

MICHAEL W. COTTER
United States Attorney
MICHAEL S. SHIN
Assistant United States Attorney
District of Montana
2601 2nd Avenue N., Box 3200
Billings, MT 59101
Telephone: (406) 247-4669
michael.shin@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

| | |
|---------------------------|---|
| -----X | |
| UNITED STATES OF AMERICA, | : |
| | : |
| Plaintiff, | : |
| | : |
| v. | : |
| | : |
| ANTHONY BOOTE, RED DOG | : |
| CONSTRUCTION, LLC, and | : |
| CHARLES J. CHANDLER, | : |
| | : |
| Defendants. | : |
| -----X | |

Case No. CV 13-_____

CONSENT ORDER

I. BACKGROUND

A. Procedural History

1. The United States of America and Anthony Boote ("Boote"), Charles J. Chandler ("Chandler"), and Red Dog Construction, LLC

("Red Dog Construction") (collectively "Defendants") enter into this Consent Order to resolve the allegations that Defendants violated Sections 804(f)(1)-(3) of the Fair Housing Act (the "Act"), 42 U.S.C. §§ 3604(f)(1)-(3). By entering into this Consent Order, Defendants do not admit to any violation of the Act and specifically deny liability of any kind related to the allegations in the Complaint filed in this matter.

2. On December 19, 2012, the United States commenced this action on behalf of Montana Fair Housing ("MFH") pursuant to the Act, 42 U.S.C. § 3612(o), which authorizes the Attorney General to initiate litigation under the Act on behalf of an aggrieved person after a party has elected to have the claims asserted in the administrative charge decided in a civil action. Specifically, the United States alleges that Defendants discriminated against MFH by failing to design and construct two units at a property in Missoula, Montana with the features of accessible and adaptable design required by the Act, 42 U.S.C. § 3604(f)(3)(C), and its implementing regulations.

B. Relevant Requirements of Fair Housing Act

3. The Act applies to "covered multifamily dwellings," which are defined as "ground floor units in [non-elevator] buildings consisting

of 4 or more units.” See 42 U.S.C. § 3604(f)(7)(A). If such covered units were designed and constructed for first occupancy after March 13, 1991, the covered units, as well as the public and common use areas of the complex, must include certain basic features of accessible and adaptive design to make the housing accessible to and usable by persons with disabilities. 42 U.S.C. § 3604(f)(3)(C).

4. Under the Fair Housing Accessibility Guidelines (the “FHAG”), 56 Fed. Reg. 9472-9515 (1991), multistory townhouses in non-elevator buildings are not “covered multifamily dwellings” for purposes of the Act because “the entire unit is not on the ground floor.” *Id.* at 9481.

C. Position of the Parties

5. The subject properties are a single-story, below-grade, one-bedroom unit and a single-story, below-grade studio unit, which are located below three two-story townhouses that do not contain elevators. The properties are located at 215 Inez Street, Missoula, Montana, 59801. Certificates of occupancy for the units were issued after March 13, 1991.

6. In the Complaint filed in this matter, the United States alleges that the two subject properties are "covered units" and lack certain features of accessible design required by the Act.

7. Defendants contend that the units are exempt from accessibility requirements because: (1) the subject properties are basement units (as confirmed by an independent professional appraiser) and thus are not "ground floor units" within the meaning of the Act and (2) because they are part of non-elevator building of multilevel townhouses, the building is not a "covered multifamily dwelling" under the FHAG.

D. Consent of Parties to Entry of Consent Order

8. The United States and Defendants agree that this Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. §§ 1331 & 1345 and 42 U.S.C. § 3612(o). The United States and Defendants agree that this matter should be resolved without further litigation.

9. Therefore, the United States and Defendants have consented to the entry of this Consent Order as indicated by the signatures appearing below.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED:

II. GENERAL INJUNCTION

10. Defendants, their officers, employees, agents and all other persons in active concert or participation with them, are enjoined from designing and constructing multifamily housing that discriminates on the basis of disability, as prohibited by the Fair Housing Act, 42 U.S.C. §§ 3604(f)(1)-(3).

III. CORRECTIVE ACTION

11. Within one year of the entry of this Consent Order, Defendants shall design and construct two one-bedroom units at 1401 South 2nd St. West, Missoula, Montana, 59801. These units together shall be a minimum of 1,000 square feet of living space.

12. Within two years of the entry of this Consent Order, Defendants shall design and construct one two-bedroom unit at Lot 3, Palmer Street, Missoula, Montana, 59802.

13. The units described in Paragraphs 11-12 above (the "new units") shall meet all of the accessibility requirements set forth in 42 U.S.C. §§ 3604(f)(3)(C) and otherwise comply with the Act, even though

they are not "dwellings" as defined by the Act, and the new units shall be in accordance with the FHAG.

