

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

**REMEDIAL ORDER**

The Charging Party (“CP”) on behalf of Montana Fair Housing, Inc., Intervenor (“MFH”), filed a Charge of Discrimination (“Charge”) against Brent Nelson, Bernard Nelson, and BWN, LLC. (“Respondents”) on September 29, 2005. The Charge alleged that Respondents, as owners of a 12-unit building in Billings, Montana, violated the Fair Housing Act (“the Act”) by failing to design and construct covered multifamily dwellings in accordance with the Act’s accessibility requirements. 42 U. S. C. § 3604(f)(2). See also 24 C.F.R. § 100.202(b).

The subject property is located at 640 Lake Elmo Drive, Billings, Montana, and consists of one three-story non-elevator building containing four dwelling units on each floor for a total of 12 units. The portions of the property covered by the Act include the four ground floor units (three two-bedroom units and one three-bedroom unit) and the public and common use areas of the property. Specifically, the Charge allege that:

- a) The public use and common use portions of the covered ground floor units were designed and constructed such that they are not readily accessible to, and usable by, handicapped persons. . .that due to the split-level design of the entrance to the front of the subject property, and stairs leading down to the covered ground floor units,

- there are no accessible entrances to the covered units on an accessible route; and  
 the parking lot does not contain parking spaces designated as accessible.
- b) The covered ground floor units at the property were designed and constructed such that not all doors allow passage into and within the unit by a person with a disability. Specifically, the patio doors are not sufficiently wide to allow passage by a person in a wheelchair; the doors to the master bathrooms are not sufficiently wide to allow passage by a person in a wheelchair; and the front doors and all doors within the units (except the patio doors) use knob hardware.
- c) The covered ground floor units at the property were designed and constructed such that certain features of adaptive design violate the Act. Specifically, entrances to the kitchens in the two-bedroom units are not sufficiently wide for passage by a person in a wheelchair; and the bathrooms in certain units do not provide enough clear floor space to be accessible to, or usable by, persons in wheelchairs.
- Charge of Discrimination, ¶16.

A hearing was held before administrative law judge (“ALJ”) Robert Andretta on April 11 and 12, 2006. Judge Andretta issued an Initial Decision on August 24, 2006, finding Respondents not liable for the discrimination alleged and dismissing the Charge against them. On September 21, 2006, upon appeal by the CP and MFH, the Secretary set aside the ALJ’s Initial Decision, found Respondents Brent Nelson and Bernard Nelson liable for the violations alleged in the Charge, and remanded the case to the ALJ “to enter a remedial order to include appropriate retrofits to the property; monetary damages to the MFH, including litigation costs and costs relating to pursuing the administrative complaint with HUD; civil penalties; and injunctive relief.” See Order on Secretarial Review, September 21, 2006. (“Secretary’s Order”).

Subsequent to the remand, the parties filed numerous pleadings. On October 31, 2006, the CP filed a motion requesting the Court to issue a prompt remedial order to include full retrofits proposed by CP’s design and construction expert, Ken Schoonover, damages to the MFH, civil penalties, injunctive and public interest relief. Respondents filed a pleading on November 7, 2006, but they did not address all of the areas remanded for retrofitting. CP’s filing of October 31, 2006.

On December 1, 2006, Judge Andretta ordered Respondents to file, by January 5, 2007, a detailed remedial plan with appropriate timetables identifying the time it would take to remediate the existing conditions (or to inform the court if they did not intend to do so). The remediation plan was to include: “proposed methods, specific acts that must occur, impact on the building..., costs and expenses involved, impact on tenants..., maintenance issues, feasibility, practicality, alternatives, expert advice, building code compliance, length of time involved, weather issues..., affidavits from architects or other experts in support, and any other information necessary to fully understand and assess the plan.” See *ALJ’s Order of Dec. 1, 2006*.

Respondents filed pleadings on January 5, 2007, that included affidavits from an architect (Durward Sobek) and the head of a carpentry company (Kelly Hintt), and a statement from the head of a construction company (Robert Pentecost), all relating to proposals for retrofitting certain areas of the building in question. Importantly, Sobek and Pentecost suggested that it was

not feasible to retrofit the front entrances of the building. They suggested that a replacement entry might subject the building to water drainage, safety and mold problems, and therefore recommended against changing the design and construction of the front entryways. Rs' filing of Jan. 5, 2007. The combined proposals did not include all of the information that had been ordered by Judge Andretta.

The CP filed a response to Respondents' January 5, 2007, filing and requested the ALJ to sanction Respondents for their failure to file the required information by precluding them from producing any further evidence on the issue of retrofits. CP's filing of Jan. 12, 2007.

On January 22, 2007, Judge Andretta convened a conference call with the parties wherein he directed Respondents to file, on or before February 22, 2007, a comprehensive retrofit plan. CP opposed giving Respondents an additional opportunity to present evidence on the feasibility/infeasibility of the retrofits and requested the ALJ to reverse his ruling, or in the alternative, to give the CP opportunity to cross-examine any affiant whose proposal was submitted by Respondents. The ALJ denied CP's requests.

Respondents filed Retrofit Diagrams on February 22, 2007, prepared by a second architect of VanGo Architects, that included most of the areas required to be retrofitted, but not all of them. They did not include costs and expenses involved in all areas of retrofit. Respondents' consultants reiterated the difficulty or infeasibility of retrofitting the front entryways. Respondents requested that they be allowed 2-1/2 years to complete any required retrofit to the property, stating that they are unable to immediately fund the modifications out of pocket. Rs' filing of Feb. 22, 2007.

ALJ Andretta retired on March 3, 2007, and the matter was reassigned to me to comply with the Secretary's remand order.

