

**UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES**

| | | |
|---|---|----------------------------|
| The Secretary, United States Department of |) | |
| Housing and Urban Development, on behalf of |) | |
| Fair Housing Council of Oregon, |) | |
| |) | |
| Charging Party, |) | |
| |) | |
| v. |) | FHEO Case No. 10-06-0383-8 |
| |) | |
| Montagne Development, Inc., |) | HUDALJ |
| Multi/Tech Engineering Services, Inc., |) | |
| David A. Montagne, William D. Jones, |) | |
| Dav II Investment Group, LLC, |) | |
| Gateway I, LLC, and Gateway II, LLC, |) | |
| |) | |
| Respondents. |) | |
| _____ |) | |

CHARGE OF DISCRIMINATION

I. JURISDICTION

Complainant Fair Housing Council of Oregon, an aggrieved person, filed a timely complaint with the United States Department of Housing and Urban Development (“HUD” or “the Department”) on July 26, 2006; the complaint was amended on February 4, 2008, and additional respondents were joined by HUD on September 13, 2010. The amended complaint alleges that Respondents Montagne Development, Inc., Multi/Tech Engineering Services, Inc., David A. Montagne, William D. Jones, Dav II Investment Group, LLC, Gateway I, LLC, and Gateway II, LLC, discriminated based on handicap by failing to design and construct multifamily dwellings for first occupancy after March 13, 1991, in a manner required by the Fair Housing Act, as amended, 42 U.S.C. Sections 3601-3619 (“Act”).¹ Efforts to conciliate the complaint were unsuccessful.

The Act authorizes issuance of a charge of discrimination on behalf of the aggrieved person following an investigation and a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred. 42 U.S.C. § 3610 (g)(1)-(2). The Secretary has

¹ “Gateway Village Apartments, LLC” was named in this complaint after the entity was identified by a respondent as the property owner; however, the Oregon Secretary of State has no record of this entity. “Gateway Village Apartments” is a registered assumed business name for the property.

delegated to the General Counsel, 24 C.F.R. § 103.400(a)(2)(i), who has redelegated to the Regional Counsel, 76 Fed. Reg. 42463-01, 42465 (July 18, 2011), the authority to issue such a charge, following a determination of reasonable cause by the Assistant Secretary for Fair Housing and Equal Opportunity or his or her designee.

The Director for Fair Housing and Equal Opportunity, Region X, has determined that reasonable cause exists to believe that discriminatory housing practices have occurred and authorized the issuance of this Charge of Discrimination.

II. SUMMARY OF THE ALLEGATIONS IN SUPPORT OF THIS CHARGE

Based on HUD's investigation of the complaint and the attached determination of reasonable cause, the Regional Counsel for Region X charges Respondents with violations of the Act, specifically, 42 U.S.C. Section 3604(f)(3)(C). The following allegations support this Charge of Discrimination.

1. It is unlawful to fail to design and construct covered multifamily dwellings for first occupancy after March 13, 1991, in such a manner that:
 - a) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
 - b) 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,
 - c) 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. 42 U.S.C. §3604(f)(3)(C).
2. As used in 42 U.S.C. Section 3604(f)(3)(C), "covered multifamily dwellings" are buildings consisting of four or more units if such buildings have one or more elevators, and ground floor units in other buildings consisting of four or more units. 42 U.S.C. §3604(f)(7).
3. The subject property, Gateway Village Apartments, located at 1900 Madras Street SE, Salem, Oregon, consists of 30, two- and three-story, non-elevator buildings with four or more units per building, for a total of 275 residential units. Gateway Village has 112 ground floor units or "covered multifamily dwellings."

