

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 Will-Grundy Center for Independent Living, Charging Party, v. Perland Corp., William Persico, and Thomas A. Buchar, and Thomas A. Buchar & Assoc., Inc. Respondents.

HUDALJ 05-96-1517-8
Decided: March 30, 1998

Kathleen Pennington, Esq.
For the Charging Party

Robert J. Baron, Esq.
Bryan W. Kopman, Esq.
For the Respondents

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by the Will-Grundy Center for Independent Living ("Complainant") alleging discrimination in violation of the Fair

Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* (the Act"). On September 2, 1997, the Department of Housing and Urban Development ("HUD" or "Charging Party") issued a Charge against Perland Corp. and William Persico (collectively "Respondents"), as well as Thomas A. Buchar, alleging that they had discriminated against Complainant based on handicap¹ in violation of 42 U.S.C. § 3604(f)(2), and the regulations codified at 24 C.F.R. § 100.202(b), by failing to design and construct multifamily dwellings at Meadow View Terrace Condominiums ("Meadow View") in accordance with 42 U.S.C. § 3604(f)(3)(C), and 24 C.F.R. § 100.205(c).

As of October 14, 1997, neither Respondents nor Mr. Buchar had answered the Charge. Accordingly, on that date the Charging Party moved for a default decision.² On October 20, 1997, Mr. Buchar filed both a response to the Charging Party's Motion for Default Decision and a Motion for Leave to File Answer Instantly (with an attached answer to the Charge). Respondents did not file a response to the Motion for Default Decision.

On October 27, 1997, an Order was issued, denying the Charging Party's Motion for Default Decision as to Mr. Buchar, and granting his Motion for Leave to File Answer Instantly. Mr. Buchar, the Order stated, had demonstrated that the delay in filing his Answer was not due to inexcusable neglect and had not prejudiced the Charging Party. In light of Respondents' failure to file an Answer or a response to the Motion for Default Decision, the Motion for Default Decision was granted in part as against those Respondents. However, in order not to prejudice the rights of Mr. Buchar, it was further ordered that no allegation in the Charge denied by him in his Answer would be deemed to be admitted by him or

¹While the Act uses the term "handicap," this decision also uses "disability," a synonymous term, because "handicap" derives from a negative stereotype about persons with disabilities. *See, e.g., Helen L. v. DiDario*, 46 F.3d 325, 330 n.8 (3d Cir.) (noting in Americans with Disabilities Act ("ADA") case recognition by Congress that persons with disabilities find term "'handicapped' objectionable"), *cert. denied*, 516 U.S. 813, 116 S.Ct. 88 (1995). The legislative history of the Act evidences Congress' use of both terms. *See, e.g.,* H.R. Rep. No. 711, 100th Cong., 2d Sess. at 18, 24, 28 (1988). In addition, since the Fair Housing Amendments Act of 1988, Congress has enacted legislation, such as the ADA, which does not use "handicap," and has amended Section 504 of the Rehabilitation Act of 1973 to replace "handicap" with "disability." *See* 42 U.S.C. §§ 12101-12203; 29 U.S.C. § 794; Pub.L. No. 102-569, § 102(p)(32), 106 Stat. 4344, 4348-49 (1992).

²*See* 24 C.F.R. § 180.420(b) (failure to file answer within 30 days of service of Charge shall be deemed admission of all matters of fact recited in Charge, and may result in entry of default decision).

Respondents for the purpose of the Order. The Order specified those matters of fact alleged in the Charge which were to be deemed admitted as against Respondents.

By Order dated November 19, 1997, the Charge was amended to add Thomas A. Buchar & Assoc., Inc., as a respondent.³ On December 1, 1997, Respondents filed a Motion to Vacate Default which stated that they were not aware that a formal Answer to the Charge had been due and that they believed that settlement negotiations allowed for a delay in filing an Answer. Also on December 1, 1997, the Charging Party filed a Motion for Decision Finding Respondents in Full Default. By Order dated December 2, 1997, I denied Respondents' Motion to Vacate Default and gave them the opportunity to respond to the Charging Party's motion for a full default.

During a telephone conference on December 5, 1997, I granted the Charging Party's motion for a full default to the extent that all facts alleged in the Charge against Respondents were deemed admitted. However, I ruled that Respondents would be allowed to present evidence at the hearing supporting their defense that, due to impracticality, Meadow View was not required to have been designed and constructed in accordance with 42 U.S.C. § 3604(f)(3)(C). I also denied counsel for Respondents' request for a postponement of the hearing because, among other reasons, Respondents had failed timely to retain counsel, answer the Charge, and respond to the Motion for Default Decision. They had also hindered the completion of discovery. Moreover, the Charging Party's expert witness was to undergo surgery shortly and, the Act itself contemplates prompt hearings in these proceedings.

A hearing was held on December 9, 1997, in Chicago, Illinois. The parties timely filed their briefs on January 16, 1998, and reply briefs on February 2, 1998.

Findings of Fact

The Parties

1. Complainant Will-Grundy Center for Independent Living, located in Joliet, Illinois, is a service and advocacy organization for persons with disabilities.

³On February 27, 1998, I signed an Initial Consent Order which resolved the Charge against Thomas A. Buchar and Thomas A. Buchar & Assoc., Inc.

Charge ¶ 4; Tr. 19.⁴ Complainant's mission is "to empower people with disabilities so that they may lead self-determined lives and have control over their li[ves] and enjoy the rights and responsibilities" of American citizens. Tr. 20.

2. Among the services that Complainant offers persons with disabilities and their families is assisting them in finding accessible housing. Charge ¶ 4; Tr. 20. Complainant provides a list of housing options, both rental and purchase, in Will and Grundy counties in Illinois. Complainant compiles this list by visiting housing complexes and obtaining information about their amenities. The list specifies whether or not housing is accessible. Members of the public request copies of this list about four to five times per week. Tr. 20-22.

3. Complainant also works toward ensuring that accessible housing exists in Will and Grundy counties by providing technical assistance to builders and architects. Tr. 22, 24-25; CPX1C. In addition, Complainant educates persons with disabilities about their rights under the Act including those respecting accessible housing, and assists such persons when their rights may have been violated. Tr. 22, 23-24; CPX1B.

4. Pam Heavens is Complainant's Executive Director and is a person with a disability who uses a wheelchair. Charge ¶ 20; Tr. 18.

5. Respondent William Persico is the president of Respondent Perland Corp. and controls its actions. Charge ¶ 9; Tr. 166-67.

Meadow View

6. Respondents constructed Meadow View. Charge ¶ 11. Meadow View consists of two three-story buildings of 12 units, each building having four

⁴"Charge" refers to the Determination of Reasonable Cause and Charge of Discrimination. "Tr." refers to the hearing transcript. "CPX" refers to exhibits introduced by the Charging Party; "RX" refers to exhibits introduced by Respondents.

ground-floor units, four second-floor units, and four third-floor units.⁵ Charge ¶ 7; Tr. 10, 171. All eight ground floor units have two bedrooms and two bathrooms. CPX7 at p. A3; CPX8B.

The two buildings are located at 2024-28 Manico Ct. ("Building 1") and 2034-38 Manico Ct. ("Building 2"), Crest Hill, Will County, Illinois.⁶ Charge ¶ 5; Tr. 9.