14. Defendants shall obtain certificates of occupancy for the new units and shall offer the units for rental to the public as follows:

- a. the 1401 South 2nd St. West units shall be offered no later than one year from the entry of this Consent Order; and
- b. the Palmer Street unit shall be offered no later than two years from the entry of this Consent Order.

15. Within 30 days of the commencement of the construction of the new units, Defendants shall notify the United States that construction has begun and provide an anticipated completion dates for the new units. Defendants shall notify the United States subsequently if the anticipated completion dates change by more than 60 days or fall outside the periods set forth in Paragraphs 11-14 above.

16. Upon completion of the new units and prior to their offer for rental to the public, MFH shall inspect the new units for compliance with the Act and the FHAG. Defendants shall pay MFH a total of \$500 for all inspections of the new units. MFH shall complete the inspections in a timely manner following completion of construction of the units,

and in any case no later than 30 days after each of the new units is completed, respectively. Defendants must address any deficiencies identified by MFH, and the MFH shall re-inspect the new units to confirm that all deficiencies have been corrected. MFH shall submit to the United States a written report that certifies that the new units conform to the Act and the FHAG.

17. Upon reasonable notice to Defendants, representatives of the United States shall be permitted to inspect the new units to ensure compliance, provided, however, that the United States shall endeavor to minimize any inconvenience caused by such inspections.

18. The sale or transfer of ownership, in whole or in part, of 1401 South 2nd St. West or Lot 3, Palmer Street shall not affect Defendants' continuing obligations to design and construct the new units as specified in this Consent Order. Should Defendants decide to sell or transfer ownership, in whole or in part, either of the properties prior to the completion of the new units, they shall, at least 30 days prior to completion of the sale or transfer, (a) provide to the prospective buyer written notice that the subject property is subject to this Consent Order, including specifically Defendants' obligations to complete

required construction and to allow inspections, along with a copy of this Consent Order; and (b) provide to the United States, by facsimile and first class mail, written notice of their intent to sell or transfer ownership, along with a copy of the notice sent to each buyer, and each buyer's name, address and telephone number.

IV. STIPULATED PENALTIES

19. Each Defendant shall be liable for stipulated penalties in the amounts set forth below to the United States for failure to comply with the following requirements of this Consent Order:

a. Failure to Complete Construction. Each Defendant shall pay a penalty of \$200 per day for failing to construct the new units and offer them for rental to the public as set forth in Paragraphs 11-14 above.

20. All stipulated penalties shall begin to accrue on the first day that performance is delinquent and shall continue to accrue through the final day of correction of the violation.

21. Stipulated penalties shall become owing upon written demand by the United States and are due on or before the 15th day of the month following the month the written demand is received.

22. Each penalty installment shall be made by Fed Wire Electronic Funds Transfer ("EFT") in accordance with current electronic funds transfer procedures and pursuant to instructions to be provided to Defendants by the Financial Litigation Unit of the Office of the United States Attorney for the District of Montana. Concurrently with payment, Defendants shall provide notice to those persons identified in Section VII (Notification).

23. If any Defendant fails to pay any stipulated penalty according to the terms of this Consent Order, the United States shall be entitled to collect interest on such penalty, as provided for in 28 U.S.C. § 1961.

24. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Order.

25. Defendants shall be liable for stipulated penalties to the United States unless excused under Section V (Force Majeure).

26. Stipulated penalties shall continue to accrue during any dispute resolution, with interest on accrued penalties payable and

calculated pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the United States that is not appealed to this Court, Defendants shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 days of the effective date of the agreement or the receipt of the United States' decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by this Court to be owing, together with interest, within 60 days of receiving this Court's decision or order, except as provided in Subparagraph c, below;

c. If any party appeals this Court's decision, Defendants shall pay all accrued penalties determined to be owed, together with interest, within 15 days of receiving the final appellate court decision.

27. Nothing in this Section shall be construed to limit the United States' ability to seek any remedy, including injunctive relief, civil penalties, and/or criminal penalties otherwise provided by law for any violation of this Consent Order or the Act.

V. FORCE MAJEURE

28. Defendants shall satisfy the requirements of Section III (Corrective Action) except to the extent, and for the period of time, that such performance is prevented or delayed by events which constitute a force majeure.

29. For the purpose of this Consent Order, a force majeure is defined as any event arising from circumstances beyond the reasonable control of Defendants and that cannot be overcome by Defendants' diligent and timely efforts. Economic hardship, normal inclement weather, and increased costs of performance shall not be considered events beyond the reasonable control of Defendants for purposes of determining whether an event is a force majeure.

