



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

February 23, 2023

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

The Honorable Michael B. Hancock
Mayor, City and County of Denver
1437 Bannock St, Room 350
Denver, CO 80202

NAME REDACTED and **NAME REDACTED**
ADDRESS REDACTED
Denver, CO **ADDRESS REDACTED**

SUBJECT: Revised Letter of Determination of Noncompliance
CASE NAME: **NAME REDACTED** v. City and County of Denver, et al.
CASE NUMBER: 08-21-3770-4; 08-21-3770-D

Dear Parties:

By email dated November 4, 2022, Lewis Roca Rothgerber Christie on behalf of the City and County of Denver (Recipients), submitted a timely request for review of the Letter of Findings issued on September 30, 2022, by the US Department of Housing and Urban Development (HUD or Department) Region VIII Office of Fair Housing and Equal Opportunity (FHEO) in Denver, CO. FHEO issued a Letter of Findings of Noncompliance (LOF) on the above titled case, following an investigation under Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (ADA), and the implementing regulations at 24 C.F.R. Part 8 and 28 C.F.R. Part 35. Following a full review of the investigative record, this letter sustains the Department’s LOF and constitutes a Letter of Determination (LOD) of Noncompliance in the subject case under 24 C.F.R § 8.56(h)(3). This revised LOD updates and supplements the LOD issued on February 13, 2023.

Section 504 regulations at 24 C.F.R. Part 8 states that no otherwise qualified individual with disabilities in the United States shall, by reason of his or her disability, be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving HUD financial assistance. The City and County of Denver (Recipients) received federal financial assistance in the form of HOME, CDBG, HOPWA, and ESG grants from HUD during the alleged events. Therefore, Section 504 applies to the programs and activities¹ of Recipients concerning the subject property.² The ADA and its implementing

¹ The term “program or activity,” for purposes of Section 504, is broadly defined at 24 C.F.R. § 8.3.

² See Letter from James C. Whiteside, Acting Region VIII Director to Mr. Joshua L. Roberts,

regulations at 28 C.F.R. Part 35 state that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by a public entity. The City and County of Denver, and any department, agency, special purpose district, or other instrumentality of the City or County are public entities, as defined by the ADA at 28 C.F.R. § 35.104, and therefore are the ADA applies to recipients' programs, services, and activities.

Background:

Complainants **NAME REDACTED** and **NAME REDACTED** are a married couple who own the subject property located at **ADDRESS REDACTED**, Denver, CO **ADDRESS REDACTED**. Complainants intended to construct an accessory dwelling unit (ADU) on their property for Complainant **NAME REDACTED**'s mother, Ms. **NAME REDACTED**, to reside in. The ADU would have accessible features for Ms. **NAME REDACTED**, who is a person with a disability. Complainants alleged Recipients denied their reasonable accommodation and subjected them to discriminatory terms and conditions based on Ms. **NAME REDACTED**'s disability.

Specifically, in December 2020, Complainants asked Recipients' Board of Adjustment for Zoning (BOA) to grant a variance of the Denver Zoning Code as a reasonable accommodation needed for Ms. **NAME REDACTED**'s disability. BOA denied the requested variance and asked Complainants to submit a design that complies with the Denver Zoning Code. On March 23, 2021, at the reconsideration hearing, BOA upheld the denial and reiterated that Complainants must comply with the Denver Zoning Code.

Recipients deny discriminating against Complainants and assert Complainants failed to demonstrate how their alleged hardship supported the variances requested. Recipients maintained they invited Complainants to submit a modified request that would align more closely with the proposed variances caused by the disability. Recipients noted Complainants failed to propose variances that met the criteria required by the Denver Zoning Code. Recipients maintain Complainants' request was not a reasonable accommodation request related to Ms. **NAME REDACTED**'s disability and the BOA could not grant the requested variances.

