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 Montana Fair Housing, Inc., Charging Party, and Montana Fair Housing, Inc., Intervenor, v. Brent Nelson, Bernard Nelson, BWN, LLC., Respondents.

HUDALJ 05-068-FH
FHEO Case: 08-04-0056-8
Decided: August 24, 2006

Supriya Molina Wunsh, Esq.
For the Government

Mary Gallagher, Esq.
For the Intervenor

Mark D. Parker, Esq.
For the Respondents

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

On January 12, 2004, Montana Fair Housing, Inc. (hereinafter "Intervenor") filed a complaint with the Department of Housing and Urban Development

(hereinafter "Charging Party" or "Secretary"), against Bernard and Brent Nelson, father and son (hereinafter "Respondents Nelson" or, collectively with BWN, "Respondents"), the owners of a multi-family dwelling unit located at 640 Lake Elmo Drive, Billings, Montana (hereinafter "the property"). In July 2004 and March 2005, Intervenor amended the Complaint, naming as an additional respondent BWN, LLC (hereinafter "BWN" or, collectively with the Nelsons, "Respondents"), a Montana limited liability corporation owned by Brent Nelson that in turn had assumed ownership of the property.

Intervenor also named as respondents Ron Moat and Donald E. Neraas, some of the architects involved in design and construction of the property. On January 3, 2006, Respondents Moat and Neraas were dismissed pursuant to a settlement agreement filed with this forum in December 2005.

On September 29, 2005, after an investigation and determination of reasonable cause, the Charging Party issued a Charge of Discrimination against Respondents on behalf of Intervenor. The Charge alleged that Respondents engaged in discrimination based on [redacted] in violation of the Fair Housing Act (FHA), as amended (42 U.S.C. §3601, *et seq.*), because the design and construction of the property did not comply with design and construction accessibility requirements of the FHA. 42 U.S.C. §3604(f)(3)(C).

Respondents filed an Answer on November 1, 2005. On November 10, 2005, Intervenor filed its Motion to Intervene, which was granted. On March 23, 2006, the Charging Party filed an Amended Charge, based upon additional findings by its expert design and construction consultant during an inspection he conducted in December 2005. The hearing was held in Billings on April 11 and 12, 2006, and I received the parties' post-hearing briefs by June 5, 2006.

Findings of Fact

Parties

1. Brent Nelson purchased the property approximately four or five years ago and owned the property from that time until around September 2003. Tr

259, 289-91, 294-95.[1] In roughly September 2003, Brent Nelson transferred ownership of the property to BWN, a holding company he established for that purpose. *Id.* Brent Nelson is currently the sole owner and shareholder of BWN. Tr 289-93, 298.

2. Bernard Nelson made his credit available for Brent Nelson, his son, to qualify for a loan for the property, but did not finance the property. Tr 258-59, 306. As such, he acted as a co-signer for the loan and claimed the property on his 2003 tax return as a loss. GX 41. He was listed as an owner. Tr p. 291. He had no other involvement with the property. Tr 305.

3. Brent Nelson acted as the developer and general contractor for the property. Tr 258, 276-77. He hired Neraas and Moat to produce preliminary sketches for the property. Tr 259-60. He applied for the initial building permit. GX 21. He hired the architectural firm, CTA Architects, and the engineering firm, Engineering, Inc., to design the project. Tr 259-60, 272, 275, 322-23. He participated in having the plans approved by the city. Tr 454-57. He obtained the building permits from the city, and he hired the subcontractors who constructed the building. Tr 276; GX 22-24.

4. Intervenor, located in Missoula, Montana, is a small, private, 501(c)(3) nonprofit corporation with four full-time employees and one part-time employee. Tr 46-48, 52. Intervenor's mission is to promote fair housing, eliminate discriminatory housing practices, and increase the number and quality of housing opportunities available to people on a non-discriminatory basis. Tr 48, 50-51; IX 1, art. 2.

5. Intervenor is not part of a government agency, nor does it have any enforcement or other authority under fair housing or other laws. Intervenor has the same status as an individual citizen. Tr 46-48, 52, 524.

6. Approximately 90-95 percent of Intervenor's funding comes from the Secretary, via a grant. Tr 47, 122. The grant provides funding for private enforcement initiatives, education, and outreach in the area of fair housing.

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[1]Throughout this decision, "Tr" refers to the hearing transcript, "IX" refers to Intervenor exhibits, "GX" refers to Government exhibits, and "RX" refers to Respondent exhibits.

Tr 508-10. Intervenor must reimburse to the Secretary any funds received from any enforcement actions, to the extent that HUD funding was used by Intervenor to pursue that enforcement action. Tr 514.

Design and construction process

1. CTA Architects and Engineering, Inc. designed and drafted plans for the property; Brent Nelson submitted them to the city for approval before beginning construction on the property. Tr 259-60, 323-24. Brent Nelson then applied for the initial building permit in April 2001. GX 21. CTA Architects worked with the property design and plans through at least June 2002. GX 26-28.

2. In May 2002, the city sent Brent Nelson a Plan Correction Check List, which Brent Nelson gave to CTA Architects so they could make the needed corrections to the plans. Tr, 459-62, GX 30. The list included items relating to disabled accessibility. *Id.* The city stated it would not approve the plans and issue a building permit without the noted corrections being made. *Id.* CTA Architects made the corrections to the plans. Tr 462.