Shortly after the case was assigned to me, I granted the CP's and MFH's request for an extension of time to file a response to Respondents' February 22, 2007 pleadings. CP's responsive pleading, joined by MFH, was submitted on March 27, 2007. The CP included with its filing recommendations for retrofittings from two new consultants, Mark J. Mazz, an architect and Vernon Weiss, a professional contractor, and a supplemental recommendation from Ken Schoonover. CP's filing of March 27, 2007.

On April 2, 2007, Respondents filed objections to the CP's March 27<sup>th</sup> proposal, arguing that the declarations and recommendations from the architect and contractor are inadmissible hearsay in that Respondents have not been given an opportunity to cross-examine either declarant. Rs' filing of April 2, 2007.

On April 5, 2007, Respondents filed a motion for the appointment of another settlement judge, specifically, a United States Magistrate in Montana as a settlement judge. The Charging Party objected to Respondents' proposed appointment of settlement judge in Montana. By Order dated April 11, 2007, I denied the motion.

I have reviewed the full transcript of the hearing in this case, as well as the post-hearing briefs and all pleadings in the case. I consider that the matter is now ripe for a remedial order.

Respondents generally have objected to the remand order. They challenge this tribunal's jurisdiction to issue a remedial order in this case. They continue to argue against liability, stating variously that the "law of the case" was established by Judge Andretta's decision and that his decision is final, and that MFH lacks standing to pursue the remedies sought. Respondents also argue that the case must be dismissed because the ALJ who heard the case and rendered the initial decision has retired, and/or that since I was not the trial judge, I cannot judge the credibility of the various parties who have presented proposals in the case. These objections are overruled.

Respondents have also objected to additional evidence submitted by the CP and MFH relevant to the feasibility of retrofitting the features which the Secretary found to violate the Act. Respondents' argue that the proposals submitted by CP's consultants are unreliable and inadmissible hearsay since Respondents have had no opportunity to cross-examine them. This argument must be rejected. Judge Andretta offered the Respondents opportunity for a hearing on the issue of remedies, however, Respondents chose not to go to hearing, accepting instead the option of submitting on pleadings. Moreover, the declarations from the consultants obtained by CP were submitted, at least in part, in response to the written affidavits and declarations from consultants submitted by Respondents themselves. Accordingly, Respondents' objections to CP's post-remand submissions on the basis of hearsay are overruled.

#### THE PARTIES

The Complainant-Intervenor, Montana Fair Housing, Inc., is a nonprofit organization located in Missoula, Montana. The fair housing organization's purpose and mission is to promote fair housing, eliminate discriminatory housing practices, and increase housing opportunities on a non-discriminatory basis.

Respondents, Brent Nelson and Bernard Nelson, owned the property during its design and construction phases in 2001 or 2002 through December 31, 2005. (Secretary's Order at 5). Bernard Nelson, the father of Brent Nelson, lent his credit to help finance the construction of the property; however, his level of operational involvement in the design and construction phases was minimal. (Secretary's Order, FN 13). His liability was established by the Secretary's Order.

Brent Nelson recorded a warranty deed granting the property to BWN, LLC, on September 5, 2003. BWN, LLC, is a limited liability corporation incorporated under the laws of the state of Montana. Brent Nelson is the Registered Agent of BWN, LLC. Both Brent Nelson and Bernard Nelson are named officers of BWN, LLC.

The administrative law judge dismissed the case against BWN, LLC in his Initial Decision of August 24, 2006. That dismissal was not appealed by the CP or the Intervenor and was affirmed by the Secretary. See Secretary's Order at FN11. Accordingly, I have not considered BWN, LLC, to be a liable party for the purpose of the remedial order.

The initial Charge of Discrimination in this case included charges against two additional individual respondents – Donald E. Neraas, an architect, and Ron Moat, who was a 20-year employee of Respondent Neraas – both of whom were involved in the design of the subject property. Respondent Brent Nelson relied upon the architect to supply plans that complied with

the Act. The plans that Neraas and Moat supplied to Respondent Brent Nelson did not comply with the design and construction requirements set forth in the Act.

Donald E. Neraas and Ron Moat settled the charges against them and a dismissal was entered prior to the hearing in the case.

### THE VIOLATIONS

The Secretary's Order established that the following features of Respondents' property located at 640 Lake Elmo Drive are not accessible and usable by persons with disabilities and are in violation of the Fair Housing Act:

- a) parking;
- b) stairs;
- c) knob hardware at the front entrances;
- d) width of patio doors;
- e) height of the thresholds and lack of beveling at the patio doors;
- f) mailbox location;
- g) doorways from the kitchen to the front hall;
- h) width of the doors and clear floor space in all four master bathrooms;
- i) the lavatories in the hall bathrooms of units 6, 7, and 12;
- j) the distance from the wall to the centerline of the toilet in units 1, 6, and 12; and
- k) front entrances (Lake Elmo Drive side).

This order addresses the need to retrofit the above-identified feature of the property, as required by the Secretary's Decision.

CP and MFH contend that all the above features of the property are required to be retrofitted and that it is feasible to do so. In support of their claims that the retrofits proposed are all feasible, the CP submitted declarations from three consultants: 1) Mark J. Mazz, an architect, registered and licensed in the State of Maryland, with 30 years experience "in designing for persons with disabilities and working on standards for accessibility for people with disabilities, including 6 years as an architect for the U. S. Department of Justice helping to enforce the FHA and the ADA; 2) Vernon Weiss, a professional contractor, with over 30 years of experience working in both residential and commercial construction and who is currently Program Director at the Regional Access Mobility Program (RAMP) of Montana, a not-for-profit organization that provides consulting and construction services for senior citizens and persons with disabilities; and 3) Ken Schoonover, a registered professional engineer, licensed since 1975 in the State of Wisconsin. His experience includes over 30 years working on building codes and standards of accessibility for people with disabilities. See CP's filing of March 27, 2007 and CP's supplemental exhibit ("SX"). Mr. Schoonover testified at the hearing held in the case, and the Secretary placed great reliance upon his testimony in his Order of September 21, 2006.

