UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ACCESS LIVING OF METROPOLITAN CHICAGO, INC.,	
Plaintiff,	Case No. 18-cv-03399
v.	Honorable Edmond E. Chang
CITY OF CHICAGO,	
Defendant.	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

For 35 years, Defendant City of Chicago ("City") has been a central actor in the development of more than 500 affordable apartment developments (with more than 50,000 units) using federal, city, and other funds. But the City's Department of Housing ("DOH")[1] has utterly failed to ensure that its Affordable Rental Housing Program[2] (the "Program") is accessible to Chicagoans with disabilities. The Program provides funding to private developers to carry out the essential City function of providing affordable housing, pursuant to loan and regulatory agreements. Those agreements require developers to comply with a number of federal laws, including those requiring accessibility for people with disabilities.

The City has long acknowledged the severe lack of accessible affordable housing in Chicago. Pl.'s SOMF at ¶ 39. As early as 2005, the City's Fair Housing Plan recognized, "[d]espite the shortage of accessible housing in Chicago, there is no consistent review of accessibility for people with disabilities by the City of Chicago when issuing a building permit." *Id.* at ¶ 21. Notwithstanding this knowledge and extensive record evidence that thousands of Program-funded units are inaccessible, the City seeks to avoid all liability under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the Americans with Disabilities Act ("ADA"), and the Fair Housing Act ("FHA") (collectively, "Federal Accessibility Requirements" or "Requirements").

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[1] DOH is the current name of the City department that carries out functions related to affordable housing development. Previously, these functions were conducted by departments under different names, including the Department of Planning and Development, the Department of Housing and Economic Development, and the Department of Economic Development. Pl.'s SOMF at ¶ 3.

[2] Since the inception of this litigation, Access Living has used the term "Affordable Rental Housing Program" to describe "the City's efforts to develop and support affordable housing using federal, state, and local funding—which have resulted in the construction or rehabilitation of . . . more than 50,000 rental units." Compl., Dkt. 1, at ¶ 2. While the City does not use that term, DOH has advertised these efforts among its "Affordable Housing Programs." Pl.'s SOMF at ¶ 8.

Disclaiming any responsibility to monitor developers and enforce these accessibility provisions, the City styles itself a mere disinterested bystander, providing "gap funding" to developers and issuing permits in its "regulatory" role. Mot. for Summ. J. ("MSJ"), Dkt. 308, at 1, 19–20. That characterization is factually and legally false. The record shows that DOH brought the entire Program into existence as a way to provide affordable rental housing and revitalize the City's neighborhoods. Pl.'s SOMF at ¶¶ 4–5, 8–10. For decades, the City has been instrumental in the design, funding, approval, and oversight of the housing developments at issue.

While the City conducts thorough oversight of developers' compliance with dozens of federal, state, and local requirements prior to, during, and long after construction—including but not limited to affordability, lead paint, landscaping, prevailing wages, and the hiring of Chicago residents—the City freely admits that it does not monitor or enforce developers' compliance with Federal Accessibility Requirements and has not sanctioned a single developer for noncompliance with these Requirements from 1988 to the present. Pl.'s SOMF at ¶¶ 13–24, 26–29, 32–33.

Access Living challenges the role of the City—the sole defendant in this case—which was indisputably the recipient of qualifying federal funds, and is thus obligated to ensure the Program complies with Federal Accessibility Requirements. Access Living's central claim is that the City chose to exercise its oversight authority over developers participating in the Program in many other areas but neglected to enforce the Requirements to ensure these affordable housing units would be accessible to individuals with disabilities, with devastating effects. Access Living's architectural accessibility expert examined conditions at 173 of the developments and found that 100% failed to comply with Federal Accessibility Requirements. Pl.'s SOMF at ¶ 36. The City does not contest that evidence.

Because of the City's lack of oversight and enforcement, Access Living has had to divert thousands of hours of staff time and precious financial resources to assist thousands of Chicagoans with disabilities (referred to as "consumers") who are barred by inaccessibility from living in Program developments. When Access Living's consumers are forced to live in nursing homes, homeless shelters, or inaccessible housing, it is immensely more difficult for Access Living to assist them in living independently and participating fully in community life.