30. In the event of a force majeure, the time for performance of the activity delayed by the force majeure shall be extended for the time period of the delay attributable to the force majeure. The time for performance of any activity dependent on the delayed activity shall be similarly extended, except to the extent that the dependent activity can be reasonably implemented in a shorter time. The United States shall determine whether dependent activities will be delayed by the force

majeure and whether the time period should be extended for performance of such activities. Defendants shall adopt all reasonable measures to avoid or minimize any delay caused by a force majeure.

31. When an event occurs or has occurred that may delay or prevent the performance of any obligation under this Consent Order and which Defendants believe is a force majeure, Defendants shall notify the United States representative identified in Section VII (Notification) by telephone within 24 hours of Defendants' knowledge of such event and in writing within seven (7) days of the Defendants' knowledge of such event. The notification shall fully describe: the event that may delay or prevent performance; reasons for the delay; the reasons the delay is beyond the reasonable control of Defendants; the anticipated duration of the delay; actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to mitigate the effect of the delay; and the time needed to implement any dependent activities.

32. Defendants' failure to comply with the force majeure notice requirements provided in Paragraph 31 will be deemed an automatic forfeiture of its right to assert that any prevention or delay of performance was caused by a force majeure.

VI. DISPUTE RESOLUTION

33. If Defendants dispute any determination made by the United States under this Consent Order related to (a) stipulated penalties, (b) injunctive relief, or (c) force majeure, it shall send written notice to the United States outlining the nature of the dispute and requesting informal negotiations to resolve the dispute. Such period of informal negotiations shall not extend beyond 30 working days from the date when the notice was sent unless the parties agree otherwise.

34. If the informal negotiations are unsuccessful, the determination of the United States shall control, unless Defendants file a motion with this Court for dispute resolution. Any such motion must be filed within 30 days after receipt by Defendants of a notice in writing terminating informal negotiations, and such motion must be sent to the United States in accordance with Section VII (Notification) of this

Consent Order. The United States shall then have 30 days to respond to Defendants' motion.

35. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligations of Defendants under this Consent Order, unless the parties to the dispute so agree or the Court so orders. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment to the United States shall be stayed pending resolution of the dispute, in accordance with Paragraph 26. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section IV (Stipulated Penalties).

VII. NOTIFICATION

36. Notifications and or other communications required pursuant to this Consent Order shall be deemed submitted on the date (a) postmarked and sent by certified mail, return receipt requested, or by regular first-class mail; (b) sent by facsimile transmission, with confirmation of receipt; or (c) sent by overnight delivery service. Except as specified otherwise, when written notification to or communication

with a party is required by the terms of this Consent Order, it shall be addressed as follows:

As to the United States:

Affirmative Civil Enforcement Coordinator
District of Montana
2601 2nd Avenue N., Box 3200
Billings, MT 59101
Reference Case No. 2012V0202; HUDALJ No. 12-AF-068-
FH-28; FHEO No. 08-12-0122-8

As to the Defendants:

Anthony Boote
7365 Old Grant Creek Road
Missoula, MT 59808

Charles Chandler/Red Dog Construction, LLC
120 N. 2nd Street East, #201
Missoula, MT 59802

**VIII. NOTIFICATION OF OWNERSHIP OF MULTIFAMILY
PROPERTIES SUBJECT TO THE FAIR HOUSING ACT**

37. For the duration of this Consent Order, Defendants shall maintain, and provide to the United States upon request, the following information and statements regarding any covered, multifamily dwellings they design in whole or in part, or designed by any entities in

which they have a position of control as an officer, director, member, or manager, or have a 10% or larger ownership share:

- (a) the name and address of the project;
- (b) a description of the project and the individual units; and
- (c) a statement acknowledging that Defendants have reviewed the architectural plans for the project and that to the best of its knowledge, the design specifications therein comply with the requirements of the Fair Housing Act and the FHAG.

IX. REPORTING AND DOCUMENT RETENTION REQUIREMENTS

38. Defendants shall advise the United States in writing within 15 days of receipt of any written administrative or legal fair housing complaint against any property owned or managed by Defendants, or against any employees or agents of Defendants working at or for any such property, regarding discrimination in design and construction, as set forth in 42 U.S.C. § 3604(f)(3)(C). Upon reasonable notice, Defendants shall also provide the United States all information it may request concerning any such complaint. The Defendants shall also advise counsel for the United States, in writing, within 15 days of the resolution of any complaint.

39. For the term of this Consent Order, Defendants are required to preserve all records related to this Consent Order. Upon reasonable notice to Defendants, representatives of the United States shall be permitted to inspect and copy any records of Defendants or inspect any developments or residential units under Defendants' control bearing on compliance with this Consent Order at any and all reasonable times, provided, however, that the United States shall endeavor to minimize any inconvenience to Defendants from such inspections.