After careful consideration of the submissions from both Respondents and CP, I have concluded that the retrofittings proposed by the CP should be adopted. Some of these are in

agreement with plans presented by the Respondents; however, many are not. CP's proposal is, in every instance, more thorough in its discussion of the problem presented to handicap accessibility, in its consideration of the feasibility of retrofitting, and in its discussions of ways to retrofit to achieve accessibility.

### RETROFIT ORDER

After consideration of Respondents' proposed retrofitting plans as well as those of the Charging Party, concurred in by the Intervenor, I issue the following Orders:

#### 1. Parking: Lack of Accessible Parking and Lack of Proper Parking Signs

The parties agree that it is feasible to retrofit the parking lot to provide handicap accessible parking. Respondents' proposal to retrofit the parking is acceptable. See Rs' Feb. 22, 2007 filing at Sheet B.

Currently, twelve covered parking spaces are provided for residents in carports located immediately in front and along the entire side of the building facing Lake Elmo Drive. Additional uncovered parking space is provided for residents and guests, although the spaces are not marked. There is sufficient area in the uncovered parking lot for approximately 14 additional parking spaces. There are two parking spaces marked as accessible parking spaces – one at the south end of the covered carport and the other at an uncovered space immediately adjacent to the marked space at the carport - but these do not meet the accessibility guidelines because there is no access aisle for either space.

#### **ORDER:**

1) Respondents are hereby ordered to provide accessible parking as provided in their February 22, 2007 Retrofit Diagram at Sheet "B." Respondents are to construct a 5' access aisle within the covered parking space currently used by the building manager. This covered parking space is not to be shared by the manager.

2) Respondents are to provide an uncovered 5' access aisle adjacent to the current uncovered accessible parking space. They are to either widen the pavement currently at 11'-2" wide to at least 13'-0" (for the 8'0" wide parking space and 5'0" wide access aisle) or locate the accessible, uncovered space with an adjacent 5'0" wide access aisle elsewhere on the accessible route to the building. The relocated place on the accessible route should be at least as close to the entrances as the existing designated accessible space.

3) Respondents are to locate a third accessible parking space (uncovered) as shown on their Retrofit Diagrams near the east grass easement area C, with an adjacent compliant accessible aisle.

4) Respondents are to add signs appropriately marking the location of handicapped parking. Each space must be provided with a sign mounted at the head of the accessible space with the bottom of the sign 60" minimum above the surface of the parking space. The space

must be located on the shortest possible circulation route to the accessible entrances. See Rs' Feb 22, filing, at Sheet "B"; Schooner Decl. at ¶ 5B. Estimated cost: \$475 to \$500.

2. Mailbox Location – obstructed route

Currently the carport parking blocks any clear, unobstructed route to the mailboxes. Secretary's Order at p. 4. Moving the location of the mailbox is feasible. Respondents have stated their willingness to move the mailboxes to any location desired by the CP. However, the ultimate location of the mailbox cannot be stated because it will depend on the work which is done to retrofit the parking lot and the front entrances discussed below.

**ORDER:** Respondents shall move the mailbox stand from its existing location and relocate it on the newly constructed accessible route to the primary entrances in a manner which will meet the accessibility guidelines. The mailbox stand must have a 30" by 48" clear floor space centered on the mailbox and must be mounted such that the mail slot and the boxes for the covered units are within 48" above the clear floor space if a forward approach is provided, or 54" if a parallel approach is provided. Sx 2 at 5. The location of the mail boxes shall not be conditioned on the approval of existing tenants. Estimated cost: \$200 to \$500.

3. Knob Hardware to Units 1, 6, 7, and 12 (in the Public and Common Use Areas)

The retrofit is feasible. Respondents have agreed to undertake this retrofit. Estimated costs: \$210 for all four units.

**ORDER:** Respondents shall install lever hardware on both sides of the front doors (Lake Elmo Drive side).

4. Patio Doors to Units 1, 6, 7 and 12

Retrofitting of the patio doors is feasible. Estimated cost: \$6048 to \$8800 total for the four units. Weiss Report, #G.

**ORDER:** Respondents shall retrofit the patio doors by removing the existing sliding glass doors and installing accessible swinging doors in all four units that provide a 32" clear width, complete with compliant beveling and thresholds, as provided in their Retrofit Diagrams at "D". The thresholds must not exceed a maximum of ¾" high on the interior side and must be beveled on both sides with a slope no steeper than 1:2. Rs' Feb. 22, filing at Sheet D.

5. Doors to master bathrooms in Units 1, 6, 7, and 12

It is feasible to retrofit the doors to the master bathroom in all four covered units. Respondents' suggestion that it might not be feasible to widen the master bathroom doors because the attached wall might be a load bearing wall, is not given much weight. Respondents took no steps to determine whether the walls are, in fact, load bearing walls. CP, on the other hand, through Mr. Weiss, studied the original building plans and determined that the master bathroom walls containing the doors were not load bearing walls. Accordingly, I credit Mr. Weiss' statement that the walls are not load bearing walls. Estimated cost: \$6048 to \$8800 total

for the four units. Weiss Report, #G.