The City's summary judgment arguments distort Access Living's actual claims; ignore extensive record evidence upon which a jury could find liability; and are flatly contradicted by the plain statutory language, implementing regulations, relevant caselaw, and legislative history of Section 504, the ADA, and the FHA. The City's Motion should be denied in its entirety.

II. FACTUAL BACKGROUND

A. The City Administers an Affordable Rental Housing Program.

Since 1988, the City has received more than $3.6 billion in federal housing and community development funds from the U.S. Department of Housing and Urban Development ("HUD"). Pl.'s SOMF at ¶ 2. When the City decides to lend or grant these funds to affordable housing developers, HUD requires it to monitor their performance, ensuring such funds:

> are used in accordance with all program requirements and written agreements, and taking appropriate action when performance problems arise. *The use of . . . subrecipients, or contractors does not relieve the participating jurisdiction of this responsibility. The performance and compliance of each contractor . . . and subrecipient must be reviewed at least annually.* The [City] must have and follow written policies, procedures, and systems, including a system for assessing risk of activities and projects and a system for monitoring entities consistent with this section, to ensure that the requirements of this part are met.

24 C.F.R. § 92.504(a) (emphasis supplied). Among these requirements are HUD regulations that oblige DOH and other City agencies to (a) comply with the Federal Accessibility Requirements, and (b) ensure the "performance and compliance of each contractor" with those Requirements.

See 24 C.F.R. § 92.504(c)(2)(iv) (incorporating by reference 24 C.F.R. §§ 5.105 *et seq.*).

In the years since 1988—largely with HUD funding—DOH has "help[ed] to build, rehabilitate and preserve rental housing" by distributing Program funds to private developers and non-profits to support the construction, rehabilitation, and operation of tens of thousands of apartment units operated as affordable housing pursuant to loan and regulatory agreements with the City. Pl.'s SOMF at ¶ 2. As explained in greater detail below, four City entities assumed oversight roles with respect to the Program: DOH, the City Council, the City's Department of Buildings ("DOB") and the Mayor's Office for People with Disabilities ("MOPD"). None ensured compliance with the Requirements in the construction or operation of the Program.

i. The City Developed the Program.

The City is the designer of a program to which it invites developers to apply. The City's own publications identify one of the DOH's "chief responsibilities" as "work[ing] with private developers to increase the supply of affordable housing in every Chicago neighborhood through a litany of targeted programs." Pl.'s SOMF at ¶ 5. Similarly, through its "Affordable Housing Programs," Pl.'s SOMF at ¶ 8, the City bundles federal and other funds into a Multi-Family Financial Assistance program, through which it "encourages developers to apply for public funds and other subsidies to build and rehabilitate affordable rental properties in Chicago." Pl.'s SOMF at ¶ 9.

DOH instructs that "[a]ll developers seeking DOH funds or other assistance to rehab, construct, or refinance multi-family affordable rental housing developments must complete and submit the Multi-Family Housing Financial Assistance Application." Pl.'s SOMF at ¶ 6. This Application identifies a dozen or more programs, initiatives, and funding sources DOH makes available to developers, including several types of federal funding. Pl.'s SOMF at ¶ 7.

The City describes its role as "help[ing] to build, rehabilitate and preserve rental housing" and it issues quarterly reports boasting about its progress toward increasing the affordable housing stock. Pl.'s SOMF at ¶¶ 4, 12. For instance, between 1989 and 2009, the City "invested more than $4.5 billion in local state and federal funds to create, improve and maintain" thousands of affordable units. Pl.'s SOMF at ¶ 10. In its current affordable housing plan, the City asserts it "will continue to work with and through local partners to invest in targeted development that builds on the existing assets in these neighborhoods to pave the way for private investment. This improved quality of life and new development will help to attract new residents." Pl.'s SOMF at ¶ 11.

ii. The City Oversees the Program.

