UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

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 05-068FH FHEO Case: 08-04-0056-8

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ORDER ON SECRETARIAL REVIEW

Petition for Secretarial Review

On September 8, 2006, the Charging Party filed with the Secretary a Petition for Review of Initial Decision and Memorandum of Points and Authorities In Support Thereof, and the Intervenor filed a document in support of the Charging Party's Petition for Review. On September 15, 2006, the Respondents filed an Opposition to the Charging Party's Petition.

On September 14, 2006, pursuant to 24 C.F.R. § 180.310, Access Living and the National Council of Independent Living filed a motion for leave to file an *amicus curiae* brief in support of the Charging Party's Petition and an accompanying *amicus curiae* brief. Access Living was founded in 1980 and is one of the largest Centers for Independent Living for people with disabilities established pursuant to the Rehabilitation Act, 29 U.S.C. § 794. The National Council on Independent Living is the oldest cross disability, grassroots organization run by and for people with disabilities. It represents over 700 Centers for Independent Living, individuals with disabilities, and other supportive organizations. The missions of both of the proposed *amici* are to advocate for people with disabilities to ensure their equal access to and participation in services, programs, resources and facilities. The Secretary grants their motion for leave to file an *amicus curiae* brief in support of the Charging Party and has considered their brief, along with the other briefs.

In its Petition for Secretarial Review, the Charging Party asserts that it met its burden of proof demonstrating that the property is inaccessible and unusable by persons with disabilities and that the Administrative Law Judge's (hereinafter "ALJ") decision is not supported by substantial evidence on the record; the dismissal of Respondent Bernard Nelson from the case was erroneous; and that the standard used by the ALJ for establishing standing concerning whether litigation expenses alone create a compensable injury under the Fair Housing Act (hereinafter "FHA") is inconsistent with HUD precedent and should be modified.

The Respondents, in their Response (hereinafter "Response") to the Charging Party's Petition for Secretarial Review, in asking the Secretary to affirm the ALJ's ID in its entirety, assert that the Charging Party, in its Petition for Secretarial Review, fails to recognize that the ALJ's ID is entitled to great deference. (Response at 3, 7-8) Although stating that the Charging Party "might be able to" establish a *prima facie* case by showing a violation of the Guidelines (Response at 6), and that the "Charging Party has provided evidence only of its allegations that Respondent violated HUD's Guidelines" (Response at 10), Respondents argue, that, even if a violation of the Guidelines establishes a *prima facie* case or a rebuttable presumption, the burden is still on the Charging Party to satisfy its duty of persuasion that the property is inaccessible. Respondents contend the Charging Party has failed to do, as found by the ALJ, whose findings the Respondents assert were supported by the record.

Respondents further argue that the Intervenor had no standing as there was no party aggrieved, all of the Intervener's costs arise from bringing the present case rather than "combating or addressing any discrimination that may have occurred," and all of the

cases granting standing have involved testers who suffered injuries in the course of their testing activities. (Response at 11)

Respondents also contend that the ALJ properly dismissed Bernard Nelson as he was not involved in the design of this project but was merely helping out his son. (Response at 12) Finally, the Respondents assert that any error by the ALJ in this case was "harmless," as "no handicapped person, even a tester," [was] denied accommodations. . . ." (Response at 12)

Upon review of the entire record in this proceeding, including all the briefs, and based on an analysis of the applicable law, I GRANT the Charging Party's Petition for the reasons set forth below. Pursuant to 24 C.F.R. § 180.675(a), I SET ASIDE the August 24, 2006, Initial Decision (hereinafter "ID). Pursuant to 24 C.F.R. §§ 180.675(a) and (g) and 42 U.S.C. §§ 3608(a) and (c), I REMAND this proceeding to the ALJ to enter a remedial order to include appropriate retrofits to the property, monetary damages to the Intervenor, including litigation costs and costs relating to pursuing the administrative complaint with HUD; civil penalties; and injunctive relief.