3. Building permits were issued for the dwelling in July 2002 and the garage in September 2002. GX 22-23. Construction subsequently began. Brent Nelson constructed the property based upon the approved plans except that he installed carports instead of garages, built a sidewalk flush to the parking lot instead of installing curbs and ramps, did not initially include designated disabled parking, and changed the layout of the parking lot and ingress/egress routes. Tr 452-53, 271-72, 324-26, 334. The plans included a designated handicapped access route to the building by means of a sidewalk running around the building. Tr 325-26. Two of the parking lot spaces were eventually designated as disabled parking.

4. Construction on the building was substantially completed and the first tenants moved in during the spring of 2003. Tr 279-80, 454-57, 482. Construction on other portions of the property was not yet completed at that time. Tr 371, 480.

5. In May 2003, Pam Bean, an employee of Intervenor, noticed the property under construction. Tr 53-55. She then requested from the city a copy of the building permit and temporary certificate of occupancy for the property. Tr 363-64.

6. On June 3, 2003, Pam Bean returned to the property to inspect it. She determined that exterior construction was progressing in a manner that she believed would render the property inaccessible. Tr 371. She based this determination upon her observation that "routes from parking into the units include stairs." *Id.*

7. Intervenor then sent a letter to Brent Nelson on June 12, 2003, stating that Intervenor thought Brent Nelson might not be aware of the accessibility requirements, and providing copies of fair housing laws and accessibility guidelines. Tr 371-75; IX 6. This letter did not reach Brent Nelson because it had an incomplete address. Tr 404-05. The letter was also silent about any accessibility issues Intervenor may have noticed, or any suggested changes or improvements. Tr 496-97; IX 6. On September 23 and November 11, 2003, Bean again conducted half-hour inspections of the property. IX 4.

8. In November 2003, prior to completion of the sidewalk around the building, the city's Code Enforcement Division sent Brent Nelson a letter stating, "[y]ou have not provided handicapped accessibility to the rear of the building via wheelchair ramp as approved in your submitted site plans." GX 33.

9. In January 2004, Intervenor filed its complaint with the Secretary, alleging that the property did not meet accessibility requirements. IX2.

10. The city issued building permits for the carports in June 2004 and for the parking lot in September 2004. Tr 287; GX 24-25.

11. In November 2004, the city approved the sidewalk to the rear of the building for handicapped accessibility, based upon photographs of the sidewalk when it was completed (submitted by Brent Nelson in response to the city's November 2003 letter regarding accessibility via wheelchair

ramp).
Tr 454-59. After the construction was completed there were no outstanding approval issues with the city. Tr 440.

The property

1. The property consists of one three-story building with four dwelling units on each floor and no elevator. Tr 157.

2. The property was designed and constructed for first occupancy in spring 2003. Tr 278-79, 281; GX 22, 29.

3. There are four ground floor units in the building. Unit #1 is a ground floor three-bedroom unit. Units ##6, 7, and 12 are ground floor two-bedroom units. The two-bedroom units have identical layouts. Tr 158.

External aspects of the property at issue

1. The property has one parking lot, on the building's east side, running the length of the building. The lot consists of 12 covered carport parking spaces for residents, along the length of the building, and additional uncovered parking space (not lined) for residents and visitors. Tr 157 and 159; GX 2, at 1, and GX 3. Two parking spaces in front of the building are marked on the ground as disabled parking, and are reserved for disabled parking by a joint sign. Tr 185-86, 192-93; GX 7. One disabled parking space is a covered carport space and the other is not. GX 7.

2. The parking lot is separated from the building by a sidewalk. The sidewalk begins at the parking lot, by the southeast corner of the building. GX 4, 5, 7, 8. At the corner, the sidewalk diverges in two directions. *Id.* One section continues straight, along the south end of the building, and then turns to continue along the length of the west side of the building. *Id.* The other section turns to the right to run along the east side of the building, between the building and the parking lot/carport. *Id.* The building is thus bordered on three sides by a sidewalk. It is possible to proceed on the sidewalk from the parking lot to, and along, both the west and east sides of the building.

3. The sidewalk leading to the west side of the dwelling has cross slopes (the rise or fall of the path perpendicular to the direction of travel) ranging from 2.6% to 4.3% and running slopes (the rise or fall of the path in the direction of travel) ranging from 5.9% to 6.8%. Tr 195; GX 2 at ¶B5. At the southwest end of the sidewalk, the cross slope is 4.3% at the corner and 3.7% within six feet of the corner. Tr 194. The portion of the sidewalk between units 6 and 7 on the west side of the building has running slopes ranging from 5.9% to 6.8% and cross slopes ranging from 2.6% to 3.5%. Tr 194.

4. There are entrances on both the east and west sides of the building. On the east side there are two entrances, each serving two of the four ground floor units and each containing four steps up to an intermediate landing and five steps down to the front doors. Tr 159, 224-25; GX 2 at 1, 3; GX 3-6. On the west side there are four entrances, each serving one of the ground floor units and each consisting of sliding glass doors fronted by flat patios. Tr 157, 167; GX 2, at 1; GX 7-8, 10.

5. The entrances on the east side face the parking lot and have unit numbers posted on the doors. Tr 180-81. The doors to each unit have knob hardware that requires grasping and twisting of the wrist to turn. Tr 203; GX 2, at ¶C1; GX 13.

6. The sliding glass doors at the west entrances to the building open to between 29½" and 30½" wide. The thresholds to these doors are raised and create a 2" difference in height between the top of the threshold and the inside floor. They are not beveled. Tr 195, 198, 200-01; GX 2, at ¶¶B5, D1.