DOH provides a Multi-Family Housing Financial Assistance Application and detailed Instructions for interested developers. Pl.'s SOMF at ¶¶ 6–7. Along with other City agencies, it carefully vets each developer's application, and the City Council approves every loan. Def.'s SOMF at ¶¶ 32–33. DOH enters into loan and regulatory agreements ("Agreements") with developers requiring the latter to comply with a plethora of federal, state, and local requirements, including Section 504, the ADA, and the FHA. 24 C.F.R. § 92.504(c)(3)(iv) (incorporating 24 C.F.R. § 92.251); Def.'s SOMF at ¶¶ 8–11, 13–19; Pl.'s SOMF at ¶¶ 13–16. Under those Agreements, the City has authority to enter and inspect the developments, Pl.'s SOMF at ¶ 15, and to enforce a borrower's compliance with the Federal Accessibility Requirements. Pl.'s SOMF at ¶ 14.

iii. The City Monitors Developers for Compliance with Non-Accessibility Program Requirements.

DOH monitors and enforces borrower compliance with several dozen federal, state, and local requirements that do not concern accessibility, Pl.'s SOMF at ¶¶ 17, 19–20, and has

detailed protocols devoted to oversight and enforcement of these requirements. Pl.'s SOMF at ¶¶ 16–17. Pursuant to its HOME Long Term Monitoring Policies and Procedures (the "Policies Manual"), DOH exercises detailed oversight prior to, during, and after construction or rehabilitation of the developments through front-end "construction monitoring" and back-end "physical inspections." Pl.'s SOMF at ¶ 17.

The Policies Manual devotes 25 pages to oversight of developer requirements under the Davis-Bacon Act (concerning wage rates), Section 3 of the Housing and Community Development Act (concerning hiring of low-income workers), minority and women business enterprise standards, City of Chicago local hiring requirements, loan disbursements, tenant eligibility, and rent levels. Pl.'s SOMF at ¶ 17. Similarly, the Agreements provide extensive detail about these non-accessibility requirements, how developers must document compliance, and sanctions for noncompliance. Pl.'s SOMF at ¶ 16.

DOH relies on the DOB to determine whether to issue construction and occupancy permits pursuant to the requirements in the Chicago Building Code ("CBC"). Pl.'s SOMF at ¶ 19. DOB has deep expertise in the CBC and regularly goes onto building locations to ensure compliance with structural, electrical, plumbing, HVAC, fire safety and other City requirements. Pl.'s SOMF at ¶ 20. But prior to 2022 (when a handful of developments were finally inspected for accessibility), no City agency went on-site to inspect any Program development for compliance with the Federal Accessibility Requirements. Pl.'s SOMF at ¶¶ 21, 23, 28–30.

DOH tells HUD and the public that "[a]ll HOME funded projects shall be inspected at project completion and during the period of affordability to determine that the project meets the . . . §92.251 Property Standards." Pl.'s SOMF at ¶ 18. But that is not true. In addition to other requirements, those "Property Standards" explicitly incorporate the Federal Accessibility

Requirements, *see* §§ 92.251(a)(2)(i), (b)(1)(iv), and the City admits that it does not enforce those Requirements against developers. Pl.'s SOMF at ¶¶ 21, 32–33.

B. The City Failed to Ensure Accessibility of the Program.

Unlike many other provisions in the Agreements, the City ***has chosen not to enforce*** developers' compliance with the Federal Accessibility Requirements. Neither the City's front-end "construction monitoring" nor its back-end "physical inspections" involves an assessment of whether the development complies with those Requirements. Pl.'s SOMF at ¶ 21. DOH freely admits it has no expertise concerning Federal Accessibility Requirements and has made no effort to establish internal capacity to ensure compliance. Pl.'s SOMF at ¶ 22. DOB only enforces the CBC, but it does not review plans for accessibility and does not go on-site to make sure buildings are actually built in compliance with the Requirements. Pl.'s SOMF at ¶ 23. And there is no evidence that the DOB ever withheld a building permit from a Program borrower on the basis of accessibility violations. Pl.'s SOMF at ¶ 33.

Since approximately 2000, the City has usually employed a single architect in the MOPD to conduct accessibility reviews. Pl.'s SOMF at ¶ 25. Prior to City approval, that architect is in active partnership with each developer and its design team, but his assessment is confined to "plan review" of blueprints to determine whether they are ***drawn*** in compliance with the accessibility provisions of the CBC. *Id.* Yet, mere compliance with the CBC provisions does not amount to compliance with Federal Accessibility Requirements. Pl.'s SOMF at ¶ 26. Further, the long-time MOPD deputy commissioner testified that MOPD staff resources were "obviously not" "sufficient to confirm compliance with the local, state and federal accessible requirements for the entire [Program]." Pl.'s SOMF at ¶ 27.