4. Gateway Village Apartments was designed and constructed in two overlapping and continuous phases. The architectural and engineering plans for Phase II were completed while construction of Phase I was underway. Five of the seven floor plans for ground floor units are identical in the two phases, and the two phases share common use areas and amenities.
5. The building permits for the subject property were issued between September, 2002, and July, 2004. The last certificate of occupancy for covered multifamily dwellings was issued August 3, 2005.
6. Complainant Fair Housing Council of Oregon (“FHCO”) is a nonprofit corporation organized under the laws of the State of Oregon. FHCO’s organizational mission is to further equal access to housing of choice for all persons in Oregon and southwest Washington. FHCO seeks to further its mission through outreach, education and enforcement activities.
7. Respondent Multi/Tech Engineering Services, Inc., an Oregon corporation, was the architect and civil engineer for the subject property.
8. Respondent Montagne Development, Inc., an Oregon corporation, was the contractor responsible for the construction of Gateway Village Apartments.
9. Respondents David A. Montagne and William David Jones were General Partners in Dav II Investment Group, an Oregon General Partnership. Dav II Investment Group was the initial developer of the subject property, owning the land from the pre-development stage until the property was divided into two parcels and sold in October, 2003. Mr. Montagne was also President and Secretary of Montagne Development, Inc., and a principal in the various ownership entities involved in development of the subject property.
10. Respondent Dav II Investment Group, LLC, an Oregon limited liability company, was organized in January, 2003. DAV II Investment Group, LLC, was a developer of the subject property.
11. Respondent Gateway I, LLC, an Oregon limited liability company, has been the owner of record for Phase I of the subject property since October 16, 2003, after construction was completed on this phase. Gateway I, LLC, was not involved in the design and construction of the project, but is named as a necessary party for the purpose of obtaining full relief, including access to the property for retrofitting.
12. Respondent Gateway II, LLC, an Oregon limited liability company, has been the owner of record for Phase II of the subject property since October, 2003. Gateway II, LLC, was the owner of Phase II of the project during construction.

13. On or about December 27, 2005, Complainant FHCO sent a tester to Gateway Village Apartments to conduct an accessibility survey of the property. The tester, who claimed to be looking for an apartment for her disabled sister, viewed a two-bedroom, two-bath model unit. The FHCO tester observed interior and exterior barriers to accessibility at the property, including excessive slopes on required accessible routes, interior doorways that were too narrow, and bathrooms without the required clear floor space.
14. Complainant FHCO or its representative obtained copies of building permits and certificates of occupancy for Gateway Village and conducted additional investigation prior to filing the instant complaint. FHCO has expended funds and staff time on this matter that would have been spent working in other areas such as educational activities, counseling, and enforcement activities.
15. Complainant FHCO filed a complaint with HUD on July 26, 2006, alleging that Gateway Village Apartments was not built in compliance with the design and construction requirements of the Act.
16. The Department contracted with an architect and accessibility consultant to conduct an onsite inspection and plan review for the subject property. The consultant conducted an inspection on September 18-19, 2008, and prepared a report identifying non-compliant features observed during the site visit. He concluded that the public and common use areas and covered dwelling units at Gateway Village had not been built in accordance with the design and construction requirements of the Fair Housing Act.
17. The Department's consultant also reviewed the architectural and civil engineering drawings prepared by Respondent Multi/Tech Engineering Services, Inc., for the covered ground floor units and the most of the public use and common use areas at the subject property. He opined that the plans for Gateway Village Apartments do not comply with the design and construction requirements of the Fair Housing Act.
18. The public use and common use portions of Gateway Village Apartments are not readily accessible to and usable by handicapped persons, as required by 42 U.S.C. § 3604(f)(3)(C)(i). Specifically, the inaccessible features include, but may not be limited to, the following: (a) one to nine steps along the walkway to the common use breezeway entrances at eight buildings; (b) slopes that exceed 5% without handrails on the route to the breezeway entrances at six buildings, with some walks exceeding the 8.3% maximum slope allowed for ramps (16% measured at one location); (c) no curb ramps at breezeway entrances to four buildings; (d) at thirteen locations, running slopes along required accessible routes exceed 5%, without handrails (slopes up to 14.3%); (e) cross slopes along many required accessible routes exceed 2%, with cross slopes at building entrances measuring up to 8.3% and at one access aisle, 35%; (f) curb ramps with excessive slopes at thirteen locations; (g) at one building, there is no vehicular arrival point with a cross slope of less than 2%; (h) no accessible route connecting covered ground floor units with some common use features, including the trash dumpster, the two mailbox locations, and

some storage units; (i) no accessible carport spaces or detached garages; (j) no accessible parking at the recreation building/leasing office, some mailboxes, or the dumpster; (k) no cane detection barrier below the stairways serving upstairs units; (k) in the recreation building, the kitchen sink, paper towel dispenser, peninsula/bar seating counter, and thermostat are inaccessible; and (l) the restrooms in the recreation/leasing building lack compliant clear floor space at the toilets and seat cover dispensers, and the roll-in showers and saunas are not accessible, lacking adequate clear floor space, accessible controls, and, in the showers, compliant grab bars.

