IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE ABILITY CENTER OF GREATER TOLEDO, *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No. 3:18-cv-01120-JGC
MOLINE BUILDERS, INC., *et al*.,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517 to address questions of law concerning the Motion for Partial Summary Judgment filed by defendants James E. Moline Builders, JLJ Development, James Moline, and Lance Fuller (ECF No. 69) and Memorandum in Support (ECF No. 69-1) ("Defs.' Mem.").[1]

I. INTEREST OF THE UNITED STATES

Plaintiffs allege that the multifamily development known as Brooklynn Park Villas was designed and constructed without the accessibility features required by the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*. In 1988, Congress amended the FHA to, *inter alia*, make it unlawful to discriminate in housing on the basis of disability and defined "discrimination" to include the failure to design and construct certain multi-family dwellings to be accessible to and

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

usable by persons with disabilities. *See* 42 U.S.C. § 3604(f)(3)(C).[2] The United States has important enforcement responsibilities under the FHA. For example, the Attorney General may initiate civil proceedings on behalf of the United States in cases alleging a "pattern or practice" of housing discrimination. 42 U.S.C. § 3614(a). Additionally, the Attorney General "shall commence and maintain a civil action" on behalf of an aggrieved person who has filed a complaint of housing discrimination with the Department of Housing and Urban Development ("HUD"), where HUD has issued a determination of reasonable cause and the complainant or respondent has elected to proceed in federal court. 42 U.S.C. § 3612(o). Furthermore, private litigation under the Act is an important supplement to government enforcement. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972); 42 U.S.C. § 3616a (authorizing the Secretary of HUD to contract with private, non-profit fair housing organizations to conduct testing, investigation, and litigation under the FHA). The United States therefore has an important interest in the proper resolution of legal issues concerning the application of the FHA, including those addressed by defendants' motion.

II. BACKGROUND

This lawsuit concerns Brooklynn Park Villas, a condominium development in Toledo, Ohio, with 90 single-story multifamily dwellings that are subject to the accessibility requirements of the FHA, as well as a community clubhouse that serves the residents of those

[2] Throughout this brief, the United States uses the term "disability" instead of "handicap." For purposes of the FHA, the terms have the same meaning. *See Bragdon v. Abbott,* 524 U.S. 624, 631 (1998) (definition of "disability" under Americans with Disabilities Act taken almost verbatim from definition of "handicap" under Fair Housing Act).

dwellings.[3] Defs.' Mem. at 5-6. Each dwelling—which Defendants term "Villas"—has a walkway leading from the street to a front porch, where there is a front door through which residents or other persons can enter or seek entry into the Villa. *See* Defs.' Mem. Ex. B, Decl. of Mark Wales at 8, ECF No. 69-4 (showing photo of unit exterior). Next to the walkway and front door is an attached garage, which is connected by a driveway to the street and which has an interior door that leads into the kitchen. *See* Defs.' Mem. at 4-6.

Plaintiffs allege that the routes to many of the Villas' front doors are not accessible to persons with disabilities because of the presence of one or more steps on walkways leading to the front doors of at least 26 units and/or because these walkways have slopes that are too steep for persons with disabilities to navigate safely. Second Am. Compl. ¶ 50a, ECF No. 50. Defendants have admitted that at least some of the Villas have "a step" leading to the front door. Defs.' Mem. at 6.

III. ARGUMENT

Defendants incorrectly frame the issue here as whether the FHA requires that dwellings have more than one accessible entrance. *See* Defs.' Mem. at 1. Defendants claim that the Villas' attached garages have an accessible entrance into the dwelling, which, they argue, qualifies as the "primary" entrance. *See id*. at 6. They characterize the front doors as "secondary" entrances.

[3] As applicable here, the FHA's accessibility requirements apply to ground floor dwellings in buildings with four or more dwellings that were constructed for first occupancy after March 13, 1991. *See* 42 U.S.C. § 3604(f)(3)(C), (f)(7). Brooklynn Park Villas has 92 dwellings, of which 90 are in buildings with four to eight dwellings each and were completed and sold for first occupancy between 2011 and 2018. Defs.' Mem. Ex. A, Decl. of James Moline ¶¶ 14, 23-25, ECF No. 69-2. Brooklynn Park Villas also has a two-unit building that is not subject to the FHA's accessibility requirements and is therefore not discussed further here. Defs.' Mem. at 6.