7. The two disabled parking spaces are located at the southeast corner of the building where the sidewalk begins and diverges in both directions, are flush with the sidewalk, and are directly in front of the portion of the sidewalk that proceeds straight along the south end of the building to the west side of the building. Tr 185-86, 192-93; GX 7.

8. Bob Liston, Intervenor's executive director, navigated his wheelchair without difficulty from the parking lot to the west entrance doors. Tr 490. The mother of one of the apartment tenants uses the same route in her

wheelchair when she visits her daughter. Tr 412-13, 450-51. She has not indicated she has difficulty doing so. *Id.* A prospective tenant also traversed this route in a wheelchair without any apparent difficulty. Tr 418.

9. All the mailboxes are situated on one central mailbox stand, which is located at the side of the sidewalk, between the carport and the building, at the northeast end of the building, near the last entrance on the east side. Tr 208; GX 2, at 1; GX 4-5. It appears from the Secretary's photographs that a person can access the mailboxes from the sidewalk. GX 3-6.

Internal aspects of the property at issue

1. The doorways from the kitchens to the front hallways in all four ground level units range from between 26¼" to a little more than 30" wide. Tr 209-10; GX 2, at ¶C2.2.

2. The doors to the master bathrooms in all four ground level units are 2'4", or 28", wide. Tr 212, 216-17; GX 2, at ¶C2.1.

3. There is less than 36"x 48" of clear floor space beyond the area in which the door swings open in the master bathroom of unit 1. Tr 216, 230-31; GX 2, at ¶G2.1.

4. The toilet in the hall bathroom of unit 1 is mounted with its mid point at a distance of 18½" from the side wall. Tr 222-23; GX 2, at ¶G2.3.

5. There is less than 36"x 48" of clear floor space beyond the swing of the doors in the master bathrooms of units 6, 7, and 12. GX 2, at ¶G2.2.

6. There is less than 30"x 48" of clear floor space by the vanity in the hall bathrooms of units 6, 7, and 12. The width of the vanities is 36". The vanities include sinks and counters that sit on the cabinets rather than being mounted on the wall. Tr 219-20; GX 2, at ¶G2.4.

7. The toilet in the hall bathroom of unit 12 is mounted with its mid point at a distance of 20" from the side wall. Tr 222-23; GX 2, at ¶G2.2.

8. A prospective tenant in a wheelchair went into the three-bedroom unit, unit 1, through the sliding doors on the west side, without apparent difficulty. Tr 418-20, 450. Once inside, he went into the kitchen, moved his wheelchair around the space, pulled up to the sink, grabbed the water handle and moved it around, and did other similar activities. *Id.* He then went to the hall bathroom. *Id.* Once there, he went in, maneuvered around, backed in, placed his wheelchair so he could move himself to sit on the tub and the toilet, got back on his wheelchair, and moved back out of the room. *Id.* He proceeded through the apartment in his wheelchair and back out again with no expressed or apparent difficulty. *Id.*

Discussion

The FHA requires that covered units in multifamily housing contain certain features to make them accessible to persons with disabilities. Charging Party[2] alleges that Respondents failed to include some or all of the required features in the design and construction of the property at 640 Lake Elmo Drive.

The law

The FHA states that discrimination "in connection with the design and construction of covered multifamily dwellings for first occupancy after [March 13, 1991]," includes:

> . . . a failure to design and construct those dwellings in such a manner that --
>
> > (i) the public use and common use portions of such dwellings are *readily accessible to and usable by* handicapped persons;
> >
> > (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to *allow passage by handicapped persons in wheelchairs*; and
> >
> > (iii) all premises within such dwellings contain the following features of adaptive design:

[2]From this point forward, the term "Charging Party" will be used to refer to Intervenor and the Government collectively, for ease of reference. If the parties are discussed separately, they will be referred to as "Intervenor" and "Government."

> (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.

(emphasis added). 42 U.S.C. §3604(f)(3)(C). *See also* 24 CFR §100.205(C) (stating that all covered multifamily dwellings shall be designed and constructed with the above requirements).

In 1989, pursuant to its grant of authority from Congress, HUD issued regulations to implement the above FHA provisions on design and construction. 54 Fed. Reg. 3232, 3243-3252, 3287-3290 (Jan. 23, 1989), codified at 24 CFR 100.200, *et seq.* (hereinafter "D&C regulations"). HUD's D&C regulations did not include specific standards for design and construction compliance.

The D&C regulations do require that covered multifamily housing must have "at least one building entrance on an accessible route." 24 CFR 100.205(a). The D&C regulations also include the following definitions (and others) at 24 CFR 100.201:

> *Accessible*, when used with respect to the public and common use areas . . . , means that [they] can be approached, entered, and used by individuals with physical handicaps. The phrase *readily accessible to and usable by* is synonymous with accessible. . . .
>
> *Accessible route* means a continuous unobstructed path connecting accessible elements and spaces within a building or within a site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities. Interior accessible routes may include corridors, floors . . . . Exterior

> accessible routes may include parking access aisles, curb ramps, walks . . . .
>
> *Building entrance on an accessible route* means an accessible entrance to a building that is connected by an accessible route to . . . accessible parking and passenger loading zones, or to public streets or sidewalks, if available. . . .
>
> *Common use areas* . . . . include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings.
>
> *Entrance* means any access point to a building or portion of a building used by residents for the purpose of entering.
>
> *Public use areas* means . . . spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