19. All doors designed to allow passage into and within all premises within ground floor units at Gateway Village are not sufficiently wide to allow passage by handicapped persons in wheelchairs, as required by 42 U.S.C. § 3604(f)(3)(C)(ii). Specifically, the violations include, but may not be limited to, the following: In some dwelling units, the clear opening width of the opening to the walk-in closet, the door to the master bathroom, the sliding door to the patio and/or the door to the patio storage room is less than the required nominal 32 inches. For example, the opening to the walk-in closet in one unit measured 25.5 inches wide, the clear opening width of the door to the master bathroom in two units measured 28 inches, and the patio storage doors provide a 30-inch clear opening width.
20. The ground floor units at Gateway Village Apartments lack certain features of adaptive design required by 42 U.S.C. § 3604(f)(3)(C)(iii). Specifically, the violations include, but may not be limited to, the following.
 - a. Gateway Village Apartments lacks an accessible route into and through the dwellings, as required by 42 U.S.C. § 3604(f)(3)(C)(iii)(I). In all ground floor units, the thresholds at the patio doors are too high and are not beveled.
 - b. The electrical outlets in ground floor units are not located in accessible locations, as required by 42 U.S.C. § 3604(f)(3)(C)(iii)(II). The lower receptacle in duplex outlets is too low, at 13.5 to 14 inches above the finished floor.
 - c. Gateway Village Apartments lacks usable kitchens such that an individual in a wheelchair can maneuver about the space, as required by 42 U.S.C. § 3604(f)(3)(C)(iii)(III). Some kitchens lack sufficient clear floor space for a wheelchair user to maneuver about the space and use the fixtures and appliances. For example, in the one-bedroom, one-bath, Plan A units, the range is not usable by a person using a wheelchair as the centerline of the range is located only 18 inches from the adjacent cabinet face; a 30- by 48-inch clear floor space parallel to and centered on the range is required. In some units, the kitchen sink is not usable because the centerline of the sink is 18 to 19 inches from the adjacent cabinet. The refrigerator protrudes into the required clear floor space in many units.

d. Gateway Village Apartments lacks usable bathrooms such that an individual in a wheelchair can maneuver about the space, as required by 42 U.S.C. § 3604(f)(3)(C)(iii)(III). In dwelling units with more than one bathroom, neither bathroom provides sufficient clear floor space for a person using a wheelchair to enter the room, close the door, use all fixtures, and exit. The hall bathroom does not provide adequate clear floor space outside the swing of the door, nor is there a 30- by 48-inch clear floor space parallel to and centered on the sink. Barriers to usability in the master bathroom in these units include the lack of required clear floor space parallel to and centered on the sink, inadequate clear floor space outside the swing of the door, no 30- by 48-inch clear floor space parallel to the shower beginning at the control wall, and/or insufficient clear floor space at the toilet, which is located in a 35.5 inch by 39.5-inch alcove in the 46, two-bedroom, two-bath, Plan B units.

21. Gateway Village Apartments, as built, fails to conform in some respects with compliant design elements in the plans for the complex prepared by Respondent Multi/Tech Engineering Services, Inc.
22. Respondents committed unlawful discrimination by failing to design and construct covered multifamily dwellings and public use and common use areas at Gateway Village Apartments in accordance with the requirements of the Act, 42 U.S.C. § 3604(f)(3)(C), and the regulations promulgated thereunder, 24 C.F.R. § 100.205.
23. Complainant FHCO was injured by Respondents' discriminatory actions. Complainant FHCO has suffered damages, including diversion of its resources and frustration of its organizational mission.

III. CONCLUSION

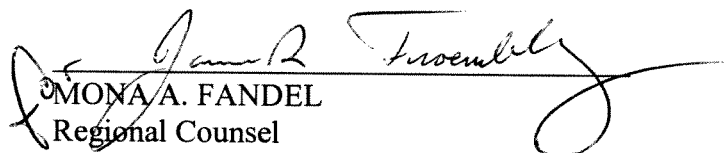
WHEREFORE, the Secretary, through the Regional Counsel for Region X, and pursuant to 42 U.S.C. § 3610(g)(2), hereby charges Respondents with engaging in discriminatory housing practices in violation of 42 U.S.C. § 3604 and prays that an order be issued, pursuant to § 3612(g)(3), that:

