**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| **GROUP HOME ON GIBSON ISLAND, LLC, et al.,**<br><br>Plaintiffs,<br><br>v.<br><br>**GIBSON ISLAND CORPORATION,**<br><br>Defendant. | Civil Action No. 1:20-cv-00891-DLB |

## STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517 and L.R. 105.12(a) to address questions of law with respect to the parties' cross-motions for summary judgment under the Fair Housing Act ("FHA").[1] *See* ECF Nos. 71, 85. Specifically, the United States addresses the legal standards and criteria against which the Court should evaluate whether the conditions imposed by Defendant Gibson Island Corporation ("GIC") on Plaintiffs' reasonable accommodation request to operate a small group home would have afforded persons with disabilities an "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). The United States does not address the parties' other claims or arguments.

## I. INTEREST OF THE UNITED STATES

Plaintiffs allege, *inter alia*, that GIC violated the FHA by denying a request for a reasonable accommodation to waive the "business purpose" clause of GIC's deed covenants to permit the

[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."

operation of an assisted living home for nine seniors with disabilities. Am. Compl. ¶¶ 11, 64-80, ECF No. 47. 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), and has challenged discriminatory land use restrictions on group homes under this provision. *See*, *e.g.*, *Valencia v. City of Springfield*, 446 F. Supp. 3d 369, 381-82 (C.D. Ill. 2020). Additionally, the Attorney General "may commence and maintain a civil action" upon the referral by HUD of any fair housing complaint that "involves the legality of any State or local zoning or other land use law or ordinance." *Id*. §§ 3610(g)(2)(C), 3614(b)(1). The United States therefore has a substantial interest in the proper application of the FHA's reasonable-accommodation provision with respect to group homes for persons with disabilities.

## II. BACKGROUND

For purposes of the United States' Statement of Interest, the relevant facts are as follows:

GIC administers the private community of Gibson Island, Maryland. *See* Answer to Am. Compl. ¶ 17, ECF No. 48. On June 10, 2020, Plaintiffs requested that GIC waive a restrictive covenant prohibiting single-family homes from being used for a "business purpose" as a reasonable accommodation to allow Plaintiffs to operate a State-licensed assisted living home for nine seniors with disabilities. GIC Mem. in Supp. Mot. Summ. J. ("GIC Mem.") 9, ECF No. 71-1, & Ex. 32, ECF No. 71-34. An accommodation was necessary because the "business purpose" covenant prohibits group homes that "feature all the usual incidents of a commercial enterprise—it will employ full-time staff, receive catered deliveries, maintain business records, obtain state licensure, and advertise its services." *Gibson Isl. Corp. v. Grp. Home on Gibson Isl., LLC*, No. RDB-20-0843, 2020 WL 3035232, at *6 (D. Md. June 5, 2020). Such characteristics are

common to most group homes, whose "commercial" supports and services enable persons with disabilities to live in the community. *See Groome Res. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000) ("Primarily, the discriminatory effect recognized by Congress resulted from the fact that the disabled were not able to live safely and independently without organized, and sometimes commercial, group homes."); *accord Bryant Woods Inn v. Howard Cnty.*, 911 F. Supp. 918, 933 n.11 (D. Md. 1996) ("Group homes are for people who cannot manage to live alone, and are ordinarily commercial operations…"), *aff'd*, 124 F.3d 597 (4th Cir. 1997).

According to their reasonable accommodation request, Plaintiffs have "a long history of providing (and mobilizing) care for seniors with disabilities throughout Anne Arundel County, including on behalf of a number of notable Gibson Island families." GIC Mem. Ex. 32 at 1. The request stated that Plaintiffs maintained an "interest list" of seniors "who would choose to live at the [home] once it is operational." *Id.* at 2. The request also noted that all residents would necessarily be persons with disabilities by virtue of their eligibility for assisted living under state law. *Id*. at 3. Finally, the request provided details on the number of expected employees, traffic, parking, and emergency services utilization. *Id.* at 5.