7. Buildings 1 and 2 at Meadow View are built on a hill. Tr. 53, 65. Meadow View is approached through Manico Court, which leads to a driveway that runs up the hill between the two buildings. Past the buildings, the driveway connects to a flat parking area. Tr. 53, 56, 65, 68-69; RX1, 2. The driveway is the only road access to the parking lot. Tr. 65. There is no sidewalk alongside the driveway. Tr. 66. Garages are on the opposite side of the parking lot from the buildings. Tr. 69-70; RX3. Building 1 is on the right side of the driveway and Building 2 is on the left. Tr. 54-56, 67; CPX7. The front entrances of both buildings face the parking lot. Tr. 55, 70; RX5; CP9A, 9B, 9E. A sidewalk, which has no curb cut, runs along the length of each building,

⁵Although Meadow View originally was to have contained two additional buildings, the parties

stipulated at
hearing that no
additional
condominiums
will be built at
Meadow View.
Charge ¶ 6; Tr.
9.

⁶2024-28 Manico Ct. is delineated as Building 3 on CPX7, p. A1, and is referred to as Building 3 in the Charge, while 2034-38 Manico Ct. is Building 4 on CPX 7, p. A1, and is referred to as Building 4 in the Charge.

between each building and the parking lot.⁷ Tr. 47, 66, 70, 75-76; RX4, 5; CPX9A, 9D. From the sidewalk, a number of steps must be climbed to reach the front entrances of the buildings. Tr. 47, 57, 70-71, 76, 100, 106; RX4-6; CPX9K. Once inside, additional steps must be negotiated, either up or down, to reach an apartment. Tr. 47, 57-58, 78. On the rear of both buildings, ground-floor units have sliding glass doors and patios; the upper-level units have balconies. Tr. 54-55, 73-74; RX1, 8, 9, 13, 14. Building 2 has a walkway from the driveway that connects the ground-floor unit patios; Building 1 does not. Tr. 72; RX9; CPX9C, 9F, 9G, 9I.

8. Each building was designed and constructed for first occupancy after March 13, 1991. Charge ¶ 13. The City of Crest Hill issued a building permit for Building 1 on July 19, 1995, and for Building 2 in January 1996. Tr. 170; CPX10.

9. Respondent Persico resides in Sarasota, Florida, and maintains, but does not own, a residence in a ground-floor unit in Building 2 at Meadow View. Tr. 148-49, 173. His wife is the Secretary of Respondent Perland Corp., and she works at the sales office at Meadow View. Tr. 167. Mr. Persico was born and raised in Italy, where he completed his formal education through the fifth grade. Tr. 149. He came to the United States in 1956. *Id.* In 1960, following work as a construction laborer, he began his own asphalt paving business. Tr. 150. Mr. Persico sold that business in 1988, and in 1989, he acquired the property on which Meadow View was built.⁸ Tr. 151-53.

10. Respondents employed Thomas A. Buchar, and Thomas A. Buchar & Assoc., Inc., to draw building plans for Meadow View. Charge ¶ 12; CPX7-8B. Respondents, together with the architects, are responsible for the design of Meadow View. Charge ¶ 12; CPX7-8B.

⁷Meadow View has one curb cut between the sidewalk along the rear of Building 2 and the driveway). This sidewalk ends at the driveway. See RX7, 8. (There is no sidewalk along the rear of Building 1. Tr. 72; RX10).

⁸Despite Mr. Persico's description of himself as "just a ditch digger" with limited formal education (see Tr. 183, 149), his testimony demonstrates considerable business acumen and sophistication.

11. With the exception of the condominiums and common areas that have been sold under construction, Respondent Perland Corp. owns Meadow View. Charge ¶8; Tr. 152-53, 172. Respondent Persico was present during the construction of Meadow View and supervised the work of subcontractors. Tr. 166, 181, 173, 185.

12. Perland Corp. has sold one of the ground-floor units in Building 1. It has also sold six upper-level units in Building 1 and one upper-level unit in Building 2. Perland Corp. owns five units in Building 1 and 11 units in Building 2. A homeowners' association owns the common areas of Building 1, and Respondents maintain those areas. Perland Corp. owns the common areas of Building 2, and Respondents maintain them. Tr. 172-73; Charging Party's Brief at 4 & n.6.

Complainant's Actions With Respect To Meadow View

13. Traveling by Meadow View in late March 1996, Ms. Heavens observed a sign advertising condominiums for sale. Charge ¶ 20; Tr. 26. Later, she asked her staff to visit the site to "see that it was being built according to the Act." Tr. 26-27.

14. Leigh Ann Heenan, Independent Living Coordinator for Complainant visited Meadow View on April 2, 1996. Charge ¶ 21; Tr. 45, 47. At the time of the visit, only Building 1 had been constructed. Ms. Heenan observed that Building 1 was not accessible to a person using a wheelchair, because steps were required to enter the building and the apartments, and no curb cuts existed between the parking lot and the building. Charge ¶ 21; Tr. 47.

15. On or about June 5, 1996, Ms. Heenan telephoned Respondents and spoke with "Connie." Tr. 48.⁹ Connie informed Ms. Heenan that one 12-unit building (Building 1) "was up."¹⁰ *Id.* Ms. Heenan informed Connie that the Act required new condominiums to be accessible. *Id.* When asked, Connie advised Ms. Heenan that Respondent Persico owned Meadow View. Tr. 48-49.

⁹A "Connie Bursar" signed the return receipt that accompanied the July 16, 1996, letter from Complainant to Respondents, discussed *infra*, which was sent to Respondents' Post Office Box number in Joliet, Illinois. See CPX 3.

¹⁰According to Mr. Persico, Building 1 was "completed" through the winter of [1996]." Tr. 196. The term "completed" meant to him that, except for some work by the trim carpenter and carpet installation, the units were finished. See Tr. 189-92.

16. By registered letter dated July 16, 1996, Complainant notified Respondents that Meadow View did not comply with the design and construction requirements of the Act explained those requirements, and offered assistance in meeting them. Tr. 27-28; CPX2, 3. Respondents received Complainant's letter on July 17, 1996, but failed to respond to it. *Id.* Ms. Heenan made a second visit to Meadow View in late July 1996 and observed that Building 2 was under construction; concrete had been poured and the outer shell had been built.¹¹ Tr. 50, 171. By registered letter dated August 1, 1996, Complainant again wrote to Respondents about the failure of Meadow View to comply with the Act. Tr. 29-30; CPX4, 5. Respondents received this letter on August 9, 1996, but did not respond to it.¹² Tr. 29, 50-51; CPX5.

17. Complainant filed a fair housing complaint with HUD on August 28, 1996. Tr. 30-31, 50; CPX6. By letter dated September 13, 1996, Respondents replied to HUD's letter that had enclosed a copy of the complaint. In that letter, Respondents requested copies of the attachments referred to in the complaint "as well as explanatory materials on the law referred to" by HUD.¹³ CPX11.

The Lack of Accessibility at Meadow View

18. Each ground-floor unit at Meadow View was designed and constructed so that

¹¹ According to Mr. Persico, Building 2 was "completed" in January 1997. Tr. 196. See also *supra* n. 10. However, his testimony was directly contradicted by his January 21, 1997, agreement with a real estate agent in which he states that "[u]nits at [2034-38] Manico Ct. are not yet completed and will be reserved for long term buyers." CPX12. In any event, at the time he received the second letter from Complainant, construction of Building 2, was in a relatively early phase.