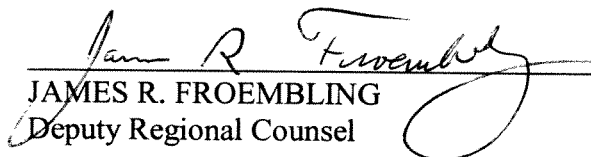
1. Declares that the discriminatory housing practices of Respondents, as set forth above, violate the Fair Housing Act, 42 U.S.C. §§ 3601-3619;
2. Enjoins Respondents, their agents, employees, and successors, and all other persons in active concert or participation with them from discriminating because of handicap in any aspect of the rental or sale of a dwelling;
3. Directs Respondents, their agents, employees, and successors, and all other persons in active concert or participation with them to bring the public and common use areas and the covered ground floor units at Gateway Village Apartments into compliance with 42

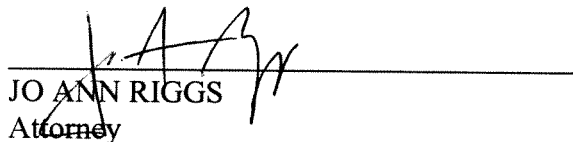
U.S.C. Section 3604(f)(3)(C), including providing reasonable compensation to tenants for inconvenience caused by, and other expenses related to, such retrofitting;

4. Awards such damages as will fully compensate Complainant Fair Housing Council of Oregon for its damages caused by Respondents' discriminatory conduct;
5. Awards a civil penalty against each Respondent for each discriminatory housing practice it is found to have committed; and
6. Awards such additional relief as may be appropriate.

Respectfully submitted,


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DATE: August 23, 2011

DETERMINATION OF REASONABLE CAUSE

CASE NAME: FHCO v. Montagne Development, Inc., et al.

CASE NUMBER: 10-06-0383-8

I. JURISDICTION

Complainant Fair Housing Council of Oregon (FHCO), a nonprofit, housing rights advocacy organization, alleges that it has been harmed by Respondents' discriminatory acts. It is alleged that Respondents were responsible for non-compliance with the design and construction requirements of the Fair Housing Act, as amended by the Fair Housing Amendments Act.

Respondents are Montagne Development, Inc.; David A. Montagne; William D. Jones; Dav II Investment Group, LLC; Gateway I, LLC; Gateway II, LLC; and Multi/Tech Engineering Services, Inc. Respondents are the general contractor, developers, former and current owners, and architect and civil engineer for the subject property, Gateway Village Apartments, a 275-unit apartment complex in Salem, Oregon. The last certificate of occupancy for a covered multifamily dwelling at the subject property was issued on August 3, 2005. The most recent alleged date of discrimination was December 27, 2005, the date on which Complainant FHCO's Tester inspected a covered ground-floor dwelling unit and public and common use facilities at the subject property. The complaint was timely filed on July 26, 2006. The original complaint was amended on February 5, 2008. On September 13, 2010, the following parties were joined by the Department as additional Respondents: David A. Montagne; William D. Jones; Dav II Investment Group, LLC; Gateway I, LLC; and Gateway II, LLC.

The subject property is not exempt under Sections 803 or 807 of the Fair Housing Act ("the Act"). Neither the named Respondents nor the subject property receive federal financial assistance from HUD.

If proven, the alleged discriminatory acts would violate Section 804(f)(3)(C) of the Fair Housing Act. Section 804(f)(3)(C) makes it unlawful to fail to design and construct covered multifamily 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.

42 U.S.C. Section 3604(f)(3)(C).

II. COMPLAINANT'S ALLEGATIONS

Fair Housing Council of Oregon (FHCO) has asserted organizational standing as a private nonprofit corporation whose mission is to assure access to housing for all persons in Oregon and SW Washington. FHCO seeks to further this mission through outreach, education and enforcement.

On December 27, 2005, FHCO conducted an on-site survey of the Gateway Village Apartments in Salem, Oregon, for compliance with the accessibility requirements of the Fair Housing Act. FHCO alleges that its on-site survey found the following non-compliant design elements at Gateway Village Apartments:

- Slope of ramp to parking lot in front of building 1922 measures 7.9% without handrail.
- Walkway on corner near units 2027 and 1027 is uneven and exceeds 5.5% without handrails.
- Curb cut in front of building 1902 has a slope measuring between 8.2% and 8.7%.
- Leasing office lacks accessible parking.
- Covered parking area lacks accessible parking spaces.
- Mailboxes are inaccessible because of stairs.
- U- Shaped kitchen in model unit measures 57 inches wide, which does not provide the required turning circle, making the kitchen inaccessible.
- Doorway to master bathroom in model unit measures 27 inches wide, making the bathroom inaccessible.
- Master bathroom has a wall between toilet and lavatory which protrudes leaving 28.5 inches between end of wall and bathtub. The protruding wall encroaches on the 30 by 40 inches required clear floor space around the toilet¹ and makes the bathroom inaccessible.
- Main bathroom in model units is inaccessible because distance from toilet to swing of door measures only 22 inches, encroaching on the required 30 by 40 inch clear floor space.