On January 25, 2021, GIC sent Plaintiffs a proposed "accommodation agreement" in the form of a Memorandum of Understanding (MOU). GIC Mem. at 12 & Ex. 53, ECF No. 71-55. The MOU did not seek to reduce the number of residents or employees at the home, but contained 23 conditions upon which GIC's approval of the home was contingent. On March 18, 2021, following negotiations with Plaintiffs, GIC revised these conditions and informed Plaintiffs that it would approve their reasonable accommodation request "upon your acceptance of the attached MOU." GIC Mem. at 15 & Ex. 66, ECF No. 71-68. On March 26, 2021, following additional discussions with Plaintiffs, GIC sent Plaintiffs a revised, final MOU "and

would not accept any additional changes." *Id.* at 15 & Ex. 68, ECF No. 71-70. The March 26, 2021 draft MOU thus appears to contain GIC's final conditions for approval of Plaintiffs' reasonable accommodation request.

A number of GIC's conditions required Plaintiff to comply with their existing legal obligations and responsibilities. *See* GIC Mem. Ex. 68, MOU at 4-5. Others confirmed Plaintiffs' adherence to limitations on the home that Plaintiffs had proposed in their reasonable accommodation request, such as the number of residents, employees, and off-street parking. *See id.* at 1-2, 4. Certain conditions, however, imposed new or heightened requirements on the home or operated to waive certain of Plaintiffs' legal rights with respect to GIC. For example, GIC required Plaintiffs to maintain a $1 million general liability insurance policy that names GIC as a beneficiary and which may not be revised without GIC's approval. *Id.* at 2. GIC also required Plaintiffs to indemnify GIC "from any claims, costs, and/or fees arising from the operation or use of the" group home, except for any "claims arising solely from the acts or omissions of" GIC. *Id.* GIC further required Plaintiffs to provide an annual "Septic Certification" and "install a meter that creates daily monitoring reports measuring effluent at less than 900gpd flowing to the tank." *Id.* at 3. Finally, GIC required that any future claims with respect to Plaintiffs' reasonable accommodation be "subject to mandatory and binding arbitration," including a requirement that each side deposit $100,000 in escrow to cover any future award of attorneys' fees and damages. *Id.* at 5-6. Plaintiffs agreed to many, but not all, of these conditions, and a final agreement was not reached.

On August 17, 2022, GIC moved for summary judgment on all of Plaintiffs' claims, including for a reasonable accommodation. ECF No. 71, at 1-2. GIC argued that it had "approved" Plaintiffs' proposed group home, subject to the conditions set forth in the March 26,

2021 draft MOU, and therefore had not, as a matter of law, "denied" Plaintiffs a reasonable accommodation or made housing "unavailable." GIC Mem. at 2, 22. GIC further argued that its conditions were a "robust alternative" to Plaintiffs' requested accommodation, which was therefore not "necessary to afford [persons with disabilities] an equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B); *see* GIC Mem. at 19-23.

## III. ARGUMENT

### *A. GIC's Proposed Conditions Are Not a "Reasonable Accommodation" If They Would Not Have Provided an "Equal Housing Opportunity" Under the FHA*

Under the FHA, it is illegal "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." 42 U.S.C. § 3604(f)(1). The FHA similarly prohibits discrimination 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" based on disability. *Id.* § 3604(f)(2). "Discrimination" includes the refusal to make reasonable accommodations to "rules, policies, practices or services" necessary to allow persons with disabilities equal opportunity to use a dwelling. *Id.* § 3604(f)(3)(B); *see also Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 272 (4th Cir. 2013). These provisions have long been held to prohibit discriminatory land-use practices by both public and private entities. *See, e.g., Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 748 n.4 (7th Cir. 2006) (*en banc*) ("The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.") (quoting H.R. Rep. No. 100-711, at 24 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2185);

*Groome Res.*, 234 F.3d at 201-02 ("Congress found that these seemingly 'neutral rules and regulations,' even those involving commercial/noncommercial zoning distinctions, nonetheless had a discriminatory effect on the housing choices available for the disabled.").

The FHA requires accommodations when they are "(1) reasonable and (2) necessary (3) to afford [persons with disabilities] equal opportunity to use and enjoy housing." *Bryant Woods Inn v. Howard Cnty.*, 124 F.3d 597, 603 (4th Cir. 1997). "An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it." *Valencia v. City of Springfield*, 883 F.3d 959, 968 (7th Cir. 2018) (quoting *Oconomowoc Residential Servs. v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002)). In the context of land use, courts may consider "the extent to which the accommodation would undermine the legitimate purposes and effects of existing zoning regulations and the benefits that the accommodation would provide to the handicapped. It may also consider whether alternatives exist to accomplish the benefits more efficiently." *Bryant Woods Inn*, 124 F.3d at 604. An accommodation is not "reasonable" if it imposes "undue financial and administrative burdens." *Id.* This determination is "a fact-specific inquiry" that balances the benefits the accommodation provides to persons with disabilities against its costs and impact on "the legitimate purposes and effects of the existing regulations." *Scoggins*, 718 F.3d at 272 (quoting *Bryant Woods Inn*, 124 F.3d at 604).