**ORDER:** Respondents shall install a wider door for entrance into the master bedroom in the four units at issue. They are to replace the existing 2' - 4" wide door with a door that will be at least 2'8" wide which is to be an out-swinging door with swing-clear hinges to provide a clear width between door stops of a minimum of 31-5/8". In each instance, it is required that the door is made to swing into the bedroom rather than into the bathroom. See Schoonover and Weiss reports. SX 2 at 6, and Weiss Report at ¶ III-J1.

6. Lack of clear floor space beyond door swing and at fixtures in the master bathroom of Unit #1

It is feasible to retrofit the master bathroom in Unit #1 to provide sufficient clear floor space to meet the accessibility requirement of the Act. Respondents' contention that it is infeasible to retrofit to solve this violation is rejected because they have not adequately explained why it would be infeasible to do so. I accept the solution proposed by Mr. Weiss and Schoonover. Estimated cost: \$4803.

**ORDER:** Respondents are to move the wall section common to the bathtub and bedroom in Unit 1 six inches into the bedroom to provide a 30" wide clear floor space between the bathtub and the toilet. This will qualify the unit for the Option B bathroom requirements and bring it in compliance with the accessibility guidelines.

7. Lack of removable cabinets at the lavatories in the hall bathrooms of Units 6, 7 and 12

Respondents have not addressed the feasibility of correcting this deficiency in any of their pleadings. I accept CP's position that retrofitting the lavatories in the hall bathrooms of these three units is feasible. Total estimated cost: \$840 - \$1080. Weiss Report at ¶¶ III-J1, J4.

**ORDER:** Respondents shall modify the present lavatory cabinets and counters in the hall bathrooms of each of the units in question in a manner which will expose knee space and accommodate a person in a wheelchair and comply with the accessibility guidelines. Although not specifically required, the modification can be as recommended by Mr. Weiss. For suggested design and equipment, see the web site recommended by Mr. Weiss at: [http://www.design.ncsu.edu/cud/pubs\\_p/phousing.htm](http://www.design.ncsu.edu/cud/pubs_p/phousing.htm).

8. Distance from toilet centerline to sidewall in hall bathrooms of Units 1 and 12

Respondents admit that it is feasible to retrofit the hall bathrooms in Units 1 and 12 to make them handicap accessible. Respondents' proposal to fur out the wall is accepted. Estimated cost: \$150 per bathroom

**ORDER:** Respondents shall undertake the retrofitting in accordance with their proposal at Retrofit Diagram "K" to: 1) apply a ½ inch layer of drywall to the bathroom wall of Unit #1 to bring the toilet center line to 18" from the wall, and 2) to install a support structure that furs the wall by 2" in Unit #12 to bring the toilet center line to 18" from the wall.

9. Retrofitting the steps at the front entrances.

Respondents strenuously resists the requirement for retrofitting the two entryways on the Lake Elmo Drive side of the subject building. Each entryway leads to two of the four ground floor residential units. It is generally agreed that these entryways are the primary entrances into the building. However, each of the four units has a patio door at the rear of the building. Respondents contend that the Act requires only one accessible entrance on an accessible route to the building. Since retrofitting the front entrances will be difficult and costly, Respondents propose to retrofit the patio entrances to make them fully accessible. See ¶4 above. The CP, on the other hand, argues that the front entrances must be retrofitted regardless of what is done to the patio doors because the front stairways and stair landings leading to the units are common use and public use areas which are required to be handicap accessible under the Act.

The parties stipulated at trial that the stairs at the front entrances render the entrances inaccessible. The Secretary has determined that “the stair landings at the front of the building are common areas because they each provide access not only to the two ground floor units below but also to the units on the upper floors. As a result, the front (east) entrances of the property are required to be accessible as a matter of law.” Secretary’s Order at p.8. I am bound by that determination. I conclude that the Secretary’s Order requires that the front entrances be retrofitted. Accordingly, I have not considered Respondents’ argument that retrofitting the patio entrances to provide wheelchair accessibility to each unit would, without retrofitting the front entrances, meet the accessibility requirement for an accessible entrance on an accessible route under the FHA.

Respondents also contend that it would not be feasible to retrofit the front entrances due to construction difficulty and/or related costs of retrofitting the front entrances. They have alleged construction difficulty including potential storm drainage problems, safety problems, mold issues, and the cost of hand construction. Rs’ Feb. 22 filing, at Sheet A. The cost of a retrofit to the front entrances was estimated by Respondents’ consultant Pentecost at \$15,000 to \$25,000. See Rs’ Jan. 5, 2007 filing, at 5.

CP, on the other hand, contends that retrofitting the front entrances is feasible. The CP’s experts have considered Respondents’ concern for potential storm drainage, safety and mold problems and have suggested a way to retrofit the front entrances without any drainage, safety or mold problems. See Schoonover Declaration at ¶ 5A; Mazz Decl. at ¶ 5A and Weiss Report at ¶ III-A1. Schoonover’s estimated cost: \$15,000 to \$30,000. Tr. 185. Mr. Weiss states that retrofitting is feasible and that Respondents’ Pentecost’s estimate of \$15,000 to \$25,000 is a reasonable cost estimate.

After consideration of the evidence submitted, I reject Respondents’ contention that retrofitting of the front entrances is not feasible. Respondents have a “heavy burden” to prove that they should not be required to comply with the requirements of the Act. See Memphis Center for Independent Living v. Grant, et al, No. 01-2069D, slip. Op. (W.D. Tenn. 6/3/05). They have not met that burden. Although Respondents raised potential problems such as drainage and mold problems which might result from the needed modification, they have not explained the basis for their claim. CP’s consultants, on the other hand, carefully considered and ruled out any significant problems from water drainage and mold. I am persuaded by their

proposals. I also find, under the circumstances, that the estimated cost of \$15,000 to \$30,000 to retrofit the front entrances is not so unreasonable that to require that expenditure would constitute an abuse of judicial discretion.