Id. They alternatively argue that, even if the front door is the "primary" entrance, the FHA does not require that the "primary" entrance be accessible, and that the inclusion of an accessible entrance through the garage satisfies the FHA's requirements. *See id*. at 1, 6.

As explained below, defendants are incorrect as a matter of law that the presence of an accessible route through the garage, even if correct, relieves them of the obligation to make the front door accessible. Regardless which entrance is the "primary" or "secondary" entrance, the FHA requires that "the public and common use portions" of dwelling units be "readily accessible to and usable by" persons with disabilities. 42 U.S.C. § 3604(f)(3)(C)(i). The relevant question, therefore, is whether the walkways leading from the street and sidewalks to the front doors of the Villas are part of the "public use or common use" portions of the dwellings. *See id.* If they are, the FHA requires that they be accessible, regardless of whether there is another accessible way of entering the Villas, such as through the garage.

A. The FHA Requires that the Public and Common Use Portions of Multifamily Properties be Accessible, and this Requirement Typically Governs the Routes to Building Entrances and Dwelling Unit Entries

Under the FHA, "discrimination" includes the failure to "design and construct" covered multifamily dwellings built for first occupancy after March 13, 1991 without basic accessibility and usability features for persons with disabilities. 42 U.S.C. § 3604(f)(3)(C). The FHA's requirements for accessible design and construction are as follows:

> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
>
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Id. These provisions reflect "a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream . . ." H.R. Rep. No. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

HUD's FHA regulations define "common use area" as "rooms, spaces or elements *inside or outside of* a building that are *made available for the use of residents of a building or the guests thereof*. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and *passageways among and between buildings*." 24 C.F.R. § 100.201 (emphasis added). Similarly, HUD's regulations define "public use area" as "interior *or exterior* rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned." *Id.* (emphasis added). These regulations, which HUD promulgated through notice-and-comment rulemaking pursuant to congressional authority, 42 U.S.C. § 3614a, have the force of law. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process . . . have the 'force and effect of law.'") (citation omitted).

It requires little analysis to conclude that walkways that lead from the street, sidewalk, or from parking areas to the front entry doors of multifamily dwellings will typically be "exterior . .

. spaces" that are "made available to the general public" and are also "made available for the use of residents of a building or the guests thereof." Courts have so concluded. *United States v. Quality Built Constr.*, 309 F. Supp. 2d 756, 763 (E.D.N.C. 2003) (finding that lack of accessible lever door handles at primary unit entries and presence of step at unit breezeways violated 42 U.S.C. § 3604(f)(3)(C)(i)); *United States v. Shanrie Co.*, No. 05-CV-306-DRH, 2007 WL 980418 at *1, 9-10 (S.D. Ill. Mar. 30, 2007) (granting United States' motion for partial summary judgment and finding that "the public and common use areas are not accessible to and usable by persons with disabilities because . . . there are no accessible routes to the ground floor units in the first five buildings[.]"). *See also United States v. Edward Rose & Sons*, 384 F.3d 258, 262-63 (6th Cir. 2004) (stair landings at the entrance of, and shared by, two apartments and which faced parking lot were common use areas and therefore routes to these spaces had to be accessible); *Nelson v. HUD*, 320 F. App'x 635, 638 (9th Cir. 2009) (affirming HUD Secretary's order requiring respondents to retrofit inaccessible stair landings because they are "common use" areas that must be accessible to persons with disabilities).[4]

HUD also made this commonsense observation in its Final Fair Housing Act Guidelines, which establish a safe harbor for compliance and which HUD issued pursuant to notice and

[4] *United States v. Noble Homes*, 173 F.Supp.3d 568 (N.D. Ohio 2016) involved a design similar to the one at issue in this case, where there were steps on the routes to many of the front entries and a separate route into the dwelling through the attached garage. *See id*. at 570. The United States argued that the routes the front entries were part of the pubic and common use areas and therefore were required to be accessible. The court denied the parties' cross-motions for summary judgment without specifically addressing that issue, *see id.* at 571-75, and the parties reached a settlement through a court-approved consent order that included funds for retrofits of the inaccessible front entrances. *Id.*, Consent Decree ¶¶ 24-27 (entered June 23, 2016), *available at:* https://www.justice.gov/crt/case-document/consent-decree-united-states-v-noble-ed-ohio.