¹² I do not find credible Mr. Persico's testimony that, after several failed attempts to respond to Complainant by telephone, he was referred to "some lady in Chicago," who said she would meet with Respondent, but never did. See Tr. 170-71. He failed to supply a date or detail any attempt to contact Complainant nor did he say why he was referred to someone else or who made the referral. There was no reason for him to call anyone in Chicago. Complainant is located in Joliet

¹³ Mr. Persico's claim in that letter that "no one ever contacted our office for assistance until this Complaint was filed [with HUD]" is not credible. CPX11. As early as June 5, 1996, Ms. Heenan had telephoned Respondent and spoken to "Connie." See *supra* Finding of Fact No. 15. Moreover, at the hearing, Mr. Persico testified that he first learned that Meadow View might not comply with applicable accessibility requirements when he received the letter from "Will-Grundy County" in late July or August of 1996. Tr. 170.

the public and common-use portions of the ground-floor dwellings are not readily accessible to and usable by persons with disabilities. Charge ¶ 15.¹⁴

Specifically, the following conditions at Meadow View prevent ready accessibility in those dwellings:

(a) each ground-floor unit can be accessed only by using steps, both to enter the building and then to descend to the unit. Charge ¶ 15; Tr. 57-58, 76, 78, 105-07; CPX9A; RX4-5.

b) curbs must be climbed because no curb cuts exist between the parking lot and the building entrances. Charge ¶ 15; Tr. 76, 105, 106; CPX9A, 9B, 9E; RX4, 5.

c) the building entrance doors and the unit doors have round doorknobs, rather than lever or other accessible hardware. Charge ¶ 15; Tr. 77, 79.

d) the parking lot has no handicap-designated parking spaces. Charge ¶ 15; Tr. 75, 106.

e) no accessible wheelchair route exists from Manico Court and its sidewalk to the buildings or the parking lot. Charge ¶ 15; RXI, 7, 8, 13.

19. Each ground-floor unit at Meadow View was designed and constructed so that all doors designed to allow passage into and within the dwellings are not sufficiently wide to allow passage by persons using wheelchairs. Charge ¶ 16. These doors include bedroom, bathroom and walk-in closet doors. *Id.* See also Tr. 84-85, 96-97, 108, 127. A doorway must be at least 32" wide to permit a person using a wheelchair to pass through it. Charge ¶ 16.

20. Each ground-floor unit at Meadow View was designed and constructed so that its electrical outlets are not in accessible locations. Charge ¶ 17. The outlets are too low to be reached by a person using a wheelchair because they are only about 11"- 12" from the floor. *Id.* See also Tr. 139-40.

¹⁴ The Charge alleged that Meadow View's trash receptacles were not accessible. See Charge ¶ 15. At hearing, the parties stipulated that the receptacles are accessible. Tr. 9.

21. Each ground-floor unit at Meadow View was designed and constructed without reinforcements in bathroom walls to allow for later installation of grab bars. Charge ¶18.

22. Seven ground-floor units at Meadow View do not have usable bathrooms because they lack maneuvering space for an individual using a wheelchair. Charge ¶ 19. In each unit: 1) in the master bathroom, the tub obstructs access to the bath controls because they are located on the wall behind the tub; and 2) the second bathroom is too small to provide 30" by 48" of clear floor space at the sink, toilet and tub. Charge ¶ 19. See *a/so* Tr. 91.

23. Four ground-floor units at Meadow View, *ie.*, those in Building 2, do not have usable kitchens because they lack maneuvering space for an individual using a wheelchair. The kitchens do not have at least 30" by 48" of clear floor space in front of the range to allow a parallel approach to be made to it. Tr. 106, 110-11, 132; CPX8B.¹⁵

24. Meadow View can be retrofitted to address the accessibility requirements that pertain both to the public and common use portions of the ground-floor dwellings and to the individual ground-floor units themselves, as set forth in Findings of Fact Nos. 18-23.¹⁶ See, *e.g.*, Tr. 77-80, 85-90, 93-105, 106-113, 132-33, 135-39, 173-74.

Complainant's Damages

25. Had Meadow View been designed and constructed to be accessible by persons with disabilities, Complainant would not have had to divert resources from its other functions to investigate and enforce the law in this case. Tr. 36. These other functions include community outreach, education, and technical assistance in providing and acquiring accessible housing for persons with disabilities. Tr. 19-24, 36.

26. Complainant's staff spent a total of 74.5 hours investigating Meadow View, developing the complaint, and working on pre-trial matters.¹⁷ Tr. 32-33. Ms. Heavens worked 17.5 hours; Ms. Heenan, 12.5 hours; and Kyla Fris, 44.5

¹⁵The Charge did not allege a lack of clear floor space in the kitchens to allow a parallel approach to the ranges. Any determination of liability, therefore, cannot be based on this finding of fact.

¹⁶The finding that Meadow View can be retrofitted is based chiefly on the testimony of the Charging Party's expert witness, Alexander Grinnell. See Tr. 59-147. Mr. Grinnell is an architect with 35 years of experience, including participation in the preparation of a cost study for HUD of the design and construction requirements of the Act. He was the principal in charge of a book on universal design, a concept which concerns the thoughtful designing of homes for accessibility. See Tr. 59-64. At hearing, Mr. Grinnell outlined a variety of options for the retrofitting of Meadow View.

¹⁷ Pre-complaint activities included visiting Meadow View, communicating with Respondents through a telephone call and letters, and requesting information about Meadow View from the City of Crest Hill. See, *e.g.*, Tr. 27-30, 47-49; CPX2, 3, 4, 5. Pre-trial activities included discussions with the Charging Party's counsel and among Complainant's staff, as well as settlement discussions, including those with the settlement judge. Tr. 35-36.

hours. Tr. 34-35. In addition, all three traveled from Joliet to Chicago to attend the hearing, an expenditure of about 8 hours each. Tr. 36. The cost to Complainant of these activities is \$54 per hour for Ms. Heavens and \$43 per hour for Ms. Heenan and Ms. Fris, for a total cost of \$4,516. Tr. 32, 34-35.

Discussion

A. Respondents Discriminated Against Complainant In Violation of Section 804(f)(2) of the Act

1. Respondents Failed to Design and Construct Meadow View in Accordance with the Requirements of the Act

Since March 12, 1989, the effective date of the Fair Housing Amendments Act of 1988, the Act has prohibited discrimination in housing based on handicap.¹⁸ Pub. L. No. 100-430, 102 Stat. 1619 (1988). The Fair Housing Amendments Act of 1988 is "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. at 18 (1988) ("H.R. Rep."). Accordingly, toward that commitment, section 804(f)(2) of the Act makes it unlawful:

[t]o discriminate against any person in the terms, conditions, or privileges of sale... of a dwelling, or in the provision of services or facilities in connection with such a dwelling, because of a handicap of (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold... or made available; or (C) any person associated with that person.

42 U.S.C. § 3604(f)(2). See also 24 C.F.R. § 100.202(b).

Congress believed, however, that simply affording persons with disabilities traditional fair housing protections was not sufficient to ensure them equal access

¹⁸The Act defines handicap as:

- (1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment, [excluding the] current illegal use of or addiction to a controlled substance.

42 U.S.C. § 3602(h). See also 24 C.F.R. § 100.201 (1997).

to housing. See H.R. Rep. at 24-28. Congress recognized that housing that is not accessible to persons with mobility impairments just as effectively excludes those persons as housing on which a sign is posted stating "No Handicapped People Allowed." *Id.* at 25. Consequently, Congress created specific requirements related to persons with disabilities that did not exist for other protected classes. See *id.* at 24-28; 42 U.S.C. § 3604(f)(3)(C). For example, certain multifamily dwellings must be designed and constructed with

specific "modest" accessibility features.¹⁹ H.R. Rep. at 18. See also 42 U.S.C. § 3604(f)(3)(C).