**ORDER:** Respondents shall retrofit the front entrances by removing the existing stairs and concrete landings and providing a level route from the parking to the entrance doors of the residential units according to the plan proposed by consultants Mazz and Weiss. See Mazz Decl., at ¶ 5A; Weiss Report at ¶ III-A1.

10. Retrofits to the kitchen entrances, Clear floor space in the master bathrooms of Units 6, 7, & 12, and Slopes of the Sidewalk

CP originally requested that the kitchen entrances and the clear floor space in the master bathrooms of Units #6, 7 and 12 be retrofitted. However, it subsequently withdrew those requests. See CP's Response to Rs' Retrofit Filings and Renewed Motion for a Remedial Order (March 26, 2007), at 15. The CP also represented that if the front entrances were required to be retrofitted, it would withdraw its request that the slopes of the sidewalk be retrofitted. Id. at 20. Since I have required Respondents to retrofit the front entrances (see ¶10 above), I have considered CP's request for retrofitting the slopes of the sidewalk to have been withdrawn. Accordingly, Respondents are not required to take any action with regard to these violations.

#### Date for Completion of Retrofits

CP and MFH request that all retrofitting be ordered to be completed by December 31, 2007. Respondents, on the other hand, seek a 2-1/2 year period over which to complete the retrofits. They cite financial concerns, stating that they are unable to immediately fund the retrofits. After consideration of all the relevant factors, I will require that the retrofits of the common use and public use areas (parking spaces, parking signs, mailboxes, front entrances and access route from front entrances to parking and mailboxes, and door knob replacement on the front doors,) be completed on or before December 31, 2007. However, I have accepted the recommendation of MFH's Executive Director, Liston, given in his hearing testimony, that to lessen the inconvenience to the existing tenants, retrofit to the interior of the units should be done as tenants move out of the units. See Tr. at p.503. Accordingly, the Order will allow retrofit of the noncommon areas or the interior of a unit, i.e., to the patio doors and to the bathrooms and hallways, to be completed as late as 30 days after the departure of the existing tenant.

**ORDER:** Respondents shall complete the retrofit to the front entrances of the building at 640 Lake Elmo Drive and all public and common use areas (parking spaces, parking signs, mail boxes, access route from front entrances to parking and mailboxes, and door knob replacements on the front doors) on or before December 31, 2007.

**ORDER:** Respondents shall complete the retrofit to the interior of Units 1, 6, 7 and 12 no later than 30 days after the departure of the current tenant.

#### Compensation to Tenants for Inconvenience

CP requests that the Order requires Respondents to compensate tenants for their expenses and inconvenience during the retrofit of the subject property and that they do so at a rate similar to the government lodging and per diem rate. Respondents argue that this is a matter properly left to them and their tenants.

I will grant the CP's request. There is case precedent for requiring respondents to compensate existing tenants under circumstances similar to those in this case. However, by this order I have attempted to minimize tenant displacement and inconvenience.

The exterior retrofitting should not require displacement of the ground floor unit tenants because they will be able to continue to access their units through the patio doors. Further, since my order allows retrofit of the interior of the units after departure of the existing tenants, the tenants on the ground floor units should not be significantly inconvenienced by the remedial work. The concern, then, is for the tenants who occupy the second and third floors (8 units). Removal of the stairs and landings will necessarily interfere with their ability to gain entry into their units until an alternate permanent entrance(s) is provided. Should Respondents not be able to provide temporary stairs to permit entry into the second and third floor units, they will be required to compensate them for any expense incurred in obtaining alternate lodging at a rate similar to the government lodging and per diem rate.

**ORDER:** If any tenant is not able to safely access his or her residential unit during the retrofit of the front entrances, Respondents shall compensate him or her for the displacement and inconvenience for the period of time displaced at a rate similar to the government lodging and per diem rate.

#### ORDER ON DAMAGES

CP and MFH seek an Order requiring Respondents to compensate MFH the sum of \$15,100.20, for damages allegedly caused by Respondents' discriminatory conduct. Respondents objects both to the finding of liability for damages to MFH (lack of standing ) and to the amount of the damages sought. The Secretary has determined that MFH is entitled to damages, thus I have not considered that objection. However, I have considered the appropriateness of the amount of damages requested.

MFH seeks damages for diversion of its resources (\$14,001.78) and frustration of its mission (\$9,848.42) for a total of \$23,850.20. They allege spending \$661.70 in administrative costs, travel and per diem, and to diverting \$7,443.75 in staff time (99.25 hours) from its usual activities in order to pursue this case up until, but not including the hearing. MFH incurred additional expenses at the hearing totaling \$5,896.33, including \$718.83 in administrative costs such as per diem, lodging and document preparation, and \$5,177.50 in staff time (54.5 hours) for preparation, travel and trial time. A total of 253.75 staff hour time was spent on the case (99.25 plus 54.4). MFH used a rate of \$0.325/ mile for mileage up to September 2005, after which it used a mileage rate of \$0.485/mile. It used a rate of \$26.00/day for per diem up until September 2005, after which it used a mileage rate of \$39.00/day. CP states that the rates are comparable, and until October 2005 were lower, than the rates set by the federal government for the same time periods.

The damages include all expenses related to the case, including those expenses attributable solely to the four parties that were associated with the case but who have already conciliated or settled and have been dismissed from the case: Ron Moat, and Donald E. Neraas, a sole proprietorship. Expenses have been offset to the claim of damages against Respondents by \$8,750.00, the amount MFH received from conciliation or settlement in the other cases. Accordingly, MFH seeks \$15,100.20 from Respondents Brent and Bernard Nelson.