X. EDUCATION

40. Within 120 days of the date of entry of this Consent Order, Defendants shall undergo training on the design requirements of the Fair Housing Act. The training shall be conducted by a qualified third party, unconnected to Defendants or their employees, agents or counsel, and approved by the United States. Attendance at training offered in Missoula, Montana by Montana Fair Housing on January 16, 2013, from 1 o'clock p.m. to 5 o'clock p.m. (at a cost of \$100 for each Defendant) shall satisfy this requirement.

41. Any expenses associated with this training shall be borne by Defendants. Defendants shall provide to the United States, within 30

days after the training, certifications executed by Defendants and all covered employees and agents confirming their attendance, in a form substantially equivalent to Exhibit A.

XI. COMPENSATION OF MONTANA FAIR HOUSING

42. The Defendants shall pay to Montana Fair Housing \$3,000.00 in costs and fees. Defendants shall pay this amount within 30 days of the date of entry of this Order by sending to counsel for the United States a check in that amount payable to "Montana Fair Housing," provided that no amount shall be paid pursuant to this paragraph before MFH has executed a written release to be agreed upon by MFH and Defendants.

XII. DURATION OF ORDER AND TERMINATION OF LEGAL ACTION

43. This Consent Order shall remain in effect for 2 years or 6 months following the receipt of the certification set forth in Paragraph 16 of this Consent Order, whichever period is longer.

44. This Consent Order constitutes a full and final resolution of all claims of violation of the Fair Housing Act that the United States could have alleged, in this action relating to compliance of the subject properties ("Units D and E" in the Complaint) with the accessibility

requirements set forth in 42 U.S.C. § 3604(f)(3)(C), as set forth in the Complaint in this matter.

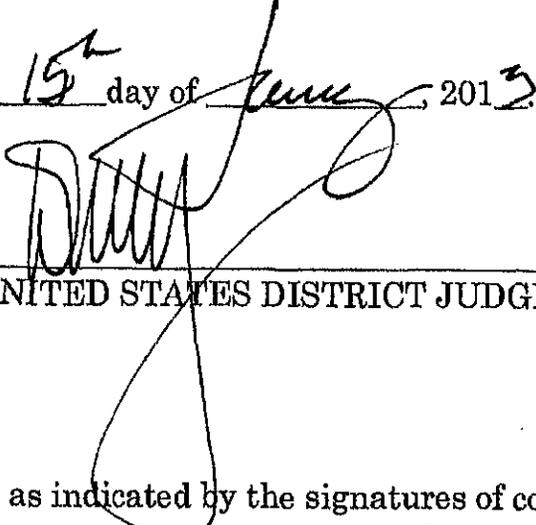
45. The Court shall retain jurisdiction, including for distribution of the settlement funds, for the duration of this Consent Order to enforce the terms of the Order, after which time the case against Defendants shall be dismissed with prejudice. Plaintiff may move the Court to extend the duration of the Order in the interests of justice.

46. Any time limits for performance imposed by this Consent Order may be extended by the mutual written agreement of Plaintiff and Defendants.

47. Plaintiff and Defendants shall, in good faith, attempt to resolve informally any differences regarding interpretation of and compliance with this Order prior to bringing such matters to the Court for resolution. However, in the event of a failure by Defendants to perform in a timely manner any act required by this Order or otherwise to act in conformance with any provision thereof, Plaintiff may move this Court to impose any remedy authorized by law or equity, including, but not limited to, an order requiring performance of such act or deeming such act to have been performed, and an award of any

damages, costs, and reasonable attorneys' fees which may have been occasioned by the violation or failure to perform.

It is so ORDERED this 15th day of June, 2013.



UNITED STATES DISTRICT JUDGE

Agreed to by the parties as indicated by the signatures of counsel below.

FOR PLAINTIFF UNITED STATES OF AMERICA:

STEVEN H. ROSENBAUM, Chief
MICHAEL S. MAURER, Deputy Chief
United States Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

MICHAEL W. COTTER
United States Attorney

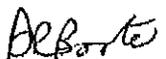
Date: 1/11/13



MICHAEL S. SHIIN
Assistant United States Attorney
District of Montana

FOR DEFENDANTS:

Date: 01/11/2013



ANTHONY BOOTE
7365 Old Grant Creek Road
Missoula, MT 59808

Date: 1-11-2013



CHARLES CHANDLER
Individually and on behalf of
RED DOG CONSTRUCTION, LLC
120 N. 2nd Street East, #201
Missoula, MT 59802

EXHIBIT A

Certification of Education and Training

I, _____, attended and completed training on
the design requirements of the Fair Housing Act on the ____ day of
_____ 201__. The training was conducted by _____ at
the following location:

Signature: _____

Date: _____

Name Printed: _____