Discrimination under the Act includes the failure to design and construct "covered multifamily dwellings"²⁰ so that:

1. Public and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;
2. All doors designed to allow passage into and within all premises within the dwellings are sufficiently wide to allow passage by persons using wheelchairs;
3. All premises within the dwellings contain the following features of adaptive design:
 - a. An accessible route into and through the dwelling;
 - b. Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
 - c. Reinforcements in bathroom walls to allow later installation of grab bars; and

¹⁹The design and construction standards did not become effective until March 12, 1991, two years after the other provisions of the Fair Housing Amendments Act of 1988 became effective. See 42 U.S.C. § 604(f)(3)(C). This delay was to "allow architects and builders adequate time to finish building projects already under way and make design modifications that will be adequate in the future." 134 Cong. Rec. S10,544-02 (daily ed. Aug. 2, 1988) (statement of Sen. Hatch).

²⁰ Covered multifamily dwellings" include ground-floor units in buildings with four or more units, first occupied after March 13, 1991. 42 U.S.C. § 3604(f)(7); 24 C.F.R. §§ 100.201, 100.205(a).

d. Usable kitchens and bathrooms such that an individual using a wheelchair can maneuver about the space.²¹

42 U.S.C. § 3604(f)(3)(C); 24 C.F.R. § 100.205(c) ("accessibility requirements" or "design and construction requirements"). By enacting these requirements, Congress expressed its belief that "[c]ompliance with these minimal standards will eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities." H.R. Rep. at 27-28.

The eight ground-floor units at Meadow View are covered multifamily dwellings because each is a ground-floor unit in a building with four or more units which was first occupied after March 13, 1991. For the reasons stated below, Meadow View was designed and constructed so that it fails to meet the requirements of 42 U.S.C. § 3604(f)(3)(C) and 24 C.F.R. § 100.205(c).

The public and common-use portions of the ground-floor dwellings at Meadow View are not readily accessible to and usable by persons with disabilities, as 42 U.S.C. § 3604(f)(3)(C)(I) requires. All interior doors designed to allow passage within the eight ground-floor dwellings are not sufficiently wide to allow passage by persons using wheelchairs. See 42 U.S.C. § 3604(f)(3)(C)(ii). In addition, eight ground-floor units do not contain the following features of adaptive design: a) electrical outlets in accessible locations, and b) reinforcements in bathroom walls to allow for later installation of grab bars. See *id.* at §§ 3604(f)(3)(C)(iii)(II) and (III). Seven ground-floor units do not contain a usable bathroom such that an individual in a wheelchair can maneuver about the space, as section 804(f)(3)(C)(iii)(IV) of the Act requires. Finally, four of the ground-floor units at Building 2 do not contain a usable kitchen such that an individual using a wheelchair can maneuver about the space, as section 804(f)(3)(C)(iii)(IV) of the Act requires.

2. Meadow View Is Not Exempt From the Design And Construction

a. HUD's Regulations Provide for a Site Impracticality

²¹ Congress drafted the requirement that all premises contain these features of adaptive design in consultation with the National Association of Home Builders and the American Institute of Architects. H.R. Rep. at 26.

Exemption from the Design and Construction
Requirements of the Act

The Act does not contain an exemption from its design and construction requirements. See 42 U.S.C. § 3604(f)(3)(C). However, the Department recognized that Congress "was sensitive to the possibility that *certain natural terrain* may pose unique building problems." 24 C.F.R. Ch. 1, Subch. A, App. I at 746 (1996) (preamble to regulations implementing the Act) (quoting H.R. Rep. at 27) (emphasis added). Consequently, the Department determined that the design and construction requirements would apply to all covered multifamily dwellings except in those instances in which the terrain or other unusual characteristics of the site make it impractical to provide at least one building entrance on an accessible route.²² See 24 C.F.R. §§ 100.205(a), (c).

Exemptions from the Act "are to be construed narrowly, in recognition of the important goal of preventing housing discrimination." *Massaro v. Mainlands Section 1 & 2 Civic Assn., Inc.*, 3 F.3d 1472, 1475-76 (11th Cir. 1993), *cert. denied*, 513 U.S. 808 (1994) (citing *Elliot v. City of Athens, Ga.*, 960 F.2d 975, 979 (11th Cir.), *cert. denied*, 506 U.S. 940 (1992)).²³ Congressional sponsors of the Act echoed this principle when they commented on the Department's proposed Fair Housing Accessibility Guidelines ("Guidelines"):

The Congressional sponsors of the Act (U.S. Representatives Edwards, Fish and Frank) stated that a limited exemption for slopes greater than 10% was not contemplated by the Act"; but that they believed the Department has the discretion to develop such an exemption if it is "carefully crafted and narrowly tailored."

Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9483 (1991).²⁴ Thus, regardless of the methodology used to prove impracticality, an overriding

²²The regulations at 24 C.F.R. § 100.205(a) provide that "[c]overed multifamily dwellings ... shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site." Section 100.205(c) further provides that "[a]ll covered multifamily dwellings ... with a building entrance on an accessible route shall be designed and constructed" in compliance with the design and construction requirements.

²³ See also *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991).

²⁴The Guidelines, published on March 6, 1991, were adopted by HUD "to provide builders and developers with technical guidance on how to comply with the specific accessibility requirements of the Fair Housing Amendments Act of 1988." 56 Fed. Reg. 9472.

consideration is that the exemption be applied consistent with Congressional intent so as not to swallow the general rule meant to foster accessibility.

b. Respondents Have Not Shown that it was Impractical to Meet the Design and Construction Requirements

HUD regulations provide that the burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility.²⁵ 24 C.F.R. § 100.205(a). The regulations do not provide guidance on how the burden of demonstrating impracticality can be met. HUD's Guidelines serve that function by providing "technical guidance on designing dwelling units as required by [the Act]." 56 Fed. Reg. 9499. The Guidelines "are not mandatory, nor do they prescribe specific requirements which must be met and which, if not met, would constitute unlawful discrimination under the Fair Housing Act." *Id.* Persons "may choose to depart from [the Guidelines] and seek alternate ways to demonstrate that they have met the requirements of [the Act]." *Id.* Thus, the Guidelines "are intended to provide a safe harbor for compliance with the accessibility requirements of [the Act]." *Id.*

The Guidelines set forth two alternative tests for determining whether the terrain of the site makes it impractical to provide at least one building entrance on an accessible route when, as in this case, a building does not have an elevator. These are the individual building test and the site analysis test.²⁶ *Id.* at 9503-04. In publishing the Guidelines the Department stated its belief that, consistent with Congressional intent it had presented enforceable criteria for determining when terrain makes accessibility impractical, while providing builders and developers with flexibility in their selection of the most appropriate or least burdensome approach for project development. *Id.* at 9484.

Both the individual building and site analysis tests require, as a primary element evidence of the slope of *the undisturbed site* on which Meadow View was

²⁵ The burden of establishing entitlement to an exemption from the Act is on the person claiming the exemption. See, e.g., *Hogar Agua Y Vida En El Desierto, Inc. v. Suarez-Afedina*, 36 F.3d 177, 182 n.4 (1st Cir. 1994). (single family house exemption); *Massaro*, 3 F.3d at 1475 (housing for older persons exemption); *Columbus Country Club*, 915 F.2d at 881-82 (religious and private club exemptions).