comment. Final Fair Housing Act Guidelines, 56 Fed. Reg. 9472, 9487-88 (Mar. 6, 1991) ("[A]pproaches to, and maneuvering spaces at, the exterior side of the entrance door to an individual dwelling unit would be considered part of the public spaces"); *see also id.* at 9488 ("Lever hardware is required for *entry doors* to the building and to individual dwelling units *because these doors are part of the public and common use areas*, and are, therefore, subject to [accessibility] provisions for public and common use areas, which specify lever hardware.") (emphasis added). Indeed, when it issued its proposed FHA regulations for public comment in 1988, HUD explained that under those regulations, persons with disabilities "should be able to enter a newly-constructed building through an entrance used by persons who do not have handicaps." 53 Fed. Reg. 44,992, 45,004 (Nov. 7, 1988).[5]

Unlike the garage, the front door of a dwelling is typically designed to be used not just by residents, but also outside guests, neighbors, and members of the public such as trick-or-treaters, couriers, delivery persons, or canvassers. Visitors who approach a unit would most logically and naturally use the walkway to the front door, instead of knocking on the garage door. It is simply common custom for visitors to use the front door, and not the garage, when accessing someone's unit. Thus, the walkway leading to the front door of the unit will typically be a "public use" or

[5] The FHA delegates authority to HUD to administer the statute, 42 U.S.C. § 3608(a), to render technical assistance, 42 U.S.C. § 3604(f)(5)(C), and to issue regulations, 42 U.S.C. § 3614a. As explained above, HUD's FHA regulations, which were promulgated through notice-and-comment rulemaking and codified at 24 C.F.R. Part 100, have the force of law. *See supra* p. 5. Although the FHA Guidelines were also issued pursuant to notice and comment, they are not mandatory and their legal effect is limited to establishing a safe harbor for compliance. *See* 56 Fed. Reg. at 9499; *accord* 24 C.F.R. § 100.205(e)(2) (listing FHA Guidelines as among the "HUD–recognized safe harbors for compliance with the Fair Housing Act design and construction requirements").

"common use" area under the ordinary meaning of these terms, even if the walkway serves only one unit.

B. If the Routes to the Front Doors are Part of the Public or Common Use Areas, Then Those Routes Must Be Accessible Regardless of Whether There is Another Means of Entering the Dwelling

If the Court concludes that the routes to the Villas' front doors are part of the public and common use areas, then the only remaining question is whether the presence of an accessible entry point through the garage relieves the defendants of the obligation to have designed and constructed the routes to the front doors to be accessible. And the answer to that question is clearly no. The FHA provides that "public and common use" areas of "covered multifamily dwellings" must be "readily accessible to and usable by" persons with disabilities. 42 U.S.C. § 3604(f)(3)(C)(i). Nothing in the plain language of the FHA suggests that this requirement is voided because the builder has provided an alternative way by which residents can enter their unit through the garage.

In fact, the Sixth Circuit resolved this issue, albeit in a different factual context, in *Edward Rose.* In that case, the defendants designed and constructed their ground floor units with front entries facing the parking lot that could be accessed by going down a flight of stairs. The defendants contended, and the Court of Appeals assumed for purposes of argument, that there was an alternative accessible route around from the parking lot to separate rear patio entries. *Edward Rose*, 384 F.3d at 261 n.3. Because the shared common landings at those entrances were part of the "common use" areas, the Court of Appeals concluded, the routes to the front entry doors were required to be accessible, and the existence of an alternative way into the units was not relevant to that determination. *Id*. at 262-63. *Edward Rose* therefore makes clear that the

only relevant consideration in this case is whether the routes to the front doors are part of the public and common use areas, not whether there is an alternative accessible way of entering the unit.