To provide technical aid to those involved in design and construction of buildings, in 1991 HUD issued Fair Housing Accessibility Guidelines (hereinafter "the Guidelines"). 56 Fed. Reg. 9472-9515 (Mar. 6, 1991).[3] The Guidelines are not mandatory, instead providing one of several "safe harbor[s] for compliance with the accessibility requirements of the Fair Housing Act." 56 Fed. Reg. 9472 (1991). HUD has stressed that these are guidelines only, and that designers and builders may choose to depart from them and seek alternative means of complying with the FHA. *See, e.g.,* 56 Fed. Reg. 9472; 59 Fed. Reg. 33362 (1994).[4]

Covered multifamily dwelling

A covered multifamily dwelling under the FHA, for purposes of this case, consists of a building with four or more units and no elevator. Only the ground floor units must be in accord with the FHA's accessibility provisions. 42 U.S.C.

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[3]The Guidelines were originally codified at Appendix II to the fair housing regulations, 24 CFR, ch. I, subch. A, app. II (April 1, 1995). In 1996, the Guidelines were removed from the Code of Federal Regulations in response to the President's Regulatory Reinvention Initiative (61 Fed. Reg. 7942 (1996)). They are now available online at: http://www.hud.gov/offices/fheo/disabilities/fhefhag.cfm.

[4]HUD's statements regarding the Guidelines are quoted and discussed in full on pages 17-18 of this decision.

§3604(f)(7). The property, consisting of a 12-unit building without an elevator, is therefore a covered multifamily dwelling. The property was also designed for first occupancy after March 1991 (the effective date set forth in the statute and regulations), as is evident from the date of the building and occupancy permits. Therefore, the accessibility provisions of the FHA apply to the property.

Standing

Respondents argue that nobody has suffered an injury because no one has tried to access the property and been unable to, and that therefore there is no standing to bring this case. Alternatively, Respondents argue that all of Intervenor's costs arise from bringing this case, rather than combating or addressing any discrimination that may have occurred. Respondents also assert that the cases granting standing to a private, non-profit housing organization (like Intervenor) all involve testers who suffered injury in the course of their testing activities, which this case does not, and the cases therefore do not apply here.

Courts have regularly held that such housing organizations have standing to sue on their own behalf, even without a tester, as long as they can meet the Article III standing requirements (i.e. they suffered a particularized, actual injury in fact; it is causally connected (fairly traceable) to the FHA violation; and it is likely to be redressed by a favorable decision). *See generally, Havens Realty Corp. V. Coleman* , 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Vill. Of Bellwood*, 441 U.S. 91, 109 (1979); *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Fair Housing of Marin v. Combs*, 285 F.3d 899, cert. denied, 123 S. Ct. 536 (2002); *Central Alabama Fair Housing Center, Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629, 639-43 (11th Cir. 2000). In particular, the Ninth Circuit, in which this case arises, has held that such an organization has standing to sue both in a representational capacity on behalf of members and in an individual capacity on its own behalf, based on allegations that the alleged FHA violation frustrated its mission and caused it to divert resources. *Smith v. Pacific Properties & Dev. Corp.*, 358 F.3d 1097, 1101-04 (9th Cir. 2004) (discussing housing organization's representative standing), 1104-06 (discussing housing organization's organizational standing). *See also HUD v. Perland*, HUDALJ 05-96-1517-8 (March 30, 1998) (member of organization drove by property, organization conducted investigation without testers, and such diversion of resources was

sufficient to create standing).

Courts have held that non-profit housing organizations have suffered an injury sufficient for standing in FHA cases if they have alleged that they have diverted resources due to the alleged FHA violations. *See, e.g., Havens*, 455 U.S. at 369, 379; *Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir. 1993) (finding that diverting resources to conduct investigation into defendants' practices conferred standing); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28-29, 31 (D.C. Cir. 1990) (finding that investigation activities and increased educational programs could reasonably be required to redress discriminatory actions and would act as a drain on the organization's resources). *Spann* specifically rejected the concept that standing could be established by alleging diversion of resources to pursue litigation, however. *Id.* at 27 ("An organization, cannot of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation."). The reasoning in *Spann* is sound and applies equally to administrative actions in this forum.

At least a plurality of circuits have agreed with *Spann*, including the Ninth Circuit. *See, e.g., Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n. 3 (9th Cir. 2001) ("Because we agree that a plaintiff cannot establish standing simply by filing its own lawsuit, we will not consider the time and money the [housing organization] has expended in prosecuting this suit in deciding if the [housing organization] has standing."); *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 79 (3rd Cir. 1998) ("We align ourselves with those courts holding that litigation expenses alone do not constitute damage sufficient to support standing."); *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991) (the organization must allege some injury "independent of its suit challenging the action). But see *Ragin v. Harry Macklowe Reas Estate Co.*, 6 F.3d 898 (2nd Cir. 1993); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (imposing no requirement that the injury be independent or separate from the litigation). Although an organization cannot establish standing based solely upon litigation costs, the fact that it alleges litigation costs does not deprive it of standing if it also alleges diversion of

resources for pre-litigation activities (such as investigations); the litigation costs may go toward damages but are not considered when assessing standing. *Ragin*, 6 F.3d, at 905.

In the instant case, Intervenor diverted resources from training and educational outreach to investigate the property and to determine that it believed there were FHA violations at the property. It also diverted resources to engage in informative and educational activities in the Billings area as a result of its investigation of the property and its concern about the possible FHA violations and impact. Intervenor alleged concrete times and costs, as well as the other activities it would have conducted instead. That is sufficient to establish injury in fact and standing. Intervenor's testimony about costs of pursuing its complaint with HUD and other litigation activities are irrelevant for purposes of standing.