FHCO alleges that Respondents have discriminated against people with disabilities by failing to design and construct multi-family dwellings that meet the accessibility requirements of the Act. FHCO alleges that Respondents' failure to comply with the Act's design and construction requirements frustrated FHCO's mission by preventing

¹ "Lavatory" was erroneously substituted for "toilet" in the filed HUD complaint.

equal access to housing for people with disabilities. The illegal acts have caused FHCO to divert organizational resources to investigate and remedy the practice of Respondents.

III. RESPONDENTS' DEFENSES

Respondents jointly raised two general defenses to the complaint allegations: site impracticality and statute of limitations. With respect to site impracticality, Counsel for Respondents-developers and Respondent-builder stated in response to a data request that "this complex was built on a hillside and has fairly extreme slopes. Every effort was made to make each ground floor unit possible accessible."

Gateway Village Apartments was constructed in two phases. Phase I was completed more than one year before the complaint was filed. Respondents assert that the complaint is untimely filed with respect to the design and construction of Phase I of Gateway Village Apartments, citing the Ninth Circuit's decision in Garcia v. Brockway.

Respondent Multi/Tech Engineering Services, Inc. (hereinafter "Respondent Multi/Tech") asserted in an interview that its plans complied with the Fair Housing Act, but the contractor deviated from the drawings. On August 19, 2008, Respondent Multi/Tech submitted a written response addressing the six exterior violations specifically alleged in the complaint. With respect to four of the alleged violations, Multi/Tech asserted that its drawings were compliant, but the contractor had deviated from the plans. Multi/Tech asserted that its drawings did not include mailboxes. Multi/Tech did not attribute fault with respect to the lack of parking at the leasing office. Multi/Tech's response did not address the four interior violations alleged.

IV. FINDINGS

The subject property, Gateway Village Apartments, is situated at 1900 Madras Street SE, in Salem, Oregon. The subject property consists of one building that contains seven (7) multi-level townhouses, and 29 multi-story, non-elevator, multifamily buildings that contain between four (4) and 12 dwelling units per building. The investigation revealed that 112 of the total 268 units in the 29 multifamily buildings are ground-floor units.

Public and common use areas at the subject property include surface and covered parking facilities, common use and connector sidewalks, building breezeways, trash disposal and recycling facilities, clustered mailbox facilities, a common use social/recreational facility, a swimming pool, a playground, and a Leasing Office.

The design and construction requirements of the Fair Housing Act apply to covered multifamily dwellings, built for first occupancy after March 13, 1991. "Covered multifamily dwellings" are ground floor units in buildings with four or more units and no elevator, and all units in elevator buildings with four or more units. 42 U.S.C. Section 3604(f)(7). At Gateway Village Apartments, the 112 ground floor units are covered multifamily dwellings subject to the Act's accessibility requirements. The multi-story townhouses are not covered.

The building permits for the subject property were issued between September 4, 2002, and July 12, 2004, and the certificates of occupancy for covered dwellings were issued between October 1, 2003, and August 3, 2005. The subject property was developed in two, overlapping phases. Phase I has 126 units, and Phase II has 149 units. There are seven dwelling unit designs for ground floor units. Five of the seven designs are the same in the two phases.

Respondent Multi/Tech Engineering Services, Inc. was the architect and civil engineer for the subject property.

Respondent Montagne Development, Inc. was the contractor/builder for the property. David A. Montagne, the president and secretary for Montagne Development, Inc., was also a principal in the various ownership entities involved in the property development.

Respondents David A. Montagne and William D. Jones were General Partners in Dav II Investment Group, an Oregon General Partnership. Dav II Investment Group purchased the undeveloped site in 1998. Dav II Investment Group divided the site into two parcels and sold the parcels in October 2003.

Respondent Dav II Investment Group, LLC, was formed in January 2003. DAV II Investment Group, LLC, was a developer of the property.