BACKGROUND

The Intervenor filed a fair housing complaint in January 2004. This complaint was amended in July 2004 and March 2005. Following an investigation and a Determination of Reasonable Cause, the Charging Party filed a Charge of Discrimination on September 29, 2005, against Respondents Bernard and Brent Nelson, father and son, and BWN, LLC (hereinafter "BWN"), the owners of a 12-unit, 3-story multi-family dwelling unit located at 640 Lake Elmo Drive, Billings, Montana (hereinafter "the property"). The Charge alleged that Respondents engaged in discrimination based on disability, in violation of the FHA, as amended, 42 U.S.C. § 3601, *et seq.*, because the design and construction of the property did not comply with the design and construction accessibility requirements of the FHA. 42 U.S.C. § 3604(f)(3)(C). A hearing was held on April 11 and 12, 2006, in Billings, Montana.

Initial Decision

On August 24, 2006, the ALJ issued an ID. In the ID the ALJ dismissed the Charging Party's suit for liability and damages in its entirety.

The ALJ concluded that the Charging Party did not meet its burden of proving that Respondents violated the FHA's design and construction requirements. The ALJ determined that, because the FHA's Accessibility Guidelines (hereinafter "Guidelines"), 56 Fed. Reg. 9472-9515 (Mar. 6, 1991), *codified* at Appendix II to the Fair Housing regulations, 24 C.F.R. ch. I, subch. A, app. II (Apr. 1, 1995), are not mandatory, establishing a violation of the Guidelines did not establish a *per se* or rebuttable presumption that there has been a violation of the FHA. (ID at 21) The ALJ also determined that Respondent Bernard Nelson is not liable for any design and construction violations at the property. (ID at 15-16) Finally, in his analysis, the ALJ adopted a standard for organizational standing for the administrative forum that disqualified the Intervenor from receiving any monetary damages for its litigation costs, including the costs related to pursuing the administrative complaint with HUD. (ID at 12-14)

DISCUSSION

I. Findings of Fact

Most of the essential facts, as set forth in the ID at 2-9. including the findings of fact made by the ALJ based on the testimony and expert report of the Charging Party's witness, Kenneth Schoonover, a nationally respected accessibility expert, are not in dispute.

A. Corrections

The following findings of fact made by the ALJ, however, are not supported by the evidence in the record and are hereby corrected:

1. Bob Liston, the Intervenor's Executive Director, never testified that he navigated his wheelchair without difficulty from the parking lot to the west entrances. (Transcript (hereinafter "TR") 490-491) He stated only that he could, hypothetically, navigate the sidewalk to the back entrances, not that he actually did so. *Id.*

2. Contrary to the ID, there is no sidewalk between the parking lot and the building on the east side of the building. (ID at 6) There is a sidewalk extending from the parking lot around the southwest side of the building and across the rear of the building that connects to the individual patios and sliding glass doors of the four ground floor units. (TR 157, 165; GX2 at 1; GX 4; GX7)

3. Contrary to the ID (ID at 8), the carport parking blocks any clear, unobstructed route to the mailboxes. (TR 208-09; GX2 at para. B4; GX4-5)

B. Supplementary Findings

The following unrebutted expert and non-expert testimony was not set forth in the ID:

1. Schoonover testified that, in his expert opinion, the following features of the property did not meet any recognized accessibility standard: the parking, the patio door widths, the doorway from the kitchen to the front hallway, and the master bedroom dimensions. (TR 186, 199, 210, 212, 217)

2. Schoonover also stated that, in his expert opinion, the following features of the property were not accessible to, and usable by, persons with disabilities, including the parking, the height of the threshold at the patio doors, the stairs and knob hardware at the front entrances, the width of the patio doors, the mailbox locations, the doorways from the kitchen to the front hall, the width of the doors and the clear floor space in all four master bathrooms, and the distance from the wall to the centerline of the toilet seat in unit numbers 1, 6 and 12. *See* GX2; and TR 185-186, 199, 200-202, 203-204, 208, 210, 211-212, 216-217, 219-221, 222-223, 224, 227.