Respondents

1. Brent Nelson

Brent Nelson was the property's owner and continues to be the property's owner through BWN, Inc. (see paragraph 2, below). Brent Nelson has been the person primarily responsible for the design and construction of the property (with the assistance of CTA Architects and Engineering, Inc.), as evidenced by his involvement in applying for permits, transmitting plans back and forth to the City, acting as the general contractor, and renting to tenants, among other activities. Therefore, as an involved owner, builder, and developer, Brent Nelson would properly be liable for any violations of the FHA. *See, e.g., Edward Rose & Sons*, 384 F.3d 258, 260 (6th Cir. 2004); *United States v. Quality Built Constr, Inc.*, 309 F. Supp. 2d 756, 762 (E.D.N.C. 2003); *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1148-49 (D. Idaho, 2003); *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 459-60 (D. Md. 2000).

2. BWN

Brent Nelson is the lone shareholder and owner of BWN, Inc., although for a brief time Bernard Nelson was also listed as an owner. Because BWN is a holding company for this and other properties and is without funding, and all profits from the property go to Brent Nelson, it is appropriate to "pierce the corporate veil" and recognize that BWN is, in essence, Brent Nelson. *See, e.g.,*

Montana Fair Housing, Inc. v. Am. Capital Dev., Inc., 81 F. Supp. 2d 1057, 1063, 1068-69 (D. Mont. 1999) (recognizing that the individuals "are behind each of these corporate veils" as they were the ones who designed, constructed, managed, and continued to profit from the project) .

The veil-piercing doctrine is a "fundamental principle of corporate law" and is invokable in FHA cases. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 62 (1998); *Holley v. Crank*, 400 F.3d 667, 674-75 (9th Cir. 2005). In a situation such as this, in which the company assumed ownership after all design and construction work was completed except for finishing the sidewalk, Brent Nelson continued to act as the contractor and owner, the City still communicated with him about approval for the property, and the company had no money or tax returns of its own, the doctrine is especially applicable. *See United States v. Quality Built Constr, Inc.*, 309 F. Supp. 2d 756, 762 (E.D.N.C. 2003) (piercing corporate veil where individual was president of company, owned the land at the time the properties were constructed, listed as owner on numerous applications for building permits and certificates of occupancy, and was shareholder involved in construction and development). Therefore, BWN is dismissed.

3. Bernard Nelson

Bernard Nelson was not involved in the property's design and construction. Charging Party argues that because Bernard Nelson was nominally and briefly an owner of the property, he is automatically liable for any violation of the FHA. However, the parties' testimony made clear that Bernard Nelson had no actual involvement in any aspect of the property, including its design and construction. Although courts have held that owners can be held liable for design and construction violations of the FHA, the owners in such cases were actually involved in the design or construction of the buildings at issue, unlike Bernard Nelson. (See, e.g., cases cited under Brent Nelson section above.)

Generally speaking, courts have recognized that a wide range of participants in the design and construction process may be held liable or named as defendants, so that "When a group of entities enters into the design and construction of a covered dwelling, all participants in the process as a whole are bound to follow the FHA . . . . In essence, any entity who contributes to a violation of the [FHA] would be liable." *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F.Supp. 2d 661, 665 (D. Md. 1998). *See also United States v. Pac. Nw. Elec., Inc.*, 2003 U.S.

Dist. LEXIS 7990 at *42-43 (D. Idaho); *United States v. Quality Built Constr, Inc.*, 309 F. Supp. 2d 756, 762 (E.D.N.C. 2003); *Doering v. Pontarelli Builders, Inc.*, 2001 U.S. Dist. LEXIS 18856 at *5 (N.D. Ill. 2001) (stating that "Any entity who participates in the wrongdoing . . . should be liable"). In accord with this principle, courts have held that owners, builders, developers, contractors, architects, engineers, and others involved in the design or construction process can all be held liable for FHA violations. *See, e.g., Memphis Ctr. For Indep. Living v. R. & M. Grant Co.*, 3 Fair Hous.-Fair Lending Rep. P 16,779 at 16,779.1 (W.D. Tenn. 2004) (sustaining claim against engineer); *Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Associates*, 133 F. Supp. 2d 203, 205 (E.D.N.Y. 2001) (sustaining claim against designer-builder of prefabricated units used in project); *Montana Fair Housing, Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1059-60 (D. Mont. 1999) (sustaining claim against builder); *United States v. Days Inns of Am., Inc.*, 997 F. Supp. 1080, 1083 (C.D. Ill. 1998) (stating that liability encompasses architects, builders, and planners); *Baltimore Neighborhoods, Inc., v. Cont'l Landmark*, Fair Hous.-Fair Lending Rep. P 16,236, at 16,236.4 (D. Md. 1997) (finding that real estate firm exercising authority over condominium's Architectural Review Board had "considerable influence over a myriad of features arguably relevant to FHA compliance" and was liable).

However, the range of those who may be held liable has not been expanded to implicate everyone connected, regardless of how remotely, with a property. The Supreme Court has made clear that a violation of the FHA constitutes a tort and thus is governed by tort principles. *See Meyer v. Holley*, 537 U.S. 280, 285-91 (2003). Under ordinary tort principles, liability vests when a person engages in tortious conduct and that conduct is a "substantial factor" in causing harm to another. *See* Restatement (Third) of Torts: Apportionment of Liability 1, B18 cmt c. (2000).