In October 2003, Respondents Gateway I, LLC, purchased the land and improvements for Phase I of the project and Respondent Gateway II, LLC, purchased Phase II. Respondents Gateway I, LLC, and Gateway II, LLC, are the current owners of the subject property.²

Respondent Gateway I, LLC, purchased Phase I after construction was largely completed on the project. Gateway I, LLC, was not involved in the design and construction of the project, but is named as a necessary party to the case for the purpose of obtaining full relief, including access to the premises for retrofitting. Gateway II, LLC, was the owner of Phase II of the project during construction.

On December 27, 2005, a tester from the Fair Housing Council of Oregon (FHCO) visited the complex to conduct an accessibility survey of the property. The tester claimed to be looking for an apartment for her disabled sister. The tester observed common areas at the project and viewed a two-bedroom, two-bath, model unit on the ground floor. The tester observed barriers to accessibility at the property. FHCO or its representative conducted research in an effort to identify the developer, builder, and architect for the subject property, and obtained copies of building permits and certificates of occupancy for some of the buildings. Complainant FHCO has expended funds and staff time on this

² "Gateway Village Apartments, LLC" was named in this complaint after the entity was identified by a respondent as the property owner; however, the Oregon Secretary of State has no record of this entity. "Gateway Village Apartments" is a registered assumed business name for the property.

matter that would have been spent working in other areas such as educational activities, counseling, and enforcement activities. On July 26, 2006, FHCO filed a complaint alleging that the subject property violated the design and construction requirements of the Fair Housing Act.

The Department contracted with architect and accessibility consultant Phillip Zook to conduct an onsite inspection of the subject property and a plan review to determine compliance with the Fair Housing Act's accessibility requirements. The consultant conducted the onsite inspection on September 18 and 19, 2008. Representatives for Complainant, Respondents, and HUD were present during the inspection. The consultant inspected one unit of each of the seven designs and all public and common use areas serving covered ground floor units.

The consultant also reviewed the civil and architectural plans for Gateway Village Apartments³ drafted by Respondent Multi/Tech and prepared a plan review dated December 17, 2008.⁴ The consultant reviewed the plans to determine whether the non-compliant features observed during the onsite were specified in the plans.

Respondent Multi/Tech maintains that the majority of non-compliant features observed at the subject property were deviations from the plans. The consultant found that Gateway Village Apartments, as built, does not conform in some respects with compliant design features in the plans. However, the consultant found that many of the non-compliant features observed during the onsite inspection were specified in the plans.

Among the non-compliant design features are steps on connector sidewalks to building entrances, five to seven steps at some breezeway entrances to ground floor units, slopes exceeding 15% at some entrances, excessive slopes measuring up to 12.5% on some accessible routes and non-compliant curb ramps and cross slopes. Other non-compliant exterior design elements include a lack of accessible parking at the leasing office, no accessible garages, and no cane detection barriers under stairs. Non-compliant features in dwelling units include kitchen sinks in non-compliant locations and inadequate clear floor space at the sink and/or outside the swing of the door in some bathroom designs.

The Department finds that the architectural and civil engineering plans prepared by Respondent Multi/Tech do not comply with the Act's accessibility requirements.

The consultant prepared a Fair Housing Accessibility Compliance Report, dated December 17, 2008, setting forth his findings from the onsite inspection. The consultant

³ The consultant did not review plans for the recreation/leasing building, as those plans were not submitted to the Department.

⁴ On September 16, 2010, the consultant submitted a Report Memorandum Correction to correct an entry in the table corresponding to Cites 2.2(f), (g), and (h) in his onsite report. The corrected finding reads: "Steps are shown on plans. No site impracticality calculations."

concluded that Gateway Village Apartments does not meet the design and construction requirements specified by the Fair Housing Act. Respondents were provided with a copy of this report and the plan review and have not objected to any of the specific findings.

The Department finds that Gateway Village Apartments does not comply with the design and construction requirements of the Fair Housing Act. The noncompliant features of the subject property, as built, include, but may not be limited to, the features specifically mentioned below.

The public use and common use areas at Gateway Village Apartments are not readily accessible to and usable by handicapped persons, as required by 42 U.S.C. Section 3604(f)(3)(C)(i). Some building entrances are not located on an accessible route, with stairs and excessive slopes on several routes. At eight buildings, there are steps along the walkway connecting the common area entrance breezeway serving two ground floor units and the sidewalk and parking area. The number of 6" high steps along these required accessible routes varies from one to nine.