#### Hourly Rate

MFH seeks compensation for staff work at the rate of \$75.00 per hour before October 1, 2005, and \$95.00 per hour after October 1, 2005. Tr. Liston, at 100. MFH's rate includes salary, taxes, benefits, and all of the associated costs of overhead, including rent, utilities, insurance, and support staff. The rate was based on calculations that considered all staff members, top executives and subordinate staff, equally, although it states that its top two employees did the vast amount of the work in this case.

Respondents challenge the \$75 to \$95 charge per hour rate used by MFH in requesting compensation of \$15,100.20 for damages suffered as a result of diversion of resources and frustration of its mission due to the required activities in this case.

At the hearing, MFH's Executive Director Liston testified that MFH had 4.25 full time equivalent employees ("FTE") and that prior to October 2005, staff salaries ranged from about \$18 - \$19 per hour. No staff member was paid \$75.00 per hour. In October 2005, staff was paid between \$19 and \$20 per hour, and no staff member was paid at the rate of \$95.00 per hour. Tr. at 63-66. The \$75 per hour and \$95 per hour rate was referred to as the "agency rate." Tr. at 101. Liston described the rate as "the rate that we have been . . . using for all activities, case activities, as well as workshop and educational activities. It includes salary, taxes, benefits, all of the associated costs of overhead, rent, utilities, insurance, support staff." The rate was increased from \$75 per hour in October 2005 to \$95.00 per hour based on several years of increases in costs of doing business. Tr. at 100-01. According to Mr. Liston, there was not much cushion between the actual cost of investigation and prosecuting the case and the \$75 and \$95 per hour charge.

At trial, Respondents argued that MFH had established no basis for setting \$75 or \$95 as a reasonable and customary hourly charge in the region for the type of services provided, and that he did not believe that such a rate was set by the market. In an attempt to assess whether the hourly rate was reasonable, as an "hourly agency rate," Judge Andretta requested the parties to use the amount of MFH's total annual budget for the year 2003 or \$220,000, which covered all operating expenses, divide it by the number of FTE salaried workers at MFH (4.25) and then multiple that by the number of work hours per year per FTE or 2040. At the time, all parties indicated agreement that this was a fair way to determine a reasonable hourly agency rate. That calculation resulted in an hourly rate of \$25.37. Accordingly, Judge Andretta indicated that it was reasonable to conclude that it cost \$25.37 per hour per employee to operate MFH in the year 2003. Performing the same calculations, but using an increased annual budget of \$240,000 for the period after October 2005, yielded an hourly agency rate of \$27.68. Judge Andretta advised MFH and CP that the burden was on them to persuade him that the \$75 and \$95 hourly rates were reasonable and that he had not been persuaded at that point. He required them to address

the hourly rate in their post-hearing brief. Tr. at 126-127. Respondents argue that since Judge Andretta who heard the case has retired, there can be no finding but that the hourly rates claimed are not reasonable. I do not agree with Respondents' contention, but having considered all the evidence and arguments reach the same decision as Judge Andretta.

The burden of proof is on CP and MFH to support the claim for damages. Damages should not be based on speculation or surmise, but competent evidence. In their post-hearing brief and subsequent pleadings, CP and MFH have provided no additional factual support for the claimed hourly rate(s). However, CP has provided some legal support for the rates. CP cites the decision of a district court judge in Fair Housing of Marin v. Combs, 2000 WL 365029, (N.D. Cal. 2000) ("Combs"), aff'd, 285 F. 3d 899 ((9th Cir. 2002), as support for the hourly rate MFH has charged in this case. In Combs the court held that \$70.00 - \$75.00 was a reasonable hourly rate for the top executives of that fair housing organization even though the hourly rate did not match the pro rata salary of the individuals involved. The court stated that "it is completely reasonable to charge an hourly rate that does not match the pro rata salary of the individual; to find otherwise would place into question the fees and costs associated with a litany of professionals (including attorneys) whose hourly rate and salary prorated to the hour bear only passing resemblance to one another." MFH argues that its two highest ranked employees did the great majority of the work on the case, and therefore, the \$75.00 per hour is well justified.

Without more facts from MFH, I am not persuaded to adopt the hourly rate approved by the court in Combs and apply it to the case at hand. First of all, I do not find the analogy to a law firm applied by the trial court in Combs to be a compelling analogy. Law firms are for-profit organizations, whereas the MFH is a not-for-profit organization. Moreover, MFH regularly operated on a fairly fixed annual budget. Based on the annual budget for the years in question, the hearing testimony established that the pro rata agency funding was in the range of \$25 to \$28 per hour. In addition, the judge in Combs observed that the \$75 per hour requested by the plaintiff was "very close" to the pro rata salary of the employees involved in the case and that the \$75 per hour rate was consistent with the prevailing market rate in the area (i.e., Marin County, California). In this case, the \$75 and \$95 hourly rates requested are widely divergent from the pro rata salary of the employees involved in the case. The hearing testimony showed that the individual salaries were in the \$18 and \$20 per hour range vs. the \$75 and \$95 per hour requested. And, there is no evidence in the record as to what the market rate was for similar work performed in 2003 and 2005 in Billings, Montana, as opposed to Marin County, California, for the years in question. Accordingly, I conclude that Respondents objections have merit. Although the hourly rate may be appropriate, I conclude that the CP and Intervenor have failed to meet their burden of establishing the reasonableness of the requested hourly rates. I further conclude that the only rate reasonably established by the evidence is an hourly rate of \$25 and \$28 for the time period in question. Those rates will be approved. The reduction in hourly rate from \$75 per hour to \$25 per hour and from \$95 per hour to \$28 per hour results in a reduction of \$9,369.75 from the proposed damage award, or an award of \$5,730.45.