Court cases have followed the same principles and have found only those actively or substantially involved in design or construction to be liable. One court interpreted a similar provision in the Americans with Disabilities Act to mean that only defendants with a "significant degree of control over the final design and construction of a facility" could be held liable for a violation. *United States v. Days Inns of America, Inc.*, 151 F.3d 822, 826 (8th Cir. 1998). The court found that the defendant, although somewhat involved in the design and construction process, did not exert enough control to be held liable because it was only "tangentially or remotely connected" with the design and construction. *Id. See*

also, United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1149 (D. Idaho, 2003) (defendant not only owned the land, but also obtained financing and wrote checks for building permits); *Baltimore Neighborhoods v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664-65 (D. Md. 1998); *United States v. Days Inns of Am., Inc.*, 997 F. Supp. 1080, 1084 (C.D. Ill. 1998) (defendants were involved contractually and in a supervisory role).

Unlike the defendant in *Days Inns*, Bernard Nelson was not involved in the design or construction process for the property even to a small degree. He was only tangentially or remotely connected to the property because his credit enabled his son to aquire financing. As a result, he cannot be held liable for any violations of the FHA in this case. Bernard Nelson is therefore dismissed.

The allegations

In essence, Charging Party alleges that Respondents failed to design and construct the property to ensure that: the public and common use portions are readily accessible to and usable by individuals with disabilities (§3604(f)(3)(C)(i)); that all doors are sufficiently wide to allow passage of wheelchairs (§3604(f)(3)(C)(ii)); that there is an accessible route into and through the dwelling (§3604(f)(3)(C)(iii)(I)); that kitchens and bathrooms are usable for people in wheelchairs (§3604(f)(3)(C)(iii)(IV)); and that the property has at least one accessible building entrance on an accessible route (24 CFR 100.205(a)).

Application of HUD's Guidelines and other standards schemes

In support of its allegations, Charging Party asserts that the property does not meet certain standards for accessibility set forth in the Guidelines. Charging Party argues that failure to meet the Guidelines' standards constitutes a violation of the FHA accessibility requirements, because the Guidelines comprise the minimum standards of compliance with the FHA, unless the Respondents prove that they have complied with some other recognized set of accessibility standards (all of which are more stringent than the Guidelines).

For this proposition, Charging Party relies upon a statement made in its Notice of Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Part V, Section 1, Responses to comments on "ANSI Standard"): "The purpose of the

Guidelines is to describe minimum *standards* of compliance with the specific accessibility *requirements* of the Act." (Emphasis added.) Charging Party supports its reliance on this statement with citation to several cases in which the statement was also quoted. However, although the Guidelines may constitute the minimum *standards* in an organized scheme, the Guidelines do not constitute the minimum *requirements* necessary to meet the FHA requirements. They are merely the most minimal of the compliance standards schemes that have been set forth by an organization and recognized by HUD as "safe harbors."

HUD itself has explicitly stated that the Guidelines do not serve as minimum requirements for compliance with the FHA. In the same Notice of Final Fair Housing Accessibility Guidelines, for example, HUD wrote, "The guidelines . . . are intended to provide technical guidance only, and are not mandatory," then explained that HUD had published more than one option for the proposed guideline standards "to illustrate that there may be several ways to achieve compliance with the Act's accessibility requirements. Congress made clear that compliance with the Act's accessibility standards did not require adherence to a single set of design specifications," and HUD later further clarified:

> The Department has not categorized the final Guidelines as either performance standards *or minimum requirements. The minimum accessibility requirements are contained in the Act.* The Guidelines adopted by the Department provide *one way* in which a builder or developer *may* achieve compliance with the Act's accessibility requirements. There are other ways to achieve compliance with the Act's accessibility requirements, as for example, full compliance with ANSI A117.1. Given this fact, *it would be inappropriate on the part of the Department to constrain designers by presenting the Fair Housing Accessibility Guidelines as minimum requirements.* Builders and developers should be free to use *any reasonable design* that obtains a *result consistent with the Act's requirements.*

(emphasis added). 56 Fed. Reg. 9472, at Summary and at Part V, Section 1, Responses to comments on "Guidelines as Minimum Requirements" and "One Set of Design Standards." HUD made these statements in response to specific public comments asking whether the Guidelines would constitute minimum requirements and whether they would be the only set of acceptable standards. By contrast, the

statement the Charging Party relies upon was made as part of a response to a comment asking why HUD had generated the Guidelines instead of using the already-established ANSI standards, which are more stringent.

Courts have long accorded deference to agency interpretations of the laws they are tasked with enforcing, as long as such interpretations are reasonable. *See generally, Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)("regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). *See also Meyer v. Holley*, 537 U.S. 280 (2003) (deferring to HUD's reasonable interpretation of a statute as set forth in its regulations). Courts do not accord the same level of deference to less formal (i.e. outside the regulations) agency interpretations, but they are nonetheless considered.