An accommodation is "necessary" when there is "a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the" person with a disability. *Bryant Woods Inn*, 124 F.3d at 604. Group homes typically satisfy this element by providing supports and services that enable persons with disabilities to live in residential communities alongside, and on similar terms as, persons without disabilities. *See*, *e.g.*, *Oconomowoc*, 300 F.3d at 787 ("[G]roup living arrangements can be essential for disabled persons who cannot live

without the services such arrangements provide, and not similarly essential for the non-disabled.").

Even when a requested accommodation is reasonable, a defendant may offer an "alternative accommodation that would be equally effective in meeting the individual's disability-related needs." *Sabal Palm Condos. of Pine Isl. Ridge Ass'n v. Fischer*, 6 F. Supp. 3d 1272, 1283 (S.D. Fla. 2014) (quoting Joint Statement of the Dep't of Hous. & Urban Dev. and the Dep't of Justice, *Reasonable Accommodations Under the Fair Housing Act* 8 (2004)). Courts have differed as to the legal impact of a defendant's offer of an alternative accommodation. The court in *Sabal Palm* rejected the contention that a plaintiff was obligated to accept an alternative accommodation if her proposed accommodation was reasonable. *Id.* Similarly, in *Schaw v. Habitat for Humanity*, 938 F.3d 1259 (11th Cir. 2019), the Eleventh Circuit held that it was premature for the district court to enter summary judgment for the defendant based on its offer of an "alternative accommodation" before determining whether the plaintiff's requested accommodation was reasonable. *Id.* at 1269. The Third Circuit, however, has held that a requested accommodation was not "necessary" where the defendant had offered several equally effective alternatives. *See Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 112 (3d Cir. 2018) (plaintiff's requested accommodation of leaving her walker in the lobby of her building was not "necessary" because building had offered to have staff store and retrieve the walker on demand, bring the walker to plaintiff's car, or allow plaintiff to park and leave the walker in the building's valet garage). Other courts have held that where a defendant has already provided a reasonable accommodation, albeit not the one the plaintiff prefers, the defendant cannot be said to have "denied" a reasonable accommodation. *See Temple v. Hudson View Owners Corp.*, 222 F. Supp. 3d 318, 324 (S.D.N.Y. 2016); *Resnick v. 392 Central Park W.*

*Condo.*, No. 07 Civ. 1988(LBS), 2007 WL 2375750, at *2 (S.D.N.Y. Aug. 14, 2007).

A common theme of these cases, however, is that any alternative accommodation offered by a defendant is invalid unless it actually affords persons with disabilities "equal housing opportunity." *Vorchheimer*, 903 F.3d at 109. As *Vorchheimer* recognized, this "may require more than just [offering] the accommodations *that are absolutely necessary for the disabled individual's treatment or basic ability to function*." *Id.* (citation and internal quotations omitted) (emphasis added). "An accommodation that does not provide *equal* opportunity, or that provides equal opportunity to *use* but not to *enjoy*, will not satisfy that requirement." *Id.* (emphasis in original).

Here, GIC argues that "equal housing opportunity" is limited to whether GIC's conditions would directly prevent the group home from providing "the same therapeutic benefits" to residents. *See* GIC Mem. at 22. This overly narrow interpretation is inconsistent with the FHA. For example, it is well-settled that offering a group home the right to operate at a different location does not afford persons with disabilities an "equal housing opportunity to use and enjoy a dwelling," 42 U.S.C. § 3604(f)(3)(B), even if the home could provide "the same therapeutic benefits" just as effectively at an alternate location. "[T]he essential question in reasonable accommodation cases is whether the handicapped have an equal opportunity to live in the dwellings *of their choice*, not simply an opportunity to live somewhere in the City." *Schwarz v. City of Treasure Isl.*, 544 F.3d 1201, 1225 (11th Cir. 2008)) (emphasis in original); *accord Dr. Gertrude A. Barber Ctr. v. Peters Twp.*, 273 F. Supp. 2d 643, 654 (W.D. Pa. 2003) (defendant's alternative accommodation for group home "is not a reasonable accommodation, since it would preclude the Barber Center's residents from living in the home and neighborhood of their choice.").