²⁶ The Guidelines provide that "regardless of which test is selected, at least 20% of the total ground floor units in nonelevator buildings, on any site, must comply with the guidelines." 56 Fed. Reg. at 9503.

constructed. *Id.* at 9482, 9503-04. Where, as here, there are multiple buildings with multiple entrances, the individual building test first requires evidence of the slope, on the undisturbed site, of a straight line between each of the planned building entrances and certain pedestrian and vehicular arrival points. The site analysis test first requires a calculation of the total buildable area of the undisturbed site having a natural grade of less than 10 percent. Respondents presented no such evidence. Respondents, therefore, failed to establish under either the individual building test or the site analysis test that Meadow View's terrain made it impractical to design and construct its ground-floor units so that there would be at least one building entrance on an accessible route.

Respondents rely on the testimony of the Charging Party's expert witness, Alexander Grinnell, that the slope from the parking lot down to the end of the street at Manico Court "varies between probably 3 and 10 or 12 percent...." Tr. 65. However, Mr. Grinnell specifically testified that the slope had "been modified and manipulated to create the contours that exist currently." *Id.* Therefore, Mr. Grinnell's testimony does not relate to the slope of the undisturbed site.

Respondents also rely on Mr. Persico's testimony that the preconstruction slope from the front of Building 2 to the street, running down the length of the driveway, was approximately 13%. Tr. 158-59. That testimony, however, was stricken as it was based on hearsay. Tr. 162. Even if that testimony had been admissible, that one figure would not have been sufficient to meet the individual building test because it is not evidence of the slope from any planned entrance to any relevant arrival point. Moreover, Mr. Persico's estimate of a 13% grade does not square with his testimony: 1) that the elevation of Manico Court was 600 feet above sea level; 2) that the elevation at the front of Building 2 was 620 feet above sea level; and 3) that the distance from Manico Court to the front of Building 2 was 125 feet. Tr. 159. First, the difference in elevation --20 feet--divided by the distance --125 feet-- yields a slope of 16% ($20/125 \times 100 = 16\%$). Second, the site plan upon which Mr. Persico relied showed the elevation at the front of Building 2 to be no more than 610 feet which would yield a slope of 8% ($10/125 \times 100 = 8\%$). Finally, the only location on the site plan of an area with a 620 foot elevation is a tiny spot at the extreme northern corner of the site and on which nothing is built. See CPX7.

To fully establish impracticality under the individual building test, Respondents would have had to have shown, for each entrance, that the slopes of *both* the undisturbed site *and* the planned finish grade exceed 10 percent as measured between the planned entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance. 56 Fed. Reg. at 9503 (emphasis added). See

also id. at 9484. They did not make that showing.

To prove impracticability under the site analysis test Respondents would had to have first calculated the percentage of the *total buildable area* of the undisturbed site with a natural grade sloped less than 10%. *Id.* at 9503-04. Then they would had to have made accessible, at a minimum, the number of ground-floor units equal to the percentage of total buildable area (excluding floodplains, wetlands or other restricted use areas) of the undisturbed site with an existing natural grade of less than 10% slope. *Id.* at 9504. See *also id.* at 9484. In addition to this minimum, all other ground-floor units in a building, or served by a particular entrance, would had to have been made accessible if the entrance is on an accessible route, *i.e.*, a walkway with a slope between the planned entrance and a pedestrian or vehicular arrival point that is no greater than 8.33%. *Id.* at 9504. The Guidelines also require that: 1) the slope analysis be based on a topographic survey having two-foot contour intervals, with slope determinations made between each successive interval; and 2) the accuracy of the slope analysis be certified by a professional, licensed engineer, landscape architect architect or surveyor. See *id.* at 9504. Respondents introduced no evidence to show that they met any of these requirements.

Respondents are not bound by the impracticability tests set forth in the Guidelines and may choose to establish impracticability by other evidence. See *id.* at 9499. However, because the goal of the design and construction requirements is to eradicate "barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities," H.R. Rep. at 27-28, any exemption from those requirements must be construed narrowly to avoid undermining achievement of that goal. See *supra* pp. 12-13. Accordingly, any alternative method must have a rational basis, proven by reliable, probative, and credible evidence. Regardless of the method proposed, the evidence must demonstrate that the impracticability of providing at least one building entrance on an accessible route is attributed to *the terrain or other unusual characteristics of the site*. See 24 C.F.R. § 100.205(a).

Respondents failed to establish that Meadow View is exempt from the design and construction requirements of the Act because the natural terrain or other unusual characteristics of the site make it impractical to provide at least one building entrance on an accessible route. Respondents' only evidence on the exemption issue is Mr. Persico's testimony that the grade of the driveway is inconsistent and ranges in slope from 9.25% to 11.5%. Tr. 195, 197. However, as previously noted, Mr. Persico's testimony as to slope is not reliable. Moreover, evidence of the driveway slope ignores the slope of the remainder of the site and,

therefore, is insufficient to demonstrate that a building entrance on an accessible route could not be provided at the front rear, or side opposite the driveway of each building.

Respondents also argue that it is impractical to require them to retrofit Meadow View to provide a building entrance on an accessible route. To support this argument they cite Mr. Persico's testimony concerning the slope of the driveway, as addressed above, as well as Mr. Grinnell's testimony that the slope of a ramp or sidewalk cannot exceed 8.33% under the Guidelines. They argue that it is impractical to require installation of a sidewalk along the east side of Building 2, parallel to the driveway. Tr. 77; Respondents' Reply Brief at 5. That argument fails for two reasons. First, it is based in part on Mr. Persico's unreliable testimony. Second, even if, for some unstated reason, it is impractical to construct a sidewalk on the east side of Building 2, there is no evidence that a walkway or ramp could not be constructed on the west side of the building (where the site map seems to indicate that the slope from the parking lot to Manico Court is no more than 8%).

3. Respondents Discriminated Against Complainant By Failing to Construct Meadow View in Accordance With the Requirements of the Act.

By failing to design and construct Meadow View in accordance with 42 U.S.C. § 3604(f)(3)(C) and 24 C.F.R. § 100.205(c), Respondents discriminated against Complainant and persons associated with Complainant because of handicap, in violation of 42 U.S.C. § 3604(f)(2) and 24 C.F.R. § 100.202(b)²⁷. As the president of Perland Corp. and the individual who controls its actions, Mr. Persico is liable to the same extent as the corporation.

B. Remedies for Respondents' Discrimination

The Act provides that when a respondent has been found to have engaged in a discriminatory housing practice, the Administrative Law Judge ("ALJ") shall

²⁷ At the hearing, Respondents raised a question concerning Complainant's standing, but did not pursue the matter on Brief. See Tr. 16-17. In any event, it is well established that Complainants have standing in this case. See *City of Chicago v. Matchmaker Real Estate Sales Ctr. Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.), *cert. denied*, 498 U.S. 980, 1046 (1990); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

issue an order for "such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief." 42 U.S.C. § 3612(g)(3). The Act also provides that to "vindicate the public interest" the ALJ may also assess a civil penalty. *Id.* The Charging Party seeks to compensate Complainant for its actual damages and to impose a civil penalty against each Respondent.²⁸ The Charging Party also prays for injunctive and other equitable relief.