Defendants' arguments to the contrary lack merit. Defendants rely on the regulation defining the scope of the "site impracticability" exception created by the regulations to argue that only one accessible entrance to a dwelling is required. Defs.' Mem. at 9. That regulation provides that "[c]covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site." 24 C.F.R. § 100.205(a).[6] The regulations then make clear that that this group of buildings—*i.e.*, dwellings in buildings that do not meet the requirements for the "site impracticability" exception—must meet the accessibility requirements of the statute, including the separate statutory and regulatory requirement that the public and common use areas be readily accessible to and usable by persons with disabilities. *See* 42 U.S.C. § 3604(f)(3)(C)(i); 24 C.F.R. § 100.205(c) ("All covered multifamily dwellings for first occupancy after March 13, 1991 *with a building entrance on an accessible route* shall be designed and constructed in such a manner that—. . . *The public and common use areas are readily accessible to and usable by handicapped persons*") (emphasis added). The provision of the regulation relied on by defendants only defines the universe of multifamily buildings that must meet the FHA's accessibility requirements. It does not eliminate

[6] Defendants misquote the text of this regulation as beginning with the words "Requirement 1 of the Fair Housing Act requires that …" Defs.' Mem. at 9. This language does not appear either in the regulation or the statute. *See* 24 C.F.R. § 100.205(a); 42 U.S.C. § 3604(f)(3)(C).

the requirement in 24 C.F.R. § 100.205(c) that the public and common use areas serving covered units in such buildings be accessible. *See Edward Rose & Sons*, 384 F.3d at 263.

Defendants also suggest that their only relevant statutory obligation with respect to the issues raised by the motion is to provide "an accessible route into and through the dwelling." *See* Defs.' Mem. at 8 (quoting 42 U.S.C. § 3604(f)(3)(C)(iii)(I)). Any force to this argument evaporates, however, once the text is read in context. Section 3604(f)(3)(C)(iii) provides that: "all premises *within such [covered] dwellings* contain the following features of adaptive design: (I) *an accessible route into and through the dwelling*; (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (III) reinforcements in bathroom walls to allow later installation of grab bars; and (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space." 42 U.S.C. § 3604(f)(3)(C)(iii) (emphasis added).

The plain language of Section 3604(f)(3)(C)(iii) makes clear that it only applies to the premises "within" dwellings. Subsection (I), for example, ensures that the dwelling interiors do not have excessively high thresholds at entry doors and that there is an accessible path of travel within all parts of the dwelling unit. *See* Final FHA Guidelines, 56 Fed. Reg. at 9506. The routes outside the individual dwelling unit that lead from parking areas, public streets, or sidewalks to the unit entries, however, are governed by the public and common use provision in Section 3604(f)(3)(C)(i). *See supra* pp. 5-7.

Finally, Defendants rely on the unpublished opinion in *Fair Housing Council v. Village of Olde St. Andrews*, CA 3:98-630-H, slip op. (W.D. Ky. Sept. 25, 2003) (*see* Defs.' Mot. Ex. C, ECF No. 69-5), *aff'd on other grounds*, 210 F. App'x 469 (6th Cir. 2006). That opinion,

however, addressed the proper remedy for the violation, *id*., slip op. at 13, and therefore does not resolve the question of liability at issue here. Furthermore, *Olde St. Andrews* never decided whether the routes to the front doors were part of the public and common use areas. And even if the *Olde St. Andrews* ruling had held that the presence of an alternative route through the garage voided the requirement for accessible routes in public or common use areas, the court's analysis would no longer have any legal authority in light of the Sixth Circuit's later decision in *Edward Rose*.

IV. CONCLUSION

For the reasons stated above, this Court should decide defendants' motion for partial summary judgment by determining whether the walkways and other areas leading up to and immediately in front of the primary entrances to covered multifamily dwellings at Brooklynn Park Villas are "public use and common use" areas subject to the requirements of 42 U.S.C. § 3604(f)(3)(C)(i).

Dated: May 1, 2020.