3. Bernard Nelson, Brent's father, was not, as found by the ALJ, "nominally and briefly" (ID at 15) an owner of the property. Bernard Nelson co-owned the property with his son for over three years, including during the design and construction of the property from its purchase in 2001 or 2002 through December 31, 2005. (TR 291, 293, 296, 298; Bernard Nelson's Admissions, No. 1; GX21-23)

The following stipulation was not mentioned by the ALJ:

Respondents stipulated that the front (east) entrances are not accessible to persons in wheelchairs. (TR 183-184)

II. The Law

Since March 12, 1989, the effective date of the Fair Housing Amendments Act of 1988, the FHA has prohibited discrimination in housing based on disability. 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 merely giving persons with disabilities conventional fair housing guarantees was insufficient to ensure them equal access in housing. *See* H.R. Rep. at 24-28. Congress recognized that housing that is inaccessible to persons with mobility impairments just as effectively bars those persons as housing with a sign stating "No Handicapped People Allowed." *Id.* at 25. Accordingly, Congress enacted specific requirements related to persons with disabilities that did not exist for other protected classes. *See id.*; 42 U.S.C. § 3604(f)(3)(C).

Discrimination under the FHA includes the failure to design and construct "covered multifamily dwellings"[1] 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

[1] "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).

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

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

42 U.S. C. § 3604(f)(3)(C); 24 C.F.R. § 100.205(c). By legislating these requirements, Congress expressed its view 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.

In 1991, HUD issued its Guidelines, which provide specific characteristics and features for accessible public and common areas. *See* Guidelines, 56 Fed. Reg. 9472, 9504-05 (March 6, 1991).[2] The Guidelines are not mandatory but "provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act" and comprise the "minimum standards of compliance with the specific accessibility requirements of the [Act]." (56 Fed. Reg. 9476, 9499)

a. Covered multifamily dwelling

The ALJ found that Respondents' property, consisting of a 12-unit building without an elevator, is a covered multifamily dwelling because it is a building with four or more units and no elevator. (ID at 11) He further found that the property was designed for first occupancy after March 1991 (the effective date set forth in the statute and regulations) and that, therefore, the accessibility provisions of the FHA apply to the property. *Id.* The Secretary agrees with these findings.

b. Burden of Proof

The Secretary agrees with the Respondents that the findings of an ALJ are entitled to great deference.[3] However, the ALJ's ID must be supported by "substantial evidence."[4] For the reasons set forth below, the Secretary finds that, based on the record

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[2] The HUD Guidelines were issued pursuant to §804(f)(5)(C) of the Act, which directs HUD to provide technical assistance in implementing the requirements of the Act. *See* 56 Fed. Reg. at 9499.

[3] *See* Dantran, Inc. v. U.S. Department of Labor, 171 F.3d 58 (1st Cir. 1999); Aylett v. Secretary, United States Department of Housing of Urban Development, 54 F.3d 1560 (10th Cir. 1995).

as a whole, and the briefs filed in this case, the ALJ's ID is not supported by substantial and objective evidence.

The ALJ concluded that, because the Guidelines are not mandatory and are merely minimum standards of compliance, establishing a violation of the Guidelines did not establish a *per se* violation or a rebuttable presumption that there has been a violation of the FHA. (ID at 21) Therefore, he found that the Charging Party did not meet its burden of proof. The Guidelines represent HUD's official and reasonable interpretation of the FHA's design and construction requirements. Accordingly, the Guidelines must be given great deference by courts and administrative tribunals.[5] Although the ALJ professed to "defer" to the Guidelines, his conclusions of law contradict his words.

Contrary to the ALJ, the Secretary finds that the proper burden of proof is as follows. The Charging Party may establish a *prima facie* case by proving a violation of the Guidelines.[6] A respondent can then rebut the presumption established by the violation of the Guidelines by demonstrating compliance with a recognized, comparable, objective measure of accessibility. Giving the Guidelines the status of a rebuttable presumption, contrary to the ALJ, is not inconsistent with the concept that the Guidelines are not mandatory; because even if a respondent violates the Guidelines, the respondent can demonstrate that the property satisfies another comparable and objective standard of accessibility and thus avoid a liability finding.