On occasion, MOPD instructs a developer to revise building plans to meet accessibility

requirements. Pl.'s SOMF at ¶ 28. But prior to 2022, no City agency sent any inspector into the field to ascertain whether City-funded developments in the Program had ***actually been built*** in compliance with Federal Accessibility Requirements. Pl.'s SOMF at ¶ 29. In March 2022 (four years after Access Living commenced this litigation), the City finally sent an MOPD inspector to conduct on-site inspections, Pl.'s SOMF at ¶ 30, effectively conceding that its failure to do so for many years had been insufficient to meet its obligations under the Requirements. That inspector visited nine (9) new developments between March and June 2022, all of which MOPD previously approved via "plan review." *Id.* He discovered accessibility violations at all of them, consistent with the findings of Access Living's architectural accessibility expert. Pl.'s SOMF at ¶¶ 30, 36.

C. As a Result, the Program Is Inaccessible to People with Disabilities.

Because the City has failed to enforce Federal Accessibility Requirements, the Program has several thousand fewer accessible units than federal law requires. Pl.'s SOMF at ¶ 34. Collectively, Access Living's expert reports demonstrate the wholesale failure of the City to ensure architectural and programmatic accessibility. Bill Hecker, Access Living's architectural accessibility expert, found **100 percent noncompliance** in a random sample of 173 Program developments. Pl.'s SOMF at ¶ 36.[3] Hecker also reviewed the nine MOPD accessibility surveys from 2022 and opined that 100 percent of those developments failed to comply with the Requirements. *Id.* The City does not challenge a single finding in Hecker's 1,386-page report,

[3] The report of Dr. Bernard Siskin describes his statistical analysis of the estimated percentage of developments in the Program that would fail a test of architectural accessibility based on random samples Hecker reviewed. Pl.'s SOMF at ¶ 35. For example, Dr. Siskin concludes: "Based on the measurement review conducted, my best statistical estimate is that if all 542 projects subject to Section 504 were inspected, 100% would fail. I am 97.5% confident that at least 92.4% (or 501 projects) would fail." *Id.* Defendant did not submit any report countering Dr. Siskin's conclusions or challenge his qualifications as an expert. *Id.*

which chronicles how the City's oversight failures deprive people with disabilities of meaningful access to the Program. *Id.*

John L. Wodatch, Plaintiff's expert on the federal "program accessibility" requirements, reviewed the voluminous discovery record, and opined that the City has operated (and continues to operate) the Program in a manner that denies people with disabilities an equal opportunity to participate. Pl.'s SOMF at ¶ 37. His report identifies how, among other things, the City failed to: (1) develop the safeguards necessary to ensure City-funded developers comply with the Requirements; (2) identify and publicize to people with disabilities the location of accessible units; (3) develop a process for ensuring accessible units are reserved for people with disabilities and that able-bodied tenants are moved out of such units; or (4) impose sanctions on any owner who is out of compliance. *Id.* The City did not submit any report countering Wodatch's conclusions. *Id.*

As a result, Access Living's clients (or "consumers") have been largely shut out of the Program. Pl.'s SOMF at ¶ 38. Given the limited availability of affordable, accessible housing units, Access Living consumers have been forced to live in nursing homes, on the street, in their cars, in homeless shelters, or in other inadequate and dangerous housing. *Id.*

III. LEGAL STANDARD

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must show that "no reasonable jury could find for the other party based on the evidence in the record." *Martinsville Corral, Inc. v. Soc'y Ins.*, 910 F.3d 996, 998 (7th Cir. 2018). Courts must construe all facts in the light most favorable to the nonmovant and draw all reasonable and justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

IV. ARGUMENT

The crux of the City's Motion is that it cannot be held liable for Section 504, ADA, and FHA violations because (1) it does not build, own, or exercise operational control over the affordable rental housing developments in the Program, and (2) what it does do—provide funding to developers—does not give rise to any oversight obligations with respect to accessibility. As detailed below, both arguments fail as a matter of fact and law.