At the breezeway entrances to six buildings, the entrance walkway connecting with the common use sidewalk running along the parking area has a running slope exceeding 5% and is not equipped with ANSI-compliant ramp features such as hand rails on both sides of the walk. Some walks have slopes that exceed the 8.3% maximum allowed for ramps, with slopes as steep as 16% measured.

At the breezeway entrances to four buildings, there was no curb ramp at the common use sidewalk running along the parking area, resulting in an approximately 6" step between the level of the parking and the sidewalk. At the breezeway entrance for the four ground floor units at 1956 Madras, there are no vehicular arrival points with cross slopes of 2% or less (maximum allowed for cross slopes); the slopes range from 7.2 to 8.5%.

At thirteen locations in the complex, running slopes along required accessible routes connecting covered ground floor units with common use facilities exceed the 5% maximum allowed and the walk is not equipped with hand rails. In some locations, the walks have slopes that exceed the 8.3% maximum allowed for ramps. Running slopes as steep as 14.3% were measured.

On the breezeway entrance sidewalks to eight buildings, and in an additional ten locations in the complex, cross slopes along required accessible routes are excessive, exceeding 2%. Cross slopes at building entrance sidewalks measured up to 8.3%; the access aisle serving the accessible parking space at 1922 Madras has a cross slope of 35% along its entire length. At thirteen locations in the complex, curb ramps have non-compliant features, such as running slopes exceeding 8.3%, side flares exceeding 10%, and cross slopes exceeding 2%.

Several common use features, including the storage units located next to 1992 Madras, the trash dumpster, and the two mail box locations, are not connected by an accessible

route to covered ground floor units. The complex does not have an accessible parking space located near the entrance to the recreation building/leasing office, and the accessible parking sign at the closest space is mounted too low and can be obscured by a parked vehicle. There are no accessible carport parking spaces, or accessible parking at the main bank of mail boxes or the trash dumpster. There are no accessible detached garages that measure at least 14'-2" wide and have a 10'-0" wide door. In each entrance breezeway, there is no cane detection barrier below the stairway serving upstairs units.

In the Recreation/Leasing Building, the kitchen sink does not have ANSI-compliant height or knee space, the towel dispenser mounted above the sink at 59" high is not accessible, no portion of the peninsula/bar seating has a maximum height of 34", and the thermostat in the hall leading to the bathrooms is not accessible (60" height measured).

The men's and women's restrooms in the recreation building do not have compliant clear floor maneuvering space for access to the toilet stalls and approach to the toilet seat cover dispensers. The 30" x 60" roll-in type showers have a fold-up seat that obstructs the roll-in function of the shower, the grab bars do not extend to both of the side walls, the shower controls are not a usable design, and there is no handheld shower spray unit.

Also, the saunas located in both restrooms are noncompliant: the interior floor area is not large enough to allow a wheelchair user to turn around and make a compliant approach to the doors to exit, the saunas lack adequate maneuvering space at the doors on the interior side, and the controls for the saunas are located on the wall higher than 54" maximum allowed for a side reach.

All doors designed to allow passage into and within all premises in the dwellings are not sufficiently wide to allow passage by handicapped persons in wheelchairs, as required by 42 U.S.C. § 3604(f)(3)(C)(ii). In some dwelling units, the opening into the walk-in closet, the door to the master bathroom, the sliding door to the patio, and/or the door to the patio storage room do not provide a nominal 32" wide clear opening. For example, the opening to the walk-in closet in one unit measured 25.5 inches wide, the clear opening width of the door to the master bathroom in two units measured 28", and the patio storage doors provide a 30" clear opening width.

In addition, Gateway Village Apartments lacks certain features of adaptive design required by 42 U.S.C. § 3604(f)(3)(C)(iii). In all dwelling units, the interior threshold at the patio door has an abrupt level change exceeding 1/4" high and is not beveled, and the lower receptacle of typical room duplex outlets is located 13.5 to 14" above the finished floor, which is less than the 15" minimum.

In dwelling units with more than one bathroom, the hall bathroom does not provide a 30" x 48" clear floor space outside the swing of the door, nor is there a 30" x 48" clear floor space parallel to and centered on the sink. The master bathroom in units with more than one bathroom does not provide adequate maneuvering space for a person using a wheelchair; barriers to usability include the lack of a 30" x 48" clear floor space parallel

to and centered on the sink, no 30" x 48" clear floor space outside the swing of the door, no 30" x 48" clear floor space parallel to the shower beginning at the control wall, and/or insufficient clear floor space at the toilet, which is located in a 35.5" x 39.5" alcove in the 46 two-bedroom, two-bath Plan B units.