1. Economic Loss

a. Diversion of Resources

A fair housing organization may recover the opportunity costs of discrimination by demonstrating that a respondent's conduct has caused the organization to divert its resources from fulfilling its usual functions, such as education and outreach, to seeking redress for the respondent's discriminatory conduct. See *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990); *Saunders v. General Serv. Corp.*, 659 F.Supp. 1042, 1060 (E.D.Va. 1987); *HUD v. Janeik*, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,058, 25,567 (HUDALJ Oct. 1, 1993), *affd*, 44 F.3d 553 (7th Cir. 1995); *HUD v. Wilkowski*, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,045, 25,451 (HUDALJ May 18, 1993); *HUD v. Properties Unlimited*, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,009, 25,148 (HUDALJ Aug. 5, 1991). Complainant has demonstrated the requisite injury by showing that Respondents' discriminatory conduct caused Complainant to divert 98.5 staff hours from its usual activities in order to pursue this case. That expenditure of time was reasonable and appropriate. Accordingly, Complainant will be awarded \$4,516 for diversion of its resources.

b. Prospective Expenses

A fair housing organization may also be awarded the cost of monitoring a respondent's future conduct to ensure that the violation is corrected and that discrimination does not reoccur. See, e.g., *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1099 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Open Housing Ctr, Inc. v. Samson Management Corp.*, 1996 WL

²⁸ Respondents argue that no relief, remedy, or damages be awarded or imposed against Mr. Persico in his individual capacity. However, each Respondent is subject to the full panoply of remedies available under the Act, and, as discussed *infra*, the regulations expressly authorize the imposition of a civil penalty against each respondent. See 24 C.F.R. § 180.670(b)(3)(iii)(C).

140279 at 3 (S.D.N.Y. 1996); *Jancik*, 2A Fair Housing - Fair Lending at 25,567-68; *Properties Unlimited*, 2A Fair Housing-Fair Lending at 25,148-49. Because, as discussed below, Respondents will be required to retrofit Meadow View, Complainant will be awarded \$1,400, the cost of the 30 hours it estimates will be required to monitor the retrofitting and provide technical assistance to Respondents.²⁹ Such assistance will include visits by Ms. Heavens to ascertain whether a person using a wheelchair can enter and maneuver about the units. The amount sought by the Charging Party is reasonable and appropriate under the circumstances.

2. Injunctive and Other Relief

The two goals of injunctive and other equitable relief are to eliminate the effects of prior discrimination and to prevent future discrimination. See, e.g., *HUD v. Blackwell*, 908 F.2d 864, 874 (11th Cir. 1990); *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983). Once the ALJ determines that a violation of the Act has occurred, he has "the power as well as the duty to 'use any available remedy to make good the wrong done.'" *HUD v. Gwizdz*, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,086, 25,796 (HUDALJ Nov. 1, 1994) (quoting *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citations omitted)). See also *United States v. Yonkers Bd of educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). That duty is limited in one significant respect: no order may affect any sale or contract consummated before the order is issued, if that sale or contract involves a bona fide purchaser without actual notice of the Charge. 42 U.S.C. § 3612(g)(4); 24 C.F.R. § 180.670(b)(3)(ii). Because prior to the issuance of the Charge, Perland Corp. sold one ground-floor unit and transferred ownership of the common areas of Building 1 to a homeowners' association, the sale of that unit and the transfer of the common areas may not be affected by any order of equitable relief. See Charge ¶ 8; Charging Party's Brief at 29. Rather, the relief afforded must be crafted to provide incentives to bring the unit and the common areas into compliance with the Act.³⁰

²⁹ Ms. Heavens testified that monitoring and technical assistance will entail 10 hours of work by her at \$54 per hour and 20 hours of work by Ms. Fris at \$43 per hour. Tr. 37-38.

³⁰ Breadth and flexibility are inherent in equitable remedies. " *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836, 857 (N.D. Ill. 1979) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)), *affd*, 616 F.2d 1006 (7th Cir. 1980).

The Charging Party seeks an order requiring Respondents: 1) to retrofit the portions of Meadow View that Perland Corp. owns so that those portions meet the accessibility requirements; and 2) to make every effort to obtain permission to retrofit the portions that Perland Corp. no longer owns, and (a) if permission is granted, retrofit those portions, or (b) if permission is denied, establish a fund to pay the cost of retrofitting those portions in the future. In addition, the Charging Party seeks to prohibit Respondents from selling or otherwise transferring ownership of any portion of Meadow View until that portion complies with the accessibility requirements. For the reasons set forth below, the relief sought by the Charging Party will be granted, with certain specified modifications.

Injunctive and other equitable remedies must be "tailored to cure the 'condition that offends the ... [statute].'" *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 83 6, 856 (N.D. Ill. 1979) (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)), *affd*, 616 F.2d 1006 (7th Cir. 1980). In this case, the condition that offends the statute is the failure of Meadow View to comply with the accessibility requirements of the Act a condition that precludes persons using wheelchairs and having other mobility impairments from residing at, or even visiting, Meadow View. Retrofitting, the cure sought by the Charging Party, has been recognized by numerous courts as an appropriate remedy for noncompliance with design and construction requirements in various statutes.³¹

³¹For example, other federal statutes with such requirements mandate retrofitting upon a finding that design and construction requirements have not been met. See, e.g., 42 U.S.C. § 12188(a)(2) (upon a finding of noncompliance with the ADA's design and construction requirements, injunctive relief shall include an order to alter covered facilities to make them readily accessible to and usable by persons with disabilities); 46 U.S.C. § 3313 (if a tanker vessel is found not to meet design and construction standards, it must be brought into compliance or its inspection certificate may be revoked). In *Coalition of Montanans Concerned with Disabilities Inc. v. Gallatin Airport Auth.*, 957 F. Supp. 1166, 1171 (D. Mont. 1997), the court ordered the Airport Authority to redesign and construct its terminal that was found to have been designed in violation of the ADA. Orders to retrofit have been also been issued where buildings have been constructed in noncompliance with applicable building codes. See, e.g., *City of Chicago v. Birmbaum*, 274 N.E. 2d 22, 25 (Ill. 1971).

Respondents assert that retrofitting should not be required because it will be expensive and difficult, particularly to the extent it may require moving load-bearing walls. Although Respondents' concerns are plausible, they do not affect the determination that retrofitting is an appropriate remedy in this case. First, the Charging Party's expert witness testified that, based on builders' cost the cost of retrofitting the ground floor units at Meadow View is approximately \$4,000 to 5,000 per unit (including moving load-bearing walls) and \$2,300 to \$2,700 for the common areas of Building 2. See *Tr.* 111, 114-15, 143. Those costs have not been shown to be unreasonable or to be beyond the financial capabilities of Respondents. Second, the Charging Party's expert suggested that Respondents may be able to secure waivers from the local building inspector to make some alterations that could reduce expense and difficulty. Finally, Complainant will be available to provide technical assistance to Respondents and to advise HUD if any design or construction standard should be waived or modified for the affected property.

Meadow View can be retrofitted in a variety of ways to meet the accessibility requirements of the Act. The Charging Party's expert suggested a number of ways retrofitting could be accomplished, and the Charging Party acknowledges that Respondents may choose the methods by which compliance may be achieved. See Charging Party's Brief at 31 n.28 (citing *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers*, 950 F. Supp. 393, 405 (D.D.C. 1996) (ordering alteration of the design to bring a sports arena into compliance with ADA, but declining to specify how the changes should be implemented, and instead requiring defendants to devise their own plan to achieve compliance with the ADA)).

The Charging Party also requests that Respondents be required to "submit to HUD plans on how to redesign Meadow View for review by an expert' and to "establish a fund of \$2,500 to pay the expert for his review." See Draft Order at ¶ 2(b), Attachment C to Charging Party's Brief. However, this requested provision will not be included in the Order. There is no justification for the relief requested; it conflicts with the flexibility afforded Respondents to select the methodology for achieving compliance; it has the potential of conflicting with the technical assistance Complainant may offer Respondents; and it fails to specify the consequences of any adverse review by the expert.