All three statutes provide for a private right of action to enforce the City's compliance. Applying binding precedent from the Supreme Court and Seventh Circuit, the Court rejected the City's challenge to Access Living's standing at the motion to dismiss stage. Dkt. 35, at 7–11. The City has come forward with no new evidence or argument to change that outcome. Summary judgment on Plaintiff's Section 504 and ADA claims is also inappropriate because there are disputed material facts and inferences as to whether the City's design, funding, approval, and oversight of privately-owned affordable rental housing developments amount to a program, service, or activity, as broadly defined by the statutes; and whether the City's actions meet its duty to ensure Program sub-recipients comply with federal anti-discrimination provisions. The disputed material facts about the extent of the City's involvement in the process of designing and constructing the subject developments preclude summary judgment on the FHA, as well.

A. The Record Permits a Reasonable Jury to Find the City Liable for Discrimination Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

Access Living alleges the City violated Section 504 and the ADA by failing to ensure the Program is accessible to people with disabilities. To establish a violation, Plaintiff must show that (1) qualified individuals with a disability or persons alleging discrimination (2) were denied the benefits of the services, programs, or activities of the City (3) because, or on the basis of,

their disability. *Am. Council of Blind of Metro. Chi. v. City of Chicago*, No. 19 C 6322, 2023 WL 2744596, at *4 (N.D. Ill. Mar. 31, 2023) (citing *Lacy v. Cook County*, 897 F.3d 847, 853 (7th Cir. 2018)). For Section 504 liability, Plaintiff must also show the City received federal funds. *Id.* (citing *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015)).

The City concedes it is a public entity subject to the obligations of the ADA and a recipient of federal financial assistance subject to Section 504. Pl.'s SOMF at ¶ 1. Its Motion challenges the first and second factors but is silent with respect to the third and thereby waives arguments concerning causation. *See Smith v. Ne. Ill. Univ.*, 388 F.3d 559, 569 (7th Cir. 2004). In any case, causation is clear inasmuch as the Program's inaccessibility so clearly excludes Access Living's consumers ***because of their disabilities.***

As established below, the City's design, funding, approval, and oversight of more than 500 affordable rental housing developments falls squarely within the expansive definition of a "program or activity" under Section 504 and the ADA. Moreover, Access Living is qualified to challenge the City's violations in its operation of the Program, and there are genuine issues of material fact as to whether its consumers were denied equal access to the Program.

i. The City Operates a Program as Defined by the Rehabilitation Act and the Americans with Disabilities Act.

The bulk of the City's Motion argues the City's challenged conduct is not a "program or activity" under Section 504 and the ADA because: (1) it does not own, operate, or manage the housing developments; and (2) its provision of funding or tax credits to developers of the housing developments does not give rise to any legal obligation to engage in oversight.

These arguments fail as a matter of law for two reasons. *First*, the plain statutory and regulatory language broadly define "program" and "activity" to encompass all operations of the City. *Second*, it is well-established that public entities cannot avoid their Section 504 and ADA

obligations by providing funding, ceding functions, or contracting with private parties; rather, they must ensure sub-recipients comply with Federal Accessibility Requirements.

Even if the City's legal arguments had any merit, material factual disputes as to the City's role in the Program preclude summary judgment. While the City attempts to avoid liability by framing its involvement in the Program as mere "provision of funding or tax credits," MSJ at 5, there is extensive record evidence suggesting a much larger City role with respect to the design, funding, approval, and oversight of the housing developments such that a reasonable jury could conclude the City operated a "program" or "activity" as defined by Section 504 and the ADA.

a. The Program Fits Comfortably within the Statutory and Regulatory Definition of Programs or Activities.

The City simply ignores that the Rehabilitation Act defines a program or activity as "**all of the operations of**" a department, agency, or other instrumentality of a State or local government that receives or dispenses federal funds. 29 U.S.C. § 794 (b)(1) (emphasis added). *See also* 24 C.F.R. § 8.3. This expansive definition is broadly construed to include "any normal function of a governmental entity." *Am. Council of Blind of Metro. Chi.*, 2023 WL 2744596, at *4 (citing *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44 (2d Cir. 1997) and *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)).