Although Respondents have challenged other items of expense in the request for damages for diversion of resources and frustration of mission, they have not adequately supported any challenge. I, therefore, conclude that the number of hours worked, as well as the expenses incurred, are reasonably supported.

**ORDER:** Respondents shall pay MFH the sum of \$5,730.45 for damages caused by the diversion of resources and frustration of mission as a result of Respondents' discriminatory conduct in this case. (\$15,100.20 - \$9,369.75 due to hourly rate reductions).

### CIVIL PENALTY

CP seeks the maximum civil penalty against both Respondents for their involvement in the design and construction of the building in this case: a \$11,000 penalty against Brent Nelson and a \$5,000 penalty against Bernard Nelson. I conclude that the CP has failed to support its request for a maximum civil penalty in both instances.

#### Bernard Nelson

CP has conceded that Bernard Nelson's role in the operational design and construction of the subject building was minimal. See Secretary's Order at 12, FN13. Although his minimal role did not shield him from liability, it is a factor which is properly considered in mitigation of damages and civil penalty. Bernard Nelson has no previous involvement in the construction business. There is no suggestion that he will again be involved in any way in the design and construction of covered residential property. Further, even a minimal civil penalty will serve to deter others similarly situated from relying on others to be knowledgeable about and to carry out the requirements of the Act. I have considered the factors that are required to determine an appropriate civil penalty, and conclude that a civil penalty of \$500 is appropriate as against Bernard Nelson.

**ORDER:** Respondent, Bernard Nelson, shall pay, within 30 days, a civil penalty of \$500 to HUD for his involvement in the design and construction of the property in this case.

#### Brent Nelson

There are mitigating factors which argue against the imposition of a maximum civil penalty against Brent Nelson, as well. Brent Nelson does not have vast residential holdings. The construction at 640 Lake Elmo Drive is his very first building that is covered under the FHAA. The evidence shows that he hired one of the best, if not the best, architectural firm in the State of Montana to design his building. He obtained all appropriate building permits. As with the case of Bernard Nelson, although lack of knowledge of the Act's requirements and/or reliance upon a well established and respected architectural firm is not a legal excuse for noncompliance, these reasons weigh against the imposition of a maximum penalty. Brent Nelson's conduct is more fairly described as negligent rather than as showing a reckless and willful disregard for the requirements of the Act.

Additionally, I have considered that although the covered units failed to meet the required accessibility standards as determined by the Secretary, the evidence shows that at least one person with a wheelchair handicap was able to access the units of the building via the patio doors, so that accessibility was not impossible or not totally excluded by the building design. Finally, Respondents state that Brent Nelson has, without judicial prodding, sought the help of MFH in the design and construction of a new building currently being constructed on a site adjacent to 640 Lake Elmo Drive, to assure that it is being constructed in a manner that is

compliant with the Act and implementing guidelines. They state that his architect “has been working ‘hand in glove’ with the MFH people on the plans for the new project. . .[he] is now constructing.” Rs’ Filing of March 30, 2007 at p. 8. This representation has not been challenged by CP or MFH. His action in seeking the help of MFH displays a desire to fully comply with the FHA in the future. Considering these factors and all others required, I conclude that a civil penalty of \$4,000 is reasonable in this case as against Brent Nelson.

**ORDER:** Respondent, Brent Nelson, shall pay, within 30 days, a civil penalty of \$4,000 to HUD for his involvement in the design and construction of the property in this case.

### Fair Housing Training

The CP seeks an order requiring Respondent Brent Nelson to pay for and attend 8 hours of training by MFH, Fair Housing Accessibility FIRST, or another program in the design and construction requirements of the Fair Housing Act, approved in advance by HUD.

While such education is appropriate in many cases, I do not conclude that it will be necessary for the protection of the disabled to require Brent Nelson to undergo the proposed training in this case. Mr. Nelson has voluntarily sought the assistance of the MFH in the design and construction of the new project adjacent to the subject property at 640 Lake Elmo Drive. There is no evidence to suggest that he will likely be a repeat offender. Moreover, based on the finding of liability in this case, he has learned from his first building project that he cannot rely on, or delegate responsibility to, any other person or entity to comply with the Act’s requirement.

### INJUNCTIVE AND OTHER RELIEF

Respondents, their agents, employees, and successors, and all other persons in active concert or participation with any of them, are enjoined from discriminating against any person because of disability at the building at 640 Lake Elmo Drive or any other residential building they may construct in the future, in violation of the FHA;

Respondents are enjoined from coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Act.

Respondents are enjoined from selling the property at issue or otherwise transferring ownership of the property until the required retrofits are completed unless they obtain an expressed agreement in writing from the buyer that the buyer will undertake the required retrofits and be bound by the same timetable for completion.

Respondents shall cooperate with the Charging Party to the scheduling and performance of post retrofit inspections to insure compliance with the Act’s requirements;

Respondents shall submit quarterly reports to HUD setting forth their efforts to comply with this remedial order.

Respondents shall comply with the provisions of the Act with regard to the design and construction of any new building they are presently constructing or will design and construct in the future.

So ORDERED, this 1st day of June, 2007.

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CONSTANCE T. O'BRYANT  
Administrative Law Judge

## SUMMARY OF ORDERS

### RETROFITS:

#### Parking Spaces and Signs

Respondents are to provide accessible parking as provided in their February 22, 2007 Retrofit Diagram at Sheet "B." Respondents are to construct a 5' access aisle within the covered parking space currently used by the building manager. This covered parking space is not to be shared by the manager.