Likewise, courts have rejected "alternative" accommodations that imposed significant costs or administrative burdens on plaintiffs, even though they, too, may not have directly prevented the plaintiff's disability needs from being met. In *Kuhn v. McNary Estates Homeowners Association*, 228 F. Supp. 3d 1142 (D. Or. 2017), plaintiffs requested a waiver of a restrictive covenant preventing them from parking a motor home in their driveway because their son needed a vehicle with a toilet and shower due to his disabilities. *Id.* at 1144. The court rejected defendants' proffered alternatives—namely, that plaintiffs could park on the street, install a toilet in a smaller van, or expand their garage—either because they "would not meet [plaintiffs'] needs" or would have themselves required plaintiffs to seek additional accommodations. *Id.* at 1149-50. As the court held, "Defendants would have this Court hold that a requested accommodation is 'necessary' under the FHAA only if there is no other accommodation that would impose a lighter burden on the housing provider. *That is not the law*." *Id.* at 1149 (emphasis added).[2] Similarly, in *Vance v. City of Maumee*, 960 F. Supp. 2d 720 (N.D. Ohio 2013), the court rejected defendant's alternative accommodations "as either unworkable, very expensive, or both." *Id.* at 731.

Finally, the FHA generally prohibits housing providers from charging fees for reasonable accommodations, even though such fees also would not directly inhibit the accommodation's "therapeutic benefits." *See Fair Hous. of the Dakotas v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1040 (D.N.D. 2011) (housing provider may not charge a pet fee for a necessary emotional support animal); *accord Hubbard v. Samson Mgmt. Corp*., 994 F. Supp. 187, 191

[2] *Accord S.W. Fair Hous. Council v. WG Scottsdale LLC*, No. CV-19-00180-TUC-RM, 2022 WL 3155113, at *3 (D. Ariz. Aug. 8, 2022) (denying judgment as a matter of law to defendant who argued that providing an American Sign Language interpreter to a deaf tenant was not "necessary" because "a whiteboard or lipreading would have been a reasonable accommodation…").

(S.D.N.Y. 1998) (housing provider could not charge disabled tenant for reserved parking space where non-disabled tenants could walk to and park in unreserved spaces for free).

Accordingly, in evaluating whether GIC granted a "reasonable accommodation" to Plaintiffs, the Court should reject GIC's cramped and narrow analysis of whether a group home is able to provide "essential therapeutic benefits" to residents even under unequal, costly, or burdensome conditions. *See* GIC Mem. at 21. Instead, the Court should examine whether GIC's conditions would have afforded persons with disabilities an "equal opportunity to use and enjoy" the dwelling of their choice, including whether they would unreasonably or unequally impact or interfere with the ability to locate, establish, and maintain community housing for persons with disabilities.

To be sure, many of GIC's proposed conditions—such as requiring compliance with existing laws and parking restrictions—appear reasonable on their face. This is because they do not impose significantly heightened burdens on the home's operation and directly relate to GIC's legitimate, non-discriminatory interests in administering the Gibson Island community. *See Valencia*, 883 F.3d at 968 ("[E]qual opportunity" does not mean that "every rule that creates a general inconvenience or expense to the disabled needs to be modified.") (quoting *Wis. Cmty. Servs.*, 465 F.3d at 749). Others, however, would require considerable financial expenditures that would be impractical or impossible for most agencies that provide community residential services for persons with disabilities. Still others would require Plaintiffs to waive or forego legal rights they would otherwise have against GIC, including under the FHA itself. Accordingly, in determining whether GIC offered a reasonable accommodation, the Court should consider whether making the accommodation contingent on these requirements would have afforded persons with disabilities an "equal opportunity to use and enjoy" housing. *See* 42

U.S.C. § 3604(f)(3)(B).