Some kitchens lack sufficient clearance for a wheelchair user to maneuver in the kitchen and use the fixtures and appliances. In the one-bedroom, one-bath, Plan A units, the range is not usable by a person using a wheelchair as the centerline of the range is located only 18" from the adjacent cabinet face; a 30" by 48" clear floor space parallel to and centered on the range is required. In some units, the kitchen sink is not usable because the centerline of the sink is 18" or 19" from the adjacent cabinet. The refrigerator protrudes into the required clear floor space in many units, leaving 36" or 37" inches of clearance between the refrigerator and opposing cabinets. In the U-shaped kitchen in the one-bedroom, one-bath Plan B units, the refrigerator protrudes into the required 60" turning circle.

Respondents have asserted an affirmative defense of site impracticality due to the terrain features of the subject property. The Department's regulations promulgated under the Fair Housing Act provide that covered multifamily dwellings 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). The regulations expressly state that "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." *Id.* The Fair Housing Accessibility Guidelines and the Fair Housing Act Design Manual describe two methods of establishing site impracticality due to terrain.

Counsel for Respondent-developers and Respondent-builder stated that Gateway Village Apartments "was built on a hillside and has fairly extreme slopes. Every effort was made to make each ground floor unit possible accessible." This statement is the only evidence presented to the Department in support of a site impracticality claim. Respondents were invited to submit certified results of individual building tests or site analysis tests conducted in accordance with the Department's Fair Housing Accessibility Guidelines and the Fair Housing Act Design Manual; however, Respondents submitted no evidence for review.

In the absence of evidence that site analysis tests were conducted on the undisturbed site before construction commenced at the subject property, Respondents cannot rely on an affirmative defense of site impracticality due to terrain.

The investigation revealed that Gateway Village Apartments⁵ was designed and constructed in two, overlapping phases. The certificates of occupancy for Phase I were issued on October 1, 2003. While construction of Phase I was underway, the

⁵ The plans refer to the project as "Madras Street Apartments."

architectural and engineering plans for Phase II were completed. The plans for Phase II are dated May, June, and July, 2003. The building permits for Phase II were issued on April 16 and July 12, 2004.

Respondents assert that the complaint was untimely filed with respect to Phase I of the subject property, as the certificates of occupancy for Phase I were issued more than one year before the complaint was filed. Respondents rely on Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008), which held that a private civil action for a failure to properly design and construct must be filed “within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued.” An administrative complaint must be filed within one year.

The facts here differ materially from Garcia. In the two cases decided in Garcia, the two properties were fully built and occupied more than seven years before the complaints were filed. In the instant case, the investigation revealed that the last certificate of occupancy for a covered multifamily dwelling unit at Gateway Village Apartments was issued on August 3, 2005, four (4) months before the alleged date of violation (December 27, 2005) and less than one year before the administrative complaint was filed with the Department on July 26, 2006. Accordingly, the Department finds that the Respondents’ failure to design and construct Gateway Village Apartments in compliance with the Fair Housing Act’s accessibility requirements constitutes a continuing violation under the Act, because the evidence shows that the design and construction of Phases I and II of the development was overlapping and continuous. As the Ninth Circuit held in Garcia, “[a] continuing violation is occasioned by continual unlawful acts.” Id. at 462. The unlawful acts continued into the limitations period.

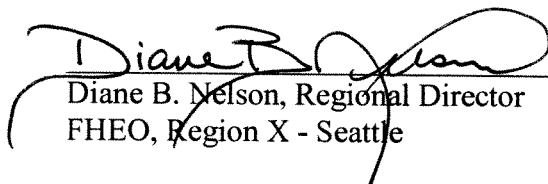
V. CONCLUSION

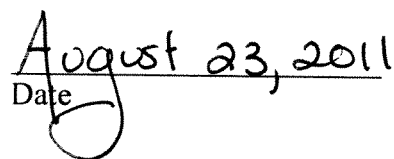
Based on the foregoing, the Department has determined that reasonable cause exists to believe that Respondents violated Section 804(f)(3)(C) of the Fair Housing Act [42 U.S.C. § 3604(f)(3)(C)], as alleged.

VI. ADDITIONAL INFORMATION

A copy of the final investigative report can be obtained from:

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Diane B. Nelson, Regional Director
FHEO, Region X - Seattle


Date