Respectfully submitted,

JUSTIN E. HERDMAN
United States Attorney
Northern District of Ohio

s/ Angelita Cruz Bridges
Angelita Cruz Bridges (0072688)
Assistant U.S. Attorney
United States Attorney's Office
Northern District of Ohio
Four Seagate, Suite 308
Toledo, OH 43604-2624
Tel: (419) 259-6376
Fax: (419) 259-6471
Email: Angelita.Bridges@usdoj.gov

ERIC S. DREIBAND
Assistant Attorney General
Civil Rights Division

s/ Max Lapertosa
SAMEENA SHINA MAJEED
Chief
TIMOTHY J. MORAN
Deputy Chief
MAX LAPERTOSA
Trial Attorney
United States Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
950 Pennsylvania Avenue NW—4CON
Washington, DC 20530
Phone: (202) 305-1077
Fax: (202) 514-1116
Email: Max.Lapertosa@usdoj.gov

Attorneys for the United States of America

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(f)

Pursuant to Local Rule 7.1(f), I certify as follows:

1. This case has been assigned or is subject to the administrative, standard and unassigned case track; and

2. This brief complies with the page limitations for dispositive motions set forth in Local Rule 7.1(f), in that it is twelve (12) pages in length.

s/ Max Lapertosa
MAX LAPERTOSA
Trial Attorney

STATUTORY AND REGULATORY APPENDIX

42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes--

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means--

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

42 U.S.C. § 3614a. Rules to Implement Subchapter

The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

24 C.F.R. § 100.201. Prohibition Against Discrimination Because of Handicap: Definitions

As used in this subpart:

Accessible, when used with respect to the public and common use areas of a building containing covered multifamily dwellings, means that the public or common use areas of the building can be approached, entered, and used by individuals with physical disabilities. The phrase "readily accessible to and usable by" is synonymous with accessible. A public or common use area that complies with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at § 100.201a), ANSI A117.1–1986 (incorporated by reference at § 100.201a), or a comparable standard is deemed "accessible" within the meaning of this paragraph.

Accessible route means a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities. Interior accessible routes may include corridors, floors, ramps, elevators, and lifts. Exterior accessible routes may include parking access aisles, curb ramps, walks, ramps, and lifts. A route that complies with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992, ANSI A117.1–1986 (incorporated by reference at § 100.201a), or a comparable standard is an "accessible route."

Building means a structure, facility or portion thereof that contains or serves one or more dwelling units.

Building entrance on an accessible route means an accessible entrance to a building that is connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, or to public streets or sidewalks, if available. A building entrance that complies with ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at § 100.201a), ANSI A117.1–1986 (incorporated by reference at § 100.201a), or a comparable standard complies with the requirements of this paragraph.

Common use areas means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings.

Controlled substance means any drug or other substance, or immediate precursor included in the definition in section 102 of the Controlled Substances Act (21 U.S.C. 802).

Covered multifamily dwellings means buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units.

Dwelling unit means a single unit of residence for a family or one or more persons. Examples of dwelling units include: a single family home; an apartment unit within an apartment building; and in other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep. Examples of the latter include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.

Entrance means any access point to a building or portion of a building used by residents for the purpose of entering.

Exterior means all areas of the premises outside of an individual dwelling unit.

First occupancy means a building that has never before been used for any purpose.

Ground floor means a floor of a building with a building entrance on an accessible route. A building may have more than one ground floor.

Handicap means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite. As used in this definition:

(a) Physical or mental impairment includes:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

(b) Major life activities means functions such as caring for one's self, performing manual tasks,

walking, seeing, hearing, speaking, breathing, learning and working.

(c) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) Is regarded as having an impairment means:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

Interior means the spaces, parts, components or elements of an individual dwelling unit.

Modification means any change to the public or common use areas of a building or any change to a dwelling unit.

Premises means the interior or exterior spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of a building.

Public use areas means interior or exterior rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

Site means a parcel of land bounded by a property line or a designated portion of a public right or way.

24 C.F.R. § 100.205. Prohibition Against Discrimination Because of Handicap: Design and Construction Requirements

(a) Covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. For purposes of this section, a covered multifamily dwelling shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991, if the dwelling is occupied by that date, or if the last building permit or renewal thereof for the dwelling is issued by a State, County or local government on or before June 15, 1990. The burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A real estate developer plans to construct six covered multifamily dwelling units on a site with a hilly terrain. Because of the terrain, it will be necessary to climb a long and steep stairway in order to enter the dwellings. Since there is no practical way to provide an accessible route to any of the dwellings, one need not be provided.