The fact that Perland Corp. no longer owns one unit and the common areas of Building 1 does not relieve Respondents of liability for discrimination, nor does it obviate

the need to provide relief for violating the Act. Relief must be fashioned to protect federal rights and implement federal policies, *ie.*, "to end the unnecessary exclusion of persons with handicaps from the American mainstream" -- even though intervening circumstances may render it difficult or impossible to order the optimal relief. H.R. Rep. at 18. See also *Park View Heights Corp. v. City of BlackJack*, 605 F.2d 1033, 1040 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). To that end, Respondents will be required to make specific efforts to obtain permission from the current owner of the ground-floor unit and from the homeowners' association at Building 1 to retrofit the unit and the common areas. As an incentive to the present owner of the ground-floor unit to retrofit that unit, Respondents will be required to offer the owner up to \$500 for the inconvenience of altering the unit. Respondents also will be required to take such steps as are necessary and within their power to oblige the homeowners' association to consider and vote favorably on a resolution to permit retrofitting of the common areas. Moreover, as a further incentive for current homeowners to allow retrofitting of the common areas, the Order will prohibit Respondents from selling any ground-floor unit until the common areas have been retrofitted to allow accessibility to and within those units. Once those ground-floor units have been sold and their owners become part of the homeowners' association, the common maintenance costs of the current homeowners will be reduced proportionately.

In the event Respondents are unable to obtain permission to retrofit the groundfloor unit and common areas of Building 1, they will be required to create an escrow fund in an amount equal to the cost of retrofitting the unit and common areas in the future.³² The fund will contain \$10,000, the present cost of retrofitting the unit and the common areas.³³ If prior to the expiration of 4 years the unit and the common areas have been retrofitted and any monies remain in the fund, the

³²Courts have required developers to establish retrofit funds to remedy violations of the Act based on the accessibility requirements. See, *e.g.*, *United States v. A. T. Maras Co., Inc.*, Civ. No. 97 C 8176 (N.D. Ill. Dec. 8, 1997) (Consent Decree) (Attachment A to Charging Party's Brief); *HUD v. Hansen*, No. 09-91-2048-3 HUDALJ Apr. 28, 1992) (Consent Order) (Attachment B to Charging Party's Brief). Such a remedy, in light of the transfers of ownership that have occurred and the goals of the Act, is "what is necessary, what is fair, and what is workable." *Park View Heights*, 605 F.2d at 1036 (quoting *Lemon v. Kurtzman*, 411 U.S. 192,200 (1973)). See also *HUD v. DiCosmo*, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,094, 25,851 HUDALJ Feb. 1, 1995) (equitable relief "is to be tailored to the facts of the particular situation").

³³The Charging Party's expert witness, Mr. Grinnell, testified that the approximate cost based on builders' cost, of retrofitting the ground-floor unit at Building 1 that has been sold (including moving load-bearing walls) will be \$4,000 to \$5,000, and that the approximate cost of retrofitting the common areas of Building 1 would be \$4,600 to \$5,200. Tr. 111, 114-15, 143. I find those estimates to be reasonable and the appropriate basis for determining the amount of the fund for future retrofitting.

balance of the fund shall be transferred to Respondents. If, after 4 years, any monies remain in the fund, the balance of the fund shall be transferred to Complainant which shall make such funds available to persons

residing in, or intending to reside in, Will County to pay the cost of modifications to make housing accessible to persons with disabilities.

C. Civil Penalties

The Act provides that when "a respondent has engaged ... in a discriminatory housing practice" the ALJ may assess a civil penalty "against the respondent ... in an amount not exceeding \$11,000.00 if the respondent has not been adjudged to have committed any prior discriminatory housing practice..... 42 U.S.C. § 3612(g)(3)(A). See also 24 C.F.R. § 180.670(b)(3)(iii)(A). HUD regulations further specify that "[i]n a proceeding involving two or more respondents, the ALJ may assess a civil penalty ... against each respondent that the ALJ determines has been engaged ... in a discriminatory housing practice." *Id.* at § 180.670(b)(3)(iii)(C). Assessment of a civil penalty is not automatic; rather the ALJ must consider any history of prior violations, the nature and circumstances of the violation, the degree of culpability, the financial circumstances of the respondent, the goal of deterrence, and other matters as justice may require. See H.R. Rep. at 37.

Because there is no evidence that Respondents have been adjudged to have committed any prior discriminatory housing practice, any civil penalty imposed against each Respondent may not exceed \$11,000. The Charging Party's request, that a civil penalty be assessed against each Respondent in the amount of \$3,000, is less than the statutory maximum.

The nature and circumstances of Respondents' violation are serious and weigh in favor of substantial civil penalties. By failing to design and construct Meadow View to conform with the accessibility requirements, Respondents have effectively excluded from Meadow View persons who use wheelchairs or have other mobility impairments. In other words, it is as if Respondents have posted a sign saying "No Handicapped People Allowed." See H.R. Rep. at 25. That conduct has denied eight units of accessible housing to persons with disabilities and their families, adversely affected the public interest of ensuring the availability of such housing, and hindered Complainant's mission as a fair housing organization dedicated to assisting those in need of such housing.

Respondents are culpable for their violation. Although the record does

not demonstrate that Respondents knew about the accessibility requirements before they began construction of Building 1, it shows that both prior to and during construction of Building 2, they were repeatedly made aware of those requirements and that they were not in compliance. However, they made no effort whatsoever to bring Meadow View into compliance with the Act. Moreover, during the construction of Building 2, Respondents were notified that a complaint had been filed alleging that Meadow View was not in compliance with the Act. Although they wrote to HUD asking for more information concerning the complaint, there is no evidence that they made any effort to address the allegations in the complaint or conform Meadow View to the accessibility requirements. Consistent with their inaction in resolving the matter, they failed to file either an Answer to the Charge or a response to the Motion for Default Decision. Moreover, they hindered discovery by the Charging Party. Waiting until the week before the hearing, they finally filed a Motion to Vacate the Default, asserting that they were not aware that a formal Answer had been due and that they believed that settlement negotiations allowed for a delay in filing an Answer. It was not until after their Motion to Vacate the Default was denied that they finally retained counsel.

The goal of deterrence militates in favor of the imposition of a civil money penalty. Respondents have yet to take responsibility either for their failure to design and construct Meadow View in compliance with the accessibility requirements, or their continued failure to take any action that would bring it into compliance. Mr. Persico ignored the problem, blamed the architect and city building inspectors, and disingenuously portrayed himself as an uneducated naif. Even if Respondents had relied on third parties to ensure general compliance with building requirements, they were specifically put on notice, as early as June and July 1996., that Meadow View did not comply with the accessibility requirements of the Act. Nevertheless, they took no action to bring either building into compliance, even though Building 2 had not been completed and three ground-floor units in Building 1 had not been sold. Imposition of civil penalties against each Respondent will put them, and other developers and builders on notice that the failure to comply with the accessibility requirements of the Act will not be tolerated and will be expensive. Compliance with the Act is ultimately the responsibility of the owner of the project. Designers, builders, and developers who tam a blind eye to the requirements of the law or who delegate responsibility for ensuring compliance with it do so at their peril.

Respondents have neither claimed nor produced any evidence demonstrating an inability to pay a civil penalty. Respondents' financial circumstances, therefore, are not a

factor in determining the civil penalties to be assessed in this case. See, e.g., *HUD v.*

Dellipaoli, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,127, 26,080 (HUDALJ Jan. 7, 1997); *HUD v. Ro*, 2A Fair Housing - Fair Lending (Aspen) ¶ 25,106, 25,930 (HUDALJ June 2, 1995). Accordingly, upon consideration of all the relevant factors, a civil penalty of \$3,000 each will be assessed against Mr. Persico and Perland Corp.