For example, GIC's arbitration clause requires Plaintiffs to deposit $100,000 in escrow for potential damages and fees to GIC. This expense—which indisputably does not apply to housing for persons without disabilities—would be so high as to operate as an effective denial of the accommodation for many group homes. *See United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417 (9th Cir. 1994) (holding that courts should scrutinize fees "with unequal impact, imposed in return for permission to engage in conduct that, under the FHAA, a landlord is required to permit"). More fundamentally, an arbitration requirement effectively forces Plaintiffs—or any other agency serving persons with disabilities—to abandon their enforcement rights under the FHA as a condition for receiving a reasonable accommodation. For example, if, in the future, GIC were to shut the home down and enforce its restrictive covenant because a group of new neighbors complained about living near persons with disabilities, the arbitration clause may preclude Plaintiffs from exercising their right to file suit under the FHA. *See* 42 U.S.C. § 3613(a). The arbitration clause also grants GIC the right to seek attorneys' fees against Plaintiffs, which the FHA does not allow except for frivolous claims. *Bryant Woods Inn*, 124 F.3d at 606 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). The parties may, of course, privately agree to arbitrate future claims, but here, GIC is asking the Court to rule that forcing a group home to waive rights under the FHA in order to receive a reasonable accommodation provided an "equal housing opportunity" as a matter of law.

Similarly, GIC's demand that Plaintiffs indemnify GIC also may condition approval of a reasonable accommodation on a waiver of legal rights otherwise available to property owners in the same community. Again, while the parties may voluntarily agree to such a provision, when ruling on GIC's summary judgment motion, the Court should determine whether such a

condition is consistent with "equal housing opportunity." Depending on the legal impact of this waiver, requiring such an indemnification may not be a "reasonable accommodation."

Finally, GIC has required that Plaintiffs maintain a $1 million liability insurance policy with GIC as a named beneficiary. A defendant may not require liability insurance as a condition of granting a reasonable accommodation under the FHA. *Sabal Palms Condos. of Pine Isl. Ridge Ass'n v. Fischer*, No. 12-60691-Civ., 2014 WL 988767, at *21 (S.D. Fla. Mar. 13, 2014).[3] Again, Plaintiffs may voluntarily choose to accept this condition, but that is separate and apart from whether GIC has offered Plaintiffs a "reasonable accommodation" as a matter of law.[4]

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[3] Similarly, a HUD administrative law judge held that a housing provider may not condition approval of a reasonable modification—specifically, a wheelchair ramp—on the tenant purchasing liability insurance, and that in doing so, the housing provider "effectively refused to permit the building of the ramp in violation of the [FHA]." *Sec'y v. Twinbrook Vill. Apts.*, HUDALJ Nos. 2-00-0256-8—2-00-0258-8, slip op. 19 (Nov. 9, 2001), *available at:* https://www.hud.gov/sites/documents/HUD2002-00-0256-8.pdf.

[4] GIC claims that these conditions "were vital to protecting GIC's interests," GIC Mem. at 16, but this only affirms why GIC's "alternative accommodation" argument is premature. GIC's argument presumes that the home, as originally requested by Plaintiffs, would have posed an undue burden on GIC, *i.e.*, by impairing GIC's "vital" interests, but GIC is not seeking summary judgment on that issue. *Id.* at 20 n.4. The Court cannot evaluate the reasonableness of GIC's required conditions unless and until it determines whether Plaintiffs' requested accommodation was reasonable. *Cf. Schaw*, 938 F.3d at 1269. And if it was, GIC's conditions should be viewed in a far different and more stringent light, because in that event, they would not be necessary to mitigate any undue burden or fundamental alteration posed by the home.

The United States notes that GIC has not challenged or sought to reduce the number of residents or employees that Plaintiffs proposed would live and work at the home, and the parties have agreed on basic land-use issues such as off-site parking, traffic restrictions, use of emergency services, and ingress and egress of residents, employees, and visitors to the community. Accordingly, it is not clear what "undue burden" or "fundamental alteration" the home would pose to GIC or the community. *See Valencia*, 883 F.3d at 970 (accommodation for group home was facially reasonable because "[i]t would cost the City no money" and there was not "sufficient evidence of intangible costs to the neighborhood."). To the extent GIC plans to argue that Plaintiffs' principal, Craig Lussi, is himself the "undue burden," *see*, *e.g.*, GIC Mem. at 12 (describing Lussi's "intemperate" negotiating style), this is presumably mitigated by the parties' agreement to name Jeanette Lussi as GIC's sole point of contact. *Id.* Ex. 68, MOU at 1. In any event, the United States is unaware of any case in which a court found an "undue burden" under the FHA based solely on personal animosity or distrust among the parties.