Applying these principles, in this case the Charging Party presented uncontradicted, objective, extensive and substantiated evidence that the property was designed and constructed in violation of the Guidelines, specifically Schoonover's expert testimony and his expert report. In fact, the ALJ did not discredit the Charging Party's extensive, objective, measurable evidence of inaccessibility as provided by the Charging Party's nationally known expert witness on accessible design and construction standards. Indeed, the ALJ made numerous specific factual findings about certain inaccessible aspects of the property that were based on the Charging Party's expert witness's measurements. (ID at 6-9)

In addition, the ALJ erroneously found that the Charging Party "provided evidence only for its allegations that Respondents are in violation of HUD's Guidelines." ID at 23. In fact, with regard to the parking, the patio door widths, the doorway from the kitchen to the front hallway, and the dimensions of the master bathrooms, the Charging Party's expert witness also specified that the property as designed and constructed does not comply with any recognized accessibility standard. *See* supra, at 4. The Respondents did not dispute this statement, and, indeed, could not name any specific accessibility standard that the property was built to meet. (TR 467)

The Charging Party's expert witness also testified, that, in his expert opinion, many features of the property are not accessible to and usable by persons with disabilities

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[4] *See* Krueger v. Cuomo, 115 F.3d 487, 491 (7th Cir. 1997); Banai v. Secretary of Housing and Urban Development, 102 F.3d 1203, 1207 (11th Cir. 1997); *see also* cases cited infra, at footnote 10.
[5] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. et al., 467 U.S. 837, 843-44 (1984).
[6] U.S. v. Quality Built Constr., Inc., 309 F. Supp. 2d 756, 764 (E.D.N.C. 2003); U.S. v. Taigen & Sons, Inc., 303 F.Supp. 2d 1129, 1151 (D. Idaho 2003).

such as the parking; the stairs and knob hardware at the front entrances; the width of the patio doors; the height of the threshold and lack of beveling at the patio doors; the mailbox location; the doorways from the kitchen to the front hall; the width of the doors and the clear floor space in all four master bathrooms; the lavatories in the hall bathrooms of units 6, 7 and 12; and the distance from the wall to the centerline of the toilet in units 1, 6 and 12. In addition, as mentioned previously, the Respondents stipulated that the front (east) entrances are not accessible to persons in wheelchairs. *See* supra, at 5.

The Charging Party also demonstrated that the property is inaccessible because of the stairs at the front (east) entrances. *See* United States v. Edward Rose & Sons, Inc., 384 F.3d 258, 262-63 (6th Cir. 2004). 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. However, as found by the ALJ and stipulated to by the Respondents, the stairs at the front (east) entrances render those entrances inaccessible.

c. Objective Evidence Required To Rebut Prima Facie Case

The ALJ found that "Respondents have presented credible evidence that the property is accessible" based on the unsubstantiated, vague, and anecdotal testimony of Respondent Brent Nelson about two people allegedly navigating the property,[7] despite the ALJ's acknowledgement of the weakness of the testimony.[8] (ID at 23) The Secretary and the federal courts have consistently held that a respondent must demonstrate that the property at issue meets some comparable objective accessibility standard.[9] However, in this case, the ALJ found that Respondents' evidence that two persons navigated from the parking lot to the west entrances and that one other person "navigated over the threshold, into and around the kitchen, from the kitchen down the hallway, and into and around one of the bathrooms, lifting himself onto the toilet and the tub," was sufficient evidence of the property's accessibility. (ID at 23) The Secretary disagrees.