ORDER

Having concluded that Respondents Perland Corp. and William Persico violated 42 U.S.C. § 3604(f)(2), as it incorporates 42 U.S.C. § 3604(f)(3)(C), and the regulation codified at 24 C.F.R. § 100.202(b), as it incorporates 24 C.F.R. § 100.205(c), it is hereby

ORDERED that:

1) Respondents and their agents are permanently enjoined from discriminating with respect to housing because of handicap. Prohibited actions include:

- a. Discriminating in the sale, or otherwise making unavailable or denying, a dwelling to any buyer because of a handicap of that buyer, any person residing in or intending to reside in that dwelling after it is sold or made available, or any person associated with that buyer;
- b. Discriminating against any person in the terms, conditions, or privileges of sale of a dwelling, or in the provision of facilities in connection with such a dwelling, because of a handicap of that person, a person residing in or intending to reside in the dwelling after it is sold or made available, or any person associated with that person; and
- c. Failing to design and construct covered multifamily dwellings for first occupancy after March 13, 1991, as set forth in 42 U.S.C. § 3604(f)(3)(C) and 24 C.F.R. § 100.205(c).

2) Within 90 days of the date on which this Order becomes final, and excepting the front entrances of each building,³⁴ Respondents shall make

³⁴Because of the extreme slope from the front entrances down the stairs to the ground-floor

whatever changes are necessary to bring those portions of Meadow View Terrace Condominiums ("Meadow View") owned by Perland Corp. into compliance with the design and construction requirements of 42 U.S.C. § 3604(f)(3)(C) and 24 C.F.R. § 100.205(c).

- a. Specifically, the public-use and common-use portions of the dwellings shall be made readily accessible to and usable by persons with disabilities; all the doors designed to allow passage into and within all premises within such dwellings shall be made sufficiently wide to allow passage by disabled persons in wheelchairs; and all premises within such dwellings shall be made to contain the following features of adaptive design: i) an accessible route into and through the dwelling; ii) electrical outlets 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 using a wheelchair can maneuver about the space.
- b. Perland Corp. shall sell no ground-floor unit at 2024-28 Manico Court until that unit is brought into compliance with these requirements; and
- c. Perland Corp. shall not sell any ground-floor unit or transfer the common areas of 2034-38 Manico Court until all ground-floor units and the common areas at that building are brought into compliance with these requirements.

3) Within 60 days of the date this Order becomes final, Respondents shall make those efforts described in the following paragraph to obtain from the current owners permission to retrofit those portions of Meadow View that Perland Corp. does not own so that those portions meet the design and construction requirements of the Act. 42 U.S.C. § 3604(f)(3)(C); 24 C.F.R. § 100.205(c). If permission is obtained, Respondents shall, within 60 days of obtaining such permission, and excepting the front entrances to each building, alter those portions so that they comply with the requirements specified by the Act. However, Respondents shall replace all front entrance door knobs with levers.

4) Respondents shall take whatever steps are within their lawful power to oblige the homeowners' association (or any other entity that owns the common

dwellings, the Charging Party does not suggest that access be provided through the front entrances; rather, access should be attained through the rear of the buildings. However, Respondents shall replace all front entrance door knobs with levers.

areas at 2024-28 Manico Court) to consider and vote favorably on a resolution to permit retrofitting of the common areas at 2024-28 Manico Court. Respondents shall vote their entire interests in favor of such a resolution. Respondents shall offer to pay the owner of the ground-floor unit at 2024-28 Manico Court up to \$500 as an incentive to permit that unit to be retrofitted and for the inconvenience of allowing such retrofitting.

5) If Respondents do not obtain the permission described in the preceding two paragraphs within 60 days of the date this Order becomes final, within seven additional days, they shall establish a fund for future retrofitting. - The initial amount of the fund shall be \$10,000 (\$5,000 for the ground-floor unit and \$5,000 for the common areas) and shall be expended to retrofit 2024-28 Manico Court consistent with 42 U.S.C.

§ 3604(f)(3)(C) and 24 C.F.R. § 100.205(c). The initial amount of the fund shall be decreased by any amount expended on retrofitting as required by paragraphs 3 and 4 above.

a. The fund shall be an interest-bearing escrow account and shall terminate at the end of 4 years or at such time as the ground-floor unit and the common areas are brought into compliance with the design and construction requirements of the Act. Respondents shall not be required to pay into the escrow account any amount in addition to the initial payment. The escrow account shall be administered by an independent third party. Respondents shall arrange for the administration of the escrow account including contracting with an independent administrator, and shall bear all costs to administer the account.

b. Prior to establishing the fund, Respondents shall submit to HUD for approval all plans and contracts for the escrow account including the name and address of the administrator. Respondents shall not be involved in any way in the administration of the account or the disbursement of funds.

c. The administrator shall be required to disburse funds upon a written request by the owner of the unretrofitted ground-floor unit or by the entity owning the unretrofitted common areas. A prospective purchaser of that unit may make a written request for funds to the administrator during negotiations for purchase of that unit, and funds shall be committed for disbursement before an offer to purchase is made. However, such funds need not be disbursed until agreement has been reached on a contract of sale and the sale has closed. The administrator shall be required to

disburse funds prior to the completion of all modifications.

6) If prior to the expiration of 4 years the ground-floor unit and the common areas of 2024-28 Manico Court have been retrofitted and any monies remain in the fund, the balance of the fund shall be transferred to Respondents. If, after 4 years, any monies remain in the fund, the balance of the fund shall be transferred to Complainant (or a like organization with similar goals, as determined by the administrator), which shall make such funds available to persons residing in, or intending to reside in, Will County to pay the cost of physical modifications that make housing accessible to, or otherwise achieve barrier-free living for, persons with disabilities. Modifications need not be limited to those within the parameters of the design and construction requirements of the Act at 42 U.S.C. § 3604(f)(3)(C).

7) Respondents shall require the administrator to keep records of all inquiries and requests for escrow funds, including a log specifying the following data for each interested person: his or her name, address and telephone number; date of inquiry or request; whether funds were disbursed and, if not the reason for denial; and the amount and date of disbursement. The administrator shall be required to send a complete copy of this log to HUD on an annual basis during the life of the escrow account.

8) Respondents shall post in their offices a sign no smaller than 10 inches by 14 inches indicating that they construct covered multifamily housing in a manner that complies with 42 U.S.C. § 3604(f)(3)(C) and that fair housing complaints may be made to HUD. After completing the retrofitting of all portions of Meadow View that Perland Corp. now owns, Respondents shall state in all advertising for its sale of any ground-floor unit that accessible condominiums are available at Meadow View.

9) Within 10 days of the date on which this Order becomes final, Respondents shall pay to Complainant: \$4,516 for actual damages and \$1,400 for future monitoring and technical advice. Respondents shall permit Complainant to monitor Respondents' activities and to provide technical assistance.

10) Within 10 days of the date on which this Order becomes final, each Respondent shall pay a \$3,000 civil penalty to the Secretary of HUD.

11) On the 30th and 60th days from the date that this Order becomes final, Respondents shall submit a report to HUD setting forth the steps taken and planned to be taken to comply with the provisions of this Order.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. §§ 180.670 and 180.680(b) and will become the final agency decision 30 days after the date of issuance of this initial decision.

/s/

ALAN W. HEIFETZ
Chief Administrative Law Judge