*B. Certain of GIC's Conditions May Have Operated as a Constructive Denial of Plaintiffs' Reasonable Accommodation Request*

A denial of a reasonable accommodation request "need not be explicit, but rather may be treated as a 'constructive' denial based on the decision maker's conduct." *Scoggins*, 718 F.3d at 262. A "constructive denial" may occur in a number of ways. For example, courts have found "constructive denial" where a defendant unduly delays responding to an accommodation request, demands excessive, unnecessary, or intrusive information from an applicant, or initiates enforcement action against the applicant. *See United States v. 111 E. 88th Partners*, No. 16 Civ. 9446 (PGG), 2020 WL 1989396, at *16-17 (S.D.N.Y. Apr. 27, 2020) (listing cases); *accord Bhogaita v. Altamonte Heights Condo. Ass'n*, No. 6:11-cv-1637-Orl-31DAB, 2012 WL 6562766, at *7 (M.D. Fla. Dec. 17, 2012), *aff'd*, 765 F.3d 1277 (11th Cir. 2014). Here, although GIC claims to have "approved" Plaintiffs' requested accommodation, *see* GIC Mem. at 15, the Court should consider whether some of the conditions upon which GIC made its "approval" contingent—along with the negotiations required to modify or reduce the impact of these conditions—may have been so unjustifiably burdensome as to give rise to a constructive denial of Plaintiffs' request. *See Sabal Palm*, 2014 WL 988767, at *14 (finding constructive denial where housing provider "already had enough qualifying-disability and nexus information" to justify accommodation, but nevertheless made "excessive and unnecessary" requests for additional records).

*C. GIC's "Septic" Condition Is Justified Only If the Group Home Poses a "Direct Threat" to the Health or Safety of Others or Would Result in Substantial Physical Damage to the Property of Others*

The parties dispute whether GIC's proposed "septic provisions" condition is reasonable, with GIC arguing that this condition is "important" given the number of residents and employees expected at the home and the unique environmental conditions on Gibson Island. GIC Mem. at

16. The parties appear to agree, however, that this requirement would apply only to the group home and not to any other properties on Gibson Island. Different or heightened requirements for housing for persons with disabilities are justified only if (1) the requirements actually benefit the residents, or (2) the home poses a "direct threat" to the health and safety of residents or others or of "substantial physical damage to the property of others." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-04 (10th Cir. 1995) (quoting 42 U.S.C. § 3604(f)(9)); *see also Larkin v. Mich. Dep't of Social Servs.*, 89 F.3d 285, 290 (6th Cir. 1996); *Cmty. House v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007). These exceptions to the FHA must be construed narrowly, and may not be based on "blanket stereotypes about" persons with disabilities, "but must be tailored to particularized concerns about individual residents." *Bangerter*, 46 F.3d at 1503; *see also Marburnak, Inc. v. City of Stow*, 974 F.2d 43, 47 (6th Cir. 1992) (heightened safety requirements for homes for persons with disabilities justified when "that protection is demonstrated to be warranted by the unique and specific needs and abilities of" residents).

GIC does not claim that the "septic provisions" would benefit the home's residents. Accordingly, the question for the Court in considering whether the septic requirements are part of a "reasonable accommodation" is whether GIC has presented sufficient evidence to demonstrate that the home, without this condition, is a "direct threat" to the health or safety of others or would cause "substantial" property damage. *See* 42 U.S.C. § 3604(f)(9).

The Fourth Circuit in *Scoggins* examined the FHA's "direct threat" defense in the context of a request to allow a resident with physical disabilities to use an all-terrain vehicle (ATV) to travel around a private community. The Court of Appeals found that defendants had produced "overwhelming evidence" that this accommodation posed a "direct threat" both to the resident himself and other neighbors. This evidence included the ATV's owners' manual, which

recommended against driving the ATV on streets, as well as an expert civil engineer who testified as to the dangers of using an ATV on paved and graded roads. 718 F.3d at 273-74. Accordingly, in determining whether GIC's septic requirements are permissible as a matter of law, the Court should consider whether GIC presented sufficient concrete, individualized evidence as to the home's impact.

## IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court consider the above views in deciding the parties' summary judgment motions.

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