Analysis:

In its request for review, Recipients assert that Section 504 does not apply to the BOA. This matter was already addressed prior to the issuance of the LOF. In a letter to Recipients dated March 14, 2022, from Acting Region VIII Director, James C. Whiteside, the Department addressed how its jurisdiction extends to zoning decisions when the Community Planning and Development Department (CPD) and BOA. Specifically, the City and County are recipients of HOME, CDBG, HOPWA, and ESG from HUD and therefore are recipients as defined by 24 C.F.R. § 8.3.

Assistant City Attorney and Mr. Charles T. Solomon, Senior Assistant City Attorney, March 14, 2022.

Recipients, as well as their departments, agencies, or other instrumentalities such as CPD and BOA, are “public entities.” Therefore, all of CPD and BOA’s programs, services, and activities including zoning-related activities must comply with the requirements of Title II of the ADA and its implementing regulation at 28 C.F.R. Part 35. One of those requirements consists of the obligation to provide reasonable accommodations.

Section 504 requires Recipients of federal financial assistance to make reasonable accommodations to policies, practices, and programs to ensure equal opportunity for individuals with disabilities to participate in and benefit from programs and activities, unless the Recipient can demonstrate that providing the accommodation would result in a fundamental alteration to the nature of the program or activity. See 24 C.F.R. § 8.33. Title II of the ADA has similar requirements. The regulation implementing Title II of the ADA requires public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination based on disability unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity. See 28 C.F.R § 35.130(b)(7)(i).

Recipients contend their process for requesting reasonable accommodations for persons with disabilities complies with Section 504 and the ADA. Recipients provided two avenues for individuals with disabilities to make reasonable accommodations related to zoning: either through the Administrative Adjustment process with CPD or the Disability Hardship Variance with BOA. During the relevant time frame, the zoning code stated a reasonable accommodation request through the Administrative Adjustment process would not be approved if the project design varied by more than 10% of what was allowed in the zoning code. As a result of this restriction, Complainants were deemed ineligible to make a reasonable accommodation request through the Administrative Adjustment process and could not avail themselves of its less burdensome process and requirements.

Recipients allege the denial of Complainants’ Variance Request was proper and did not violate Section 504 and the ADA. Recipients relied on subsection 12.4.7.6(G) of the Denver Zoning Code to defend its denial of Complainant’s reasonable accommodation request. Under Section 504, a Recipient may determine a request unreasonable if the request imposes an undue financial and administrative burden or requires a fundamental alteration in the nature of Recipients’ operations. Recipients evaluated whether the request met the BOA’s interpretation of the hardship criteria and if the request was the minimum relief necessary. However, Recipients did not evaluate whether the variance request would impose an undue financial and administrative burden on the City or if it would fundamentally alter the City’s zoning scheme. Recipients never articulated why the requested overages were outside the bounds of reasonableness as an accommodation or specified what allowances beyond what was called for in the Zoning Code would be permissible. As such, Recipients failed to show why granting the requested accommodation would pose an undue financial and administrative burden or a fundamental alteration of their program. By relying on and strictly adhering to their own variance standards, Recipients failed to provide reasonable accommodation to Complainants. Recipients also failed to meaningfully engage with Complainants to identify an effective alternative accommodation.

It is Recipients' position that they were not required to provide Complainants with a process-based reasonable accommodation. The distinction Recipients attempt to make between a "process-based reasonable accommodation" and any other reasonable accommodation is meaningless. It is clear that Complainants are covered under Section 504 and the ADA based on disability through their relationship with Ms. **NAME REDACTED**, a person with a physical and mental impairment that substantially limits one or more major life activities or major bodily functions. See 24 C.F.R. § 8.3; 28 C.F.R. § 35.104. Complainants asserted Ms. **NAME REDACTED** was Complainant **NAME REDACTED**'s mother, that she was a person with a disability, and she intended to reside in the ADU, which could only be approved through Recipients' zoning processes. Complainants also submitted documentation to BOA supporting Ms. **NAME REDACTED**'s disability and related need. Complainants sought a reasonable accommodation on behalf of Ms. **NAME REDACTED** that was necessary to ensure Ms. **NAME REDACTED**'s full participation in and benefit from the use and enjoyment of the dwelling. See 24 C.F.R. §§ 8.33, 8.4, 8.20; 28 C.F.R. §§ 35.130(b)(3), 35.130(b)(7)(i). Recipients violated their obligation under Section 504 and the ADA when they failed to timely provide the reasonable accommodation requested by Complainants.

