropriate relief.

**Parallel Citations**

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Footnotes

1 We will use the terms "dwelling unit," "unit," and "apartment" interchangeably throughout the remainder of these partial findings of fact and conclusions of law. For our purposes, a "building" is not the same thing. A building is the entire single physical structure that encapsulates anywhere from one to over one hundred apartments.

2 In their post-trial brief, defendants wrote, "This is how PHA has interpreted the word 'project' when renovating its scattered sites.

It has similarly applied the accessibility requirements to its several 'single undertakings'—the ART Program, JOCS, PHDC, and the like—and while the buildings were not contiguous PHA's goal was to make accessible *5% of all of the units modernized."* Defs' Post–Trial Br. at 20–21 (emphasis added).