The scope of services, programs, or activities giving rise to liability under the ADA is also decidedly broad. *See id.* "Although the ADA does not explicitly define 'services, programs, or activities,' the regulations promulgated pursuant to the act state that 'title II applies to **anything a public entity does**.'" *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002) (citing 28 C.F.R. pt. 35, app. A) (emphasis added); *see also Am. Council of Blind of Metro. Chi.*, 2023 WL 2744596, at *5. Courts reject the City's cramped interpretation, holding that "services, programs, or activities" is "a catch-all phrase that prohibits

all discrimination by a public entity, regardless of the context, and that should avoid . . . hair-splitting arguments." *Innovative Health Sys., Inc.*, 117 F.3d at 47.

The City's Motion provides no basis for holding the activities at issue here would fall outside the normal functions or operations of the DOH. *See Meyer v. Walthall*, 528 F. Supp. 3d 928, 958–59 (S.D. Ind. 2021) (state agency's websites did not "fall outside the broad category of government activities encompassed by 'services, programs, or activities'"); *see also Indep. Living Ctr. of S. Cal. v. City of Los Angeles*, No. CV1200551 SJO (PJWx), 2012 WL 13036779, at *8 (C.D. Cal. Nov. 29, 2012) (applying Section 504 and ADA to municipal affordable housing program).

b. The City Has a Duty to Supervise Program Sub-Recipients.

Having met this threshold, the City cannot escape liability merely by claiming that private parties own, operate, or manage the affordable housing developments. As the City acknowledges, the Seventh Circuit has held that a public entity like the City cannot "avoid its obligations under the statute[s] by ceding its governmental functions to private entities." *Ashby v. Warrick Cnty. Sch. Corp.*, 908 F.3d 225, 231 (7th Cir. 2018); *see also Hunter on behalf of A.H. v. D.C.*, 64 F. Supp. 3d 158, 168 (D.D.C. 2014) (a public entity has an obligation to "ensure that its private contractors comply with its ADA and Rehabilitation Act obligations" and "cannot escape liability by contracting away" services to a private entity) (listing cases).

This is consistent with Section 504 and ADA regulations. HUD regulations implementing Section 504 establish that recipients of federal funding "may not, directly or **through contractual, licensing, or other arrangements** . . . [a]id or perpetuate discrimination" by giving assistance to someone who discriminates on the basis of disability "in providing any housing, aid, benefit, or service." 24 C.F.R. § 8.4(b)(1)(v) (emphasis added); *see also* 24 C.F.R. § 92.504.

Similarly, ADA regulations are clear that "[a] public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability . . ." discriminate in delineated ways. 28 C.F.R. § 35.130(b)(1). Guidance on ADA's implementing regulations further establishes that "[a]ll governmental activities of public entities are covered, even if they are carried out by contractors." 28 C.F.R. pt. 35, App. B, § 35.102.

These regulations, which "warrant respect," *Ashby*, 908 F.3d at 231 n.12, explicitly spell out a "duty to supervise actions taken by other parties." *Indep. Living Ctr. of S. Cal.*, 2012 WL 13036779, at *8; *see also Ashby*, 908 F.3d at 232 (noting that "regulations specifically contemplate . . . that liability may attach to some complicated relationships between public and private actors").[4] This duty is consistent with the purposes of the Rehabilitation Act, as Congress expressed a "clear interest in eliminating disability-based discrimination in state departments or agencies . . . [which] flows with every dollar spent by a department or agency receiving federal funds." *Koslow v. Pennsylvania*, 302 F.3d 161, 175–76 (3d Cir. 2002) (internal quotation omitted); *see also Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) ("Congress has a strong interest in ensuring that federal funds are not used in a discriminatory manner and in holding states responsible when they violate funding conditions.").

Courts have thus consistently held that public entities need not own or operate the facilities at issue for Section 504 or ADA Title II liability to attach. *See, e.g.*, *Indep. Living Ctr. of S. Cal.*, 2012 WL 13036779, at *8; *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003); *see also Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 318 (E.D.N.Y. 2009)

[4] *See also Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) ("The Justice Department's interpretation of the Rehabilitation Act strongly supports this view [that a state must guarantee that those it delegates to carry out its programs comply with the Rehabilitation Act]."); *Hunter*, 64 F. Supp. 3d at 168 ("Regulations promulgated by the DOJ make clear that public entities cannot escape liability by contracting away the provision of services to a private entity.").