Complainants made four reasonable accommodation requests on behalf of Ms. **NAME REDACTED**. Recipients, through BOA, denied the first three reasonable accommodations requests. As a result of media attention garnered by Complainants' project and Complainants' persistent attempts to engage with Denver City Council and Denver officials, The CPD Zoning Administrator requested Complainants submit a fourth request despite already having provided the information required. The investigative record revealed by the time Recipients approved Complainant's request 10 months had passed. Recipients unjustifiably delayed the processing of Complainant's reasonable accommodation request.

Recipients maintain the Letter of Findings oversteps HUD's authority under 24 C.F.R. § 8.56(g) by finding Recipients acted with deliberated indifference and demanding as part of its corrective action Recipients provide Complainants with appropriate relief, including monetary compensation. This argument is without merit. HUD's authority to enforce Section 504 and Title II of the ADA are clear, as is HUD's authority to ensure proper relief through voluntary compliance or enforcement once it has identified violations of either law. The Department of Justice (DOJ) Title II regulation designates HUD as the agency with responsibility for handling complaints "relating to all programs, services, and regulatory activities related to state and local public housing, housing assistance, and referral." See 28 C.F.R § 35.190(b)(4). HUD is empowered to enforce Section 504 by encouraging informal resolution in all matters. Since an informal resolution was not reached during the investigation, pursuant to 24 C.F.R. § 8.56(g) the Department issued the Letter of Findings to all parties. The assertion that the Department overstepped its authority is unfounded.

Information in the evidentiary record establishes that Ms. **NAME REDACTED**'s disability and disability-related need for the accessible ADU were both known and obvious to Recipients. At no point during any of the hearings with the BOA did Recipients engage in an interactive conversation with Complainants about Ms. **NAME REDACTED**'s disability-related needs or accommodations for those needs. CPD and BOA asked questions, but those questions were focused on the nature of Ms. **NAME REDACTED**'s disability rather than the necessity. Recipients did not engage in the interactive process with Complainants to approve a plan that met Ms. **NAME REDACTED**'s

disability-related needs; instead, they sought to find a reason to deny Complainants' request. As a result of Recipients' resistance, the requested accommodation was denied multiple times and not properly granted until 10 months later.

Accordingly, on behalf of the reviewing civil rights official, after completing a thorough review of the case record, I hereby sustain the findings of noncompliance in the LOF with respect to Section 504 and the ADA. This letter constitutes a formal LOD of Noncompliance in this case, pursuant to 24 C.F.R § 8.56(h)(3). The Recipients may be ineligible for discretionary funding under any HUD Notice of Funding Availability until this matter is resolved to the Department's satisfaction.

Pursuant to 24 CFR § 8.56(i) requirements, the Recipients have ten calendar days from receipt of this LOD of Noncompliance to come into compliance by executing a Voluntary Compliance Agreement (VCA). The Recipients should contact FHEO Region VIII's Regional Director, James C. Whiteside, at james.c.whiteside@hud.gov to discuss the terms of a VCA. The terms of the VCA will be determined by the Regional Director, who is the Department's responsible civil rights official. The VCA should reflect such remedial action as the Regional Director deems necessary to overcome the effects of the discrimination, resolve the noncompliance, and prevent the recurrence of noncompliance in the future. See 24 C.F.R. § 8.56(j)(2).

Sincerely,



Erik Heins

Director of Enforcement Support
Office of Enforcement and Programs

Cc: James Whiteside
Director, Region VIII

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