Example (2): A real estate developer plans to construct a building consisting of 10 units of multifamily housing on a waterfront site that floods frequently. Because of this unusual characteristic of the site, the builder plans to construct the building on stilts. It is customary for housing in the geographic area where the site is located to be built on stilts. The housing may lawfully be constructed on the proposed site on stilts even though this means that there will be no practical way to provide an accessible route to the building entrance.

Example (3): A real estate developer plans to construct a multifamily housing facility on a particular site. The developer would like the facility to be built on the site to contain as many units as possible. Because of the configuration and terrain of the site, it is possible to construct a building with 105 units on the site provided the site does not have an accessible route leading to the building entrance. It is also possible to construct a building on the site with an accessible route leading to the building entrance. However, such a building would have no more than 100 dwelling units. The building to be constructed on the site must have a building entrance on an accessible route because it is not impractical to provide such an entrance because of the terrain or unusual characteristics of the site.

(c) All covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route shall be designed and constructed in such a manner that—

(1) The public and common use areas are readily accessible to and usable by handicapped persons;

(2) All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(3) All premises within covered multifamily dwelling units contain the following features of adaptable design:

(i) An accessible route into and through the covered dwelling unit;

(ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower, stall and shower seat, where such facilities are provided; and

(iv) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(d) The application of paragraph (c) of this section may be illustrated by the following examples:

Example (1): A developer plans to construct a 100 unit condominium apartment building with one elevator. In accordance with paragraph (a), the building has at least one accessible route leading to an accessible entrance. All 100 units are covered multifamily dwelling units and they all must be designed and constructed so that they comply with the accessibility requirements of paragraph (c) of this section.

Example (2): A developer plans to construct 30 garden apartments in a three story building. The building will not have an elevator. The building will have one accessible entrance which will be on the first floor. Since the building does not have an elevator, only the ground floor units are covered multifamily units. The ground floor is the first floor because that is the floor that has an accessible entrance. All of the dwelling units on the first floor must meet the accessibility requirements of paragraph (c) of this section and must have access to at least one of each type of public or common use area available for residents in the building.

(e)(1) Compliance with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at § 100.201a), or ANSI A117.1–1986 (incorporated by reference at § 100.201a) suffices to satisfy the requirements of paragraph (c)(3) of this section.

(2) The following also qualify as HUD–recognized safe harbors for compliance with the Fair Housing Act design and construction requirements:

(i) Fair Housing Accessibility Guidelines, March 6, 1991, in conjunction with the Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, June 28, 1994;

(ii) Fair Housing Act Design Manual, published by HUD in 1996, updated in 1998;

(iii) 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000 (with corrections contained in ICC–issued errata sheet), if adopted without modification and without waiver of any of the provisions;

(iv) 2000 International Building Code (IBC), as amended by the 2001 Supplement to the International Building Code (2001 IBC Supplement), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements;

(v) 2003 International Building Code (IBC), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and conditioned upon the ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7."

(vi) 2006 International Building Code; published by ICC, January 2006, with the January 31, 2007, erratum to correct the text missing from Section 1107.7.5, if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and interpreted in accordance with the relevant 2006 IBC Commentary[.]

(3) Compliance with any other safe harbor recognized by HUD in the future and announced in the Federal Register will also suffice to satisfy the requirements of paragraph (c)(3) of this section.

(f) Compliance with a duly enacted law of a State or unit of general local government that includes the requirements of paragraphs (a) and (c) of this section satisfies the requirements of paragraphs (a) and (c) of this section.

(g)(1) It is the policy of HUD to encourage States and units of general local government to include, in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraphs (a) and (c) of this section.

(2) A State or unit of general local government may review and approve newly constructed multifamily dwellings for the purpose of making determinations as to whether the requirements of paragraphs (a) and (c) of this section are met.

(h) Determinations of compliance or noncompliance by a State or a unit of general local government under paragraph (f) or (g) of this section are not conclusive in enforcement proceedings under the Fair Housing Amendments Act.

(i) This subpart does not invalidate or limit any law of a State or political subdivision of a State that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subpart.