(where state licensed and certified privately-owned adult homes to deliver services, state was subject to liability under Title II for program-wide ADA violations); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065–67 (9th Cir. 2010) (concluding that third party arrangements do not relieve public entities of ADA obligations in private prisons not owned or operated by public entity).

Two factually analogous cases are instructive. In *Independent Living Center of Southern California v. City of Los Angeles*, the court squarely rejected a city's argument that it could not be held liable under Section 504 and the ADA on the grounds that these statutory obligations applied only to the owners or managers of housing developments. 2012 WL 13036779, at *8. The court noted Congress's "strong interest [in ensuring federal funds are not used in a discriminatory manner] would be undermined if government entities could avoid liability by transferring funds to private parties." *Id.* Similarly, in *Henrietta D. v. Bloomberg*, the Second Circuit rejected a state agency's contention that neither Section 504 nor the ADA required it to supervise subsidiary entities that more directly delivered services. The Court held a "state defendant is liable to ensure that [sub-recipients] comply with the Rehabilitation Act in their delivery of federally-funded social services." 331 F.3d at 286. That is because "in accepting federal funds, [the state defendant] promised that its programs will comply with the mandate of the Rehabilitation Act[,]" and as a result, it "is also liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with the Rehabilitation Act." *Id.*

Even if it does not own or manage the housing developments in the Program, the City is still liable for ensuring borrowers comply with Section 504 and the ADA. Because the City's position is at odds with all these authorities, the Court should reject it.

c. A Reasonable Jury Could Find the Challenged Program Is a Program of the City.

Rather than engage with the plain statutory language or addressing well-established supervisory liability, the City claims Access Living's "expansive definition of 'program' is not supported[,]" and suggests that under *Ashby,* a narrower interpretation applies to "situations involving third parties." MSJ at 7. Not so. Defendant misreads *Ashby*, which reinforces Access Living's claims and highlights how factual disputes make summary judgment inappropriate here.

In *Ashby*, the Seventh Circuit held government entities cannot wash their hands of Section 504 and ADA obligations by merely ceding their functions to or contracting with third parties. 908 F.3d at 232. The Court further held that "whether a particular event is a service, program, or activity *of* a public entity" is a "fact-intensive question" that turns on "what the public entity itself is doing, providing, or making available." *Id.* at 232. Here, that "fact-intensive question" turns on highly disputed issues of fact.

A closer look at *Ashby* illustrates why. There, at the Court's request, the DOJ filed an amicus brief laying out a spectrum of liability: on one end, where "the public entity and the private entity engage in a true joint endeavor, *both* entities may be responsible for complying with the ADA [and] Section 504"; on the other end, where the public entity merely "*participates in* an event of the private entity[,]" the liability of the public entity is limited to "its *own* program within the event, but does not extend to the entire event." *Id.* at 233. Of note, at either end of the spectrum, the public entity must comply with the ADA and Section 504 with respect to its *own* activities. The Seventh Circuit found this "loose but practical framework" persuasive. *Id.* at 227.[5]

[5] The City spills much ink arguing stray provisions in its Agreements with borrowers excuse its obligation to ensure Program developments comply with Federal Accessibility Requirements. MSJ at 2, 18, 24; Def.'s SOMF at ¶¶ 22–23. Such an Agreement may provide—as between the City and a borrower—that it "shall not be deemed . . . to create any relationship of . . . principal, agent, limited or general partnership, joint venture, or any association or relationship involving the City[,]" Def.'s SOMF at ¶ 23, but the City cannot use such a provision to escape its obligations under federal law to comply with the Requirements.

The City clearly misrepresents the holding in *Ashby*, and the Court should reject the City's attempt to misapply the *Ashby* framework to these facts. The *Ashby* Court found that because it was undisputed that the event at issue—a holiday concert—was planned, advertised, and hosted by a private museum for its own benefit, and the school's only involvement was as an "invitee," the event was not an activity of the school. *Id.* at 233–34.