It is well established that a respondent's failure to present specific evidence that a property in question complies with a standard of accessibility and to only present general claims that a property is accessible is insufficient evidence of accessibility. Contrary to the vague, unsupported and weak evidence, as acknowledged by the ALJ (ID at 23), which the ALJ nonetheless found credible, the issue is not whether a specific person with a disability could access the property, but rather, whether most persons with wheelchairs or other disabilities can utilize the property. Indeed, the ALJ at ID 20 favorably quotes and then disregards Fair Housing Council, Inc. v. Village Of Olde St. Andrews, Inc., 250 F.Supp. 2d 706 (W.D. Ky. 2003), for its statement that:

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[7] The Respondents presented no witnesses to substantiate their accessibility contentions other than Respondent Brent Nelson.

[8] The ALJ erroneously found that three people navigated certain portions of the property, including Bob Liston, when in fact there is no evidence that Bob Liston ever navigated any portion of the property. *See* supra, at 4.

[9] *See* U.S. v. Quality Built Constr., supra, at 774-77; U.S. v. Taigen & Sons, Inc., supra, at 1154.

> The real question that must be resolved is whether the units and common designed are reasonably accessible to most handicapped persons. (Emphasis added.) *Id.* at 720.

As a matter of law and common sense, such anecdotal evidence, which was relied upon by the ALJ, carries little probative weight as to whether a unit is generally accessible to people with disabilities. As the Court found in U.S. v. Quality Built Constr., Inc., supra, with regard to an affidavit by a disabled person purporting to be able to navigate a unit whose design violated the Guidelines:

> [T]he Court believes that his testimony would have little bearing on the ultimate issue in this case. Whether one disabled person may be able to maneuver through the complex and units does not indicate compliance with the Act. This is particularly true with respect to Mr. Curll [the disabled affiant]. As Plaintiff notes, Mr. Curll is a wheelchair athlete and a former paralympian which seriously undermines the position that his ability to maneuver through the units is representative of the accessibility to disabled persons in general.

Id. At 772, footnote 1. This is particularly true where as here the claim of accessibility came not from a disabled individual but rather from one of the Respondents.

Other than the evidence cited above, which the ALJ acknowledged "does have some weaknesses" (ID at 23), Respondents, as mentioned above, did not present evidence that their property complies with any specific standard of accessibility. In contrast, the extensive, unrebutted, and objective testimony and expert report of the Charging Party's nationally renown expert witness demonstrated that, not only was the property designed and constructed in violation of the Guidelines, the property as designed and constructed does not comply with any recognized accessibility standard. (TR 186, 199, 210, 212, 217) In fact, as pointed out previously, the ALJ made many specific, but unacknowledged, factual findings about certain inaccessible aspects of the property based on the Charging Party's expert's measurements. *See* supra, at 7.

In their Response, Respondents characterize the exterior accessibility issues as "border[ing] on quibbling." (Response at 4) They make several arguments concerning the sidewalks. They argue that: (1) the sidewalk from the parking area to the patio doors presented no navigational hazard to any person in a wheelchair based on Respondent Brent Nelson's testimony that "several persons in wheelchair had traversed the area;" (2) their statement that "the sidewalk appeared traversable to the ALJ and would have appeared accessible to anyone;" (3) the Intervenor's Executive Director had made an inspection of the property prior to the complaint being filled (*see* correction, supra, at 4); and (4) the issue of the sidewalk was not even raised until the expert report was issued, which is irrelevant. As set forth above, these arguments are insufficient to overcome the objective factual statements in the Charging Party's expert testimony and expert report, which were not specifically discredited by the ALJ, and which were relied on by him in making many of his factual findings.

Respondents further assert that "the parking area issue is equally as trivial," as the pictures "showed huge areas of the parking lot which would have been accessible to handicapped people." (Response at 5) Respondents' "interpretation" of the pictures in

evidence does not constitute evidence or provide an objective rebuttal to the Charging Party's expert testimony and expert report, which were not discredited by the ALJ and on which the ALJ relied in making many of his findings of fact.