Respondents are to provide an uncovered 5' access aisle adjacent to the current

uncovered accessible parking space. They are to either widen the pavement currently at 11'-2" wide to at least 13'-0" (for the 8'0" wide parking space and 5'0" wide access aisle) or locate the accessible, uncovered space with an adjacent 5'0" wide access aisle elsewhere on the accessible

route to the building. The relocated place on the accessible route should be at least as close to the entrances as the existing designated accessible space.

Respondents are to locate a third accessible parking space (uncovered) as shown on their Retrofit Diagrams near the east grass easement area C, with an adjacent compliant accessible aisle.

Respondents are to add signs appropriately marking the location of handicapped parking. Each space must be provided with a sign mounted at the head of the accessible space with the bottom of the sign 60" minimum above the surface of the parking space. The space must be located on the shortest possible circulation route to the accessible entrances. See Rs' Feb 22, filing, at Sheet "B"; Schooner Decl. at ¶ 5B.

#### Mailbox

Respondents shall move the mailbox stand from its existing location and relocate it on the newly constructed accessible route to the primary entrances in a manner which will meet the accessibility guidelines. The mailbox stand must have a 30" by 48" clear floor space centered on the mailbox and must be mounted such that the mail slot and the boxes for the covered units are within 48" above the clear floor space if a forward approach is provided, or 54" if a parallel approach is provided. Sx 2 at 5. The location of the mail boxes shall not be conditioned on the approval of existing tenants.

#### Door Knob

Respondents shall install lever hardware on both sides of the front doors (Lake Elmo Drive side).

#### Patio Doors

Respondents shall retrofit the patio doors by removing the existing sliding glass doors and installing accessible swinging doors in all four units that provide a 32" clear width, complete with compliant beveling and thresholds, as provided in their Retrofit Diagrams at "D". The thresholds must not exceed a maximum of ¾" high on the interior side and must be beveled on both sides with a slope no steeper than 1:2. Rs' Feb. 22, filing at Sheet D.

#### Master Bedroom

Respondents shall install a wider door for entrance into the master bedroom in the four units at issue. They are to replace the existing 2'-4" wide door with a door that will be at least 2'8" wide which is to be an out-swinging door with swing-clear hinges to provide a clear width between door stops of a minimum of 31-5/8". In each instance, it is required that the door is made to swing into the bedroom rather than into the bathroom. See Schoonover and Weiss

reports. SX 2 at 6, and Weiss Report at ¶ III- J1.

Respondents are to move the wall section common to the bathtub and bedroom in Unit 1 six inches into the bedroom to provide a 30" wide clear floor space between the bathtub and the toilet. This will qualify the unit for the Option B bathroom requirements and bring it in compliance with the accessibility guidelines.

#### Hall Bathroom

Respondents shall modify the present lavatory cabinets and counters in the hall bathrooms of each of the units in question in a manner which will expose knee space and accommodate a person in a wheelchair and comply with the accessibility guidelines. Although not specifically required, the modification can be as recommended by Mr. Weiss. For suggested design and equipment, see the web site recommended by Mr. Weiss at: [http://www.design.ncsu.edu/cud/pubs\\_p/phousing.htm](http://www.design.ncsu.edu/cud/pubs_p/phousing.htm).

#### Front Entrances

Respondents shall complete the retrofit to the front entrances of the building at 640 Lake Elmo Drive and all public and common use areas (parking spaces, parking signs, mail boxes, access route from front entrances to parking and mailboxes, and door knob replacements on the front doors) on or before December 31, 2007.

Respondents shall complete the retrofit to the interior of Units 1, 6, 7 and 12 no later than 30 days after the departure of the current tenant.

If any tenant is not able to safely access his or her residential unit during the retrofit of the front entrances, Respondents shall compensate him or her for the displacement and inconvenience for the period of time displaced at a rate similar to the government lodging and per diem rate.

#### DAMAGES TO MFH

Respondents shall pay MFH the sum of \$5,730.45 for damages caused by the diversion of resources and frustration of mission as a result of Respondents' discriminatory conduct in this case. (\$15,100.20 - \$9,369.75 due to hourly rate reductions).

#### CIVIL PENALTY

Respondent, Bernard Nelson, shall pay, within 30 days, a civil penalty of \$500 to HUD for his involvement in the design and construction of the property in this case.

Respondent, Brent Nelson, shall pay, within 30 days, a civil penalty of \$4,000 to HUD for his involvement in the design and construction of the property in this case.

**INJUNCTIVE AND OTHER RELIEF**

Respondents, their agents, employees, and successors, and all other persons in active concert or participation with any of them, are enjoined from discriminating against any person because of disability at the building at 640 Lake Elmo Drive or any other residential building they may construct in the future, in violation of the FHA;

Respondents are enjoined from coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Act.

Respondents are enjoined from selling the property at issue or otherwise transferring ownership of the property until the required retrofits are completed unless they obtain an expressed agreement in writing from the buyer that the buyer will undertake the required retrofits and be bound by the same timetable for completion.

Respondents shall cooperate with the Charging Party to the scheduling and performance of post retrofit inspections to insure compliance with the Act's requirements;

Respondents shall submit quarterly reports to HUD setting forth their efforts to comply with this remedial order.

Respondents shall comply with the provisions of the Act with regard to the design and construction of any new building they are presently constructing or will design and construct in the future.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this REMEDIAL ORDER issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 05-068-FH, were sent to the following parties on this 1<sup>st</sup> day of June, 2007, in the manner indicated:

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