HUD has provided its official interpretation of the Guidelines' role in accessibility determinations (as quoted previously) and that interpretation is reasonable and appropriately tied to the actual language of the FHA provisions. As explained above, HUD's interpretation is that the Guidelines do not constitute requirements, even minimum ones, and that a violation of the Guidelines does not *per se* constitute a violation of the FHA. Although some courts have stated they are according deference to HUD's interpretations of the FHA by relying upon the Guidelines as requirements or rebuttable presumptions of inaccessibility, they are missing the point. The Guidelines themselves are not HUD's interpretations of the FHA, but are instead one way to ensure that the FHA's requirements have been met. HUD stated in the Federal Register, not once, but several times, very explicitly, that the Guidelines do not constitute minimum requirements and that builders and designers may follow any design that allows for accessibility, not just any set of established standards. Furthermore, HUD was very clear that considering the Guidelines to be minimum requirements was inappropriate and would limit the FHA's emphasis on enabling a wide range of solutions to accessibility issues. HUD did generate regulations interpreting the FHA that are accorded full deference. However, those regulations purposely do not include design and construction standards.

Most design and construction cases are resolved by settlement or summary judgment. As a result, the burdens of proof for a design and construction case are a relatively novel question of law. The case law that does address the issue (usually pursuant to discussion of summary judgment) of the Guidelines and

burdens of proof is split along three lines.

First, several jurisdictions have ruled in accord with HUD's description of the Guidelines' status as a safe harbor, rather than as mandatory minimum requirements. *See, e.g., United States v. Pac. Nw. Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, *37 (D. Idaho) ("the fact that a covered complex does not comply with the HUD "guidelines" does not establish a violation of the FHA."); *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1151 (D. Idaho 2003) ("the Court recognizes that a designer or builder is not required to follow ANSI or the Guidelines in order to comply with the Fair Housing Act"); *Fair Housing Council, Inc. v. Vill. Of Olde St. Andrews, Inc.*, 250 F. Supp. 2d 706, 720 (W.D. Ky. 2003) ("A failure to meet the requirements as interpreted in the Guidelines does not constitute unlawful discrimination. . . . Therefore, while the Guidelines may be of some relevance, they are not decisive."). *See also, HUD v. Perland*, HUDALJ 05-96-1517-8 (March 30, 1998).

This first group of cases, however, divides further into two lines in assessing what alternatives to the Guidelines defendants may use to establish compliance with the FHA. One track follows the language of the statute and HUD's interpretations set forth above. These courts have held that defendants can establish compliance with the FHA by providing evidence of compliance with other standards or with other types of evidence of accessibility. *See, e.g., Pac. Nw. Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *42 (denying summary judgment on alleged violations due to witness statements that they were able to use and access those portions of the property); *Vill. Of Olde St. Andrews, Inc.*, 250 F. Supp. 2d at 720 (denying summary judgment because the only evidence presented by plaintiffs is a failure to meet HUD's Guidelines; "The real question that must be resolved is whether the units and common areas . . . are reasonably accessible to most handicapped persons."). *See also HUD v. Perland*, HUDALJ 05-96-1517-8, at 16 (1998) ("Respondents are not bound by the [standards] set forth in the Guidelines and may choose to establish impracticality by other evidence. *See id.* at 9499. However, ... any alternative method must have a rational basis, proven by reliable, probative, and credible evidence.").

Even cases that have used the same statement quoted by the Charging Party have not been addressing the issue of whether or not a violation of the Guidelines is *per se* a violation of the FHA. In *United States v. Hallmark Homes, Inc.*, for

example, the court quoted the same statement that Charging Party relies upon here. 2003 U.S. Dist. LEXIS 20814, *19 (D. Idaho). However, the *Hallmark* court was addressing the defendant's assertion that the FHA's compliance requirements are too vague to be enforceable. *Id.* In response, the court stated that the FHA's requirements have been defined in several ways and cited examples of approved accessibility standards, including the Guidelines. *Id.* The court held only that the defendants could not claim the FHA was too vague and ambiguous to be enforced when they had various descriptions of accessibility to which they could have turned if unsure about what standards could meet the FHA's terms. *Id.* at *19-20. The court did not hold that failure to meet any of those safe harbor standards automatically constituted a violation of the FHA.

The second line of cases implies that failure to meet the Guidelines creates a rebuttable presumption that an FHA violation has occurred. Some of these cases have stated that the defendants must provide "evidence of alternative compliance" to rebut this presumption. *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 764. More of these cases, however, have stated that the defendants must show that they are in compliance with a different set of accepted standards to rebut the presumption. These cases do not include a discussion of why the courts reached this conclusion. *See, e.g., Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1151; *Hallmark Homes, Inc.*, 2003 U.S. Dist. LEXIS 20814, at *19 This is the version Charging Party urges this forum to adopt, without a cogent argument beyond stating that it is "reasonable."

The third line of cases simply relies upon the Guidelines without discussion or by treating the Guidelines as regulations rather than guidance. In these cases, the defendants provided no evidence to refute HUD's assertions of non-accessibility, other than conclusory statements of personal belief or flawed legal arguments on other grounds. *See, e.g., United States v. Edward Rose & Sons*, 246 F. Supp. 2d 744, 751 (E.D. Mich. 2003) (treating Guidelines as deferential regulations without addressing whether they constitute requirements, create a presumption, or may be rebutted only by means of other standards); *Montana Fair Housing, Inc.*, 81 F. Supp. 2d at 1066-67 (relying without discussion on Guidelines to define terms such as "environmental controls").