In addition, Respondents assert in their Response that "the mailbox was clearly accessible and the ALJ so found." (Response at 5) Again, this is contrary to the Charging party's objective expert testimony and expert report that the carport parking blocks any clear, unobstructed route to the mailboxes. *See* correction, supra, at 4. The Secretary also notes that the ALJ, on this point, merely found that it "appears" from the Secretary's photographs that the mailboxes were accessible from the sidewalk. (ID at 8)

Finally, Respondents characterize the patio threshold issue as "a complete red herring," as any defect can be remedied by "the simple expediency of a floor mat." (Response at 5) Respondents are confusing the remedial issue with the liability issue. The issue as to the proper remedy must be resolved by the ALJ on remand, and is irrelevant to whether the Respondents are liable under the FHA.

In these circumstances, based on the entire record, and the briefs filed in this case, the Secretary finds that: (1) the ALJ's ID is not supported by substantial evidence;[10] (2) the Charging Party's expert witness's testimony and expert report is fully credited, and the Respondent's self-serving, unsubstantiated, vague, and anecdotal testimony is discredited; (3) the Charging Party has met its burden of proof that the property is not accessible to persons with disabilities within the meaning of the FHA; and (4) the Respondents did not provide any objective and relevant evidence in rebuttal. In any event, assuming *arguendo* that Respondents did provide credible and relevant evidence of the property's accessibility, the Secretary finds that the evidence was insufficient to rebut the Charging Party's objective and comprehensive expert testimony and expert report, and that the Charging Party therefore demonstrated that Respondents violated the Act's design and construction requirements.

d. Organizational Standing

The ALJ found, and the Secretary agrees, that the Intervenor, as a private non-profit housing organization has standing to sue both in a representational capacity on behalf of members, and in an individual capacity on its own behalf, based on allegations that the alleged FHA violation frustrated its mission and caused it to divert resources. (ID at 12-13) The ALJ also found, and the Secretary concurs, that the Intervenor established injury in fact as the Intervenor: (1) "diverted resources from training and educational outreach to investigate the property and to determine that it believed there were FHA violations at the property;" (2) "also diverted resources to engage in informative and educational activities in the Billings area as a result of its investigation of the property and its concern about the possible FHA violations and impact;" and (3) "alleged concrete times and costs, as well as the other activities it would have conducted instead." (ID at 13-14)

[10] Bear Lake Watch, Inc. v. F.E.R.C., 324 F.3d 1071, 1076 (9th Cir. 2003); Western Truck Manpower, Inc. v. United States Dept. of Labor, 12 F.3d 151, 153 (9th Cir. 1993).

Relying, however, on Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir. 1990), the ALJ concluded that standing could not be established by alleging diversion of resources to pursue litigation, and for the first time extended the Spann standard for organizational standing to "administrative actions in this forum." (ID at 13) He therefore found irrelevant the Intervenor's testimony regarding the costs of pursuing its FHA complaint with HUD and its other litigation activities. (ID at 14)

As the ALJ noted, the Courts of Appeals are divided concerning the standing issue with respect to litigation. However, the Courts have generally not combined the costs of pursuing an administrative complaint with litigation costs. Accordingly, the Secretary specifically disavows and reverses the ALJ's novel extension of the Spann standard for organizational standing to include the costs of pursuing an administrative complaint with HUD. The Secretary finds that such a holding would be a significant deterrent to encouraging organizations like the Intervenor and the *amici* to assist the Department in its FHA compliance efforts.

With respect to litigation costs, the Department has followed the Courts of Appeals that have held that, for purposes of organizational standing, litigation costs are compensable. The Secretary respectfully declines to acquiesce in the contrary Courts of Appeals' precedents until the issue is resolved by the Supreme Court, because they conflict with HUD's construction of the FHA, which HUD must administer nationwide, and would discourage FHA compliance efforts by outside organizations. *See* Statement of William B. Schultz, Deputy Assistant Attorney General before the Subcommittee on Commercial and Administrative Law of the Committee of the Judiciary, United States House of Representatives, Concerning Federal Agency Nonacquiescence, October 27, 1999.

e. Dismissal of Respondent Bernard Nelson[11]

The ALJ dismissed Respondent Bernard Nelson from the case because he was "only tangentially or remotely connected to the property" (ID at 16) and "was not involved in the property's design and construction." (ID at 15) However, Bernard Nelson owned the property during its design and construction and for a period of over three years. *See* supra, at 5. Therefore, the ALJ's finding that Bernard Nelson was "nominally and briefly an owner of the property" (ID at 15) is not supported by the record.