I decline to follow the second and third lines of cases. First, HUD itself has thoroughly explained that failure to meet the Guidelines does not constitute a violation of the FHA. Therefore, relying upon failure to meet the Guidelines as a

rebuttable presumption, *prima facie* case, or *per se* violation contradicts both the language of the statute and HUD's own interpretation of the Guidelines' role. Congress did not intend to provide a "standard of total accessibility" by enacting the FHA, but instead provided minimum requirements designed to enable disabled people access to, and use of, housing. H. R. Rep. No. 100-711, at 26-67 (1988), reprinted in 1988 U.S.C.C.A.N. 2173. Those requirements, as HUD acknowledged in its comments, are contained in the FHA itself, not in the Guidelines or other standards schemes. Giving the Guidelines or other standards the status of rebuttable presumptions or *per se* violations effectively negates the fact that they are expressly not mandatory. Second, both the statute and HUD's comments on the Guidelines make clear that respondents may follow any design that affords accessibility, not just a set of established standards. Third, the cases that treat the Guidelines in accord with Congress' and HUD's intent rely upon language actually in the statute and in HUD's statements about the Guidelines and other safe harbors, while the other two lines of cases provide no discussion or reasoning for their approach. I have seen no persuasive argument for disregarding the language of the statute or HUD's statements about the Guidelines and other safe harbors. The first line of cases provides the better line of reasoning; that the Guidelines provide a

safe harbor rather than a mandatory minimum, and is also the line that is in accord with Congress' and HUD's intents.

A plain reading of the accessibility and efficacy requirements of the statute and regulations also makes clear that violating the safe harbor standards does not create a presumption that there has been a violation of the FHA. It is possible that a particular building might not meet the safe harbor standards in some way, but would still be accessible and usable by a disabled person, thus meeting the FHA accessibility requirements.[5] Therefore, even if the safe harbor standards are not

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[5]The statute does not require 100 percent accessibility, as both HUD's comments and the legislative history make clear. Certain design standards might make dwellings 100 percent wheelchair accessible but could in the process also render those dwellings unrentable or unsalable to others. For example, if an apartment building were designed in such a way that the toilets were taller, there were no cabinets under sinks, all counters were lowered, and numerous other wheelchair-access adaptive design elements were included, only people in wheelchairs would be interested in such units. It would be difficult and uncomfortable for others to use. This would burden the owner with both the expense of building fully wheelchair-accessible units and with the cost of a largely unrentable building. Congress recognized that a balance was needed between wheelchair accessibility and use by others. Not only does the statute require accessibility in specific ways, deemed sufficient to balance accessibility needs with

met, the charging party must still show that the property is inaccessible.

For example, the Charging Party's expert in this case testified that designating disabled parking with one sign on a pole between two disabled parking spaces, that are also each marked on the ground as disabled spaces, is insufficient to meet the Guideline standards. However, merely using one sign instead of two does not, without more, render those parking spaces inaccessible to people with disabilities. They would still be able to approach, enter, and use those spaces.

The safe harbor standards do serve the purpose of ensuring that a particular building is in accord with FHA accessibility requirements. As of February 2005, HUD had recognized seven safe harbors, 70 Fed. Reg. 9740 (Feb. 28, 2005), including its own Fair Housing Design Manual, issued in 1998.[6] Meeting such standards would result in a HUD determination that there was no probable cause to believe the buildings were in violation of the FHA accessibility standards. It allows those involved in design and construction to be free from worry that they might be sued for building an inaccessible building and creates a presumption that the building is in compliance. If a building is not designed and constructed in accordance with one of these standards it is not automatically in violation of the FHA; its owner simply runs the risk of being questioned about accessibility.

In addition, safe harbor standards also serve to provide descriptions of the FHA's terms, as discussed above. If a person involved in design or construction of a building feels the FHA's terms are too vague to tell how to build an accessible building, he or she has at least seven sets of standards that HUD has said will suffice to provide the builder with detailed descriptions of ways in which to build an accessible building. However, accessible buildings may also be built using other standards and in other ways.

In this case, Charging Party has alleged that Respondents are in violation of the FHA's accessibility standards, but it has provided evidence only for its allegations that Respondents are in violation of HUD's Guidelines. Without more,

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other needs, but the statute also contains a provision requiring owners to allow tenants to make reasonable modifications that are needed for that particular tenant – in recognition that the FHA's accessibility requirements will not meet the full accessibility needs of everyone.

[6]The Fair Housing Design Manual is at www.huduser.org/publications/destech/fairhousing.html.

Charging Party has failed to establish that Respondents violated the accessibility requirements of the FHA. Furthermore, Respondents have presented credible evidence that the property is accessible. Not only one, but three people in wheelchairs are known to have navigated from the parking lot to the west entrances without difficulty. One person also navigated over the threshold, into and around the kitchen, from the kitchen down the hallway, and into and around one of the bathrooms, lifting himself onto the toilet and the tub. He was clearly able to access and use the property. While this evidence is credible, it does have some weaknesses, as Charging Party pointed out in its brief, primarily that only one of the people mentioned was present to testify. However, Charging Party did not meet its burden to show that Respondents were in violation of the FHA or that the property was inaccessible or unusable by those with disabilities.[7]

Conclusion

Charging Party's suit for liability and damages is DISMISSED.

So ORDERED.

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: August 24, 2006
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[7]If Charging Party had presented other evidence of inaccessibility in addition to the Guideline violations, Respondent's evidence of accessibility might not have been strong enough to overcome the combined weight. Charging Party was on notice that merely relying on the Guidelines would not be sufficient. Not only did I deny Charging Party's summary judgment motion on the same grounds, but there have been other OALJ cases containing the same reasoning. The Government should take note of the need for stronger evidence in future cases. Respondent should also take note of this for purposes of any future buildings, including the one he is planning on the same site; if Charging Party deems one of these buildings inaccessible, Respondent may need more evidence than provided here to refute such allegations.