In addition, contrary to the ALJ, the Secretary finds that it is well established that co-owners are vicariously liable for the discriminatory acts of their agents under the FHA. even if the co-owner was not directly involved in the discriminatory actions.[12] Accordingly, the ALJ's conclusion regarding the liability of Respondent Bernard Nelson

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[11] The finding of the ALJ dismissing Respondent BWN, LLC. (ID at 13-14) was not appealed by the Charging Party or the Intervenor and is hereby affirmed.

[12] *See* Meyer v. Holley, 537 U.S. 280, 285-86 (2003) (citing Restatement (Second) of Agency § 219(1) (1958) and stating it is "well established that the [Fair Housing] Act provides for vicarious liability."); HUD v. Gruzdaitis, 1998 WL 482759; HUD v. Welch, 1996 WL 755681; HUD v. Dutra, 1996 WL 657690; HUD v. Banai, 1995 WL 72441, *aff'd*, 102 F.3d 1203 (11th Cir. 1997); HUD v. Gutleben, 1994 WL 441981; Alexander v. Riga, 208 F.3d 419, 432-34 (3rd Cir. 2000); Hamilton v. Svatik, 779 F.2d 383, 388 (7th Cir. 1985); United States v. Reece, 457 F. Supp. 43, n. 7 (D. Mont. 1978); Richards v. Bono, 2005 WL 1065141 (M. D. Fla. 2005); Cato v. Jilek, 779 F. Supp. 937, n. 21 (N.D. Ill. 1991).

was clearly erroneous because the ALJ made findings not supported by the record and because the ID is contrary to the Supreme Court's direction to follow the Restatement (Second) of Agency, as well as HUD and federal court precedents.[13]

CONCLUSION

Upon review of the entire record in this proceeding, including all the briefs, and based on an analysis of the applicable law, I GRANT the Charging Party's Petition. I find that the Charging Party met its burden of proof and that the Charging Party demonstrated by credible evidence that Respondents violated the Act's design and construction requirements; and that Respondents did not provide any objective and relevant credible evidence in rebuttal. In any event, even if it were deemed that Respondents did provide credible and relevant evidence of the property's accessibility, I find that the evidence was not sufficient to rebut the Charging Party's expert testimony, and that the Charging Party therefore demonstrated that Respondents violated the Act's design and construction requirements. I further find that Bernard Nelson should not have been dismissed from the case. In addition, I find that, for purposes of organizational standing, litigation costs, including the costs of pursuing an administrative complaint with HUD, are a compensable injury. Pursuant to 24 C.F.R. § 180.675(a), I SET ASIDE all the ID's factual findings and conclusions of law that are inconsistent with this Decision. Pursuant to 24 C.F. R. §§ 180.675(a) and (g) and 42 U.S.C. § 3608(a) and (c), I REMAND this proceeding to the ALJ to enter a remedial order to include appropriate retrofits to the property; monetary damages to the Intervenor, including litigation costs and costs relating to pursuing the administrative complaint with HUD; civil penalties; and injunctive relief.

IT IS SO ORDERED.

Dated this 21st day of September, 2006

Camille T. Pierce
Secretarial Designee

[13] The Charging Party does not dispute that the evidentiary record shows that Respondent Bernard Nelson's level of operational involvement was minimal. However, this lack of involvement, although it may be a factor for imposition of a reduced civil penalty, does not absolve him of liability under the FHA.

CERTIFICATE OF SERVICE

I HEREBY certify that on this 21st day of September 2006, the Order on Secretarial Review issued by Camille T. Pierce, Chief of Staff, in HUDALJ Case Number 05-068-FH, FHEO Case Number 08-04-0056-8, was served on the following parties in the manner indicated:

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