But here, there are genuine issues of material fact as to the scope of the City's own activities and where they fit within the *Ashby* spectrum. Rather than a single holiday concert, the challenged program here encompasses a broad range of City activities over decades. Record evidence shows the City is not a passive invitee, but the creator of the Program, which it developed to meet City objectives; it solicited applications from developers for funding projects; reviewed and approved those applications; entered into multi-year Agreements with selected developers; conducted oversight over developers prior to, during, and subsequent to construction to ensure compliance with a wide range of requirements; and issued quarterly reports boasting about its progress toward increasing the affordable housing stock, among other activities. Pl.'s SOMF at ¶¶ 2, 4–17, 19–20.

Although the City attempts to minimize its role to the provision of funding or building permits, these are factual questions that should be left to the jury. *Am. Dermatologists' Med. Grp. v. Collagen Corp.*, 595 F. Supp. 79, 81 (N.D. Ill. 1984) (questions of fact cannot be resolved at summary judgment). Even if the Court were to accept the City's premise of a limited role (absent the above record evidence), under the *Ashby* framework, a reasonable jury could still find the City's undisputed activities—funding and carrying out regulatory obligations—amount to a program of the City.

The City's other authorities all concern situations in which governmental entities could

not control the actions of third parties. Given its broad authority under federal law and the Agreements, the City has all of the power and authority it needs to enforce the Federal Accessibility Requirements, just as it does with the many other requirements it does enforce against developers. The evidentiary record here is sufficient to permit a reasonable jury to conclude that the *cumulative* effect of all of these City actions, together with its exercise of regulatory oversight, may constitute a City program or activity that must comply with Section 504 and the ADA. The City's authorities are easily distinguishable.

First, the City asserts "the mere presence of funds or tax credits" does not impute liability to the City for accessibility violations in the housing developments. MSJ at 8. Even if the scope of the City's involvement were not in dispute, the City's supporting authorities do not apply here. Neither *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir. 2007) nor *McDaniel v. Board of Education of City of Chicago*, 956 F. Supp. 2d 887 (N.D. Ill. 2013) generally foreclose public entities' liability as funders; rather, they turn on facts related to whether or not defendants had control (or authority to control the actions of other entities).[6]

Here, by contrast, there is strong evidence the City has (a) extensive supervisory authority over the Program; (b) the power to control or regulate third party owners' building and operation of the affordable housing developments; and/or (c) discretionary authority over the Program participants to ensure they comply with accessibility requirements. Pl.'s SOMF at ¶¶ 13–17, 24–25, 28, 32. Indeed, there is evidence the City exercises its supervisory or discretionary authority over many other elements of developer compliance. Pl.'s SOMF at ¶¶ 17, 19–20.

[6] *Bacon* took issue with imposing liability on a city merely because it provided funding to a school, where the city defendant had no authority over the buildings and services at issue, was "powerless" to control the expenditure of funds, and had no "discretionary authority" over the school operations resulting in the challenged infractions. 475 F.3d at 640. Similarly, in *McDaniel*, the court found the city did not possess legal authority to "carry out the conduct that form[ed] the basis of" the plaintiffs' case. 956 F. Supp. 2d at 895.

Hence, the City's argument fails.[7]

Second, the City claims that, in the absence of control over operation of the housing developments, there is no City program. MSJ at 9. But the City's level of control is in dispute, and the City's supporting authorities extend only to situations where a plaintiff challenges services that are solely within the purview of other entities. For example, in both *Swan v. Board of Education of City of Chicago*, 956 F. Supp. 2d 913, 916–17 (N.D. Ill. 2013) and *Wright v. Board of Commissioners of Capital Area Transit System*, 551 F. Supp. 3d 607, 615 (M.D. La. 2021), the municipal defendants did not have any authority over the decisions or physical premises resulting in alleged ADA violations—in *Swan*, the authority to close public schools, and in *Wright*, the authority to maintain the condition of bus stops. That is far from the case here.

Third, the City argues that issuing building permits—in and of itself—"is not sufficient to make the housing a City program." MSJ at 10. But this case is nothing like the City's supporting authorities. In *S.G. v. City of Los Angeles*, a court found that the city defendant's involvement was insufficient for ADA liability where the plaintiff only alleged the city licensed, certified, permitted, or regulated a private party's housing project, but there was no allegation that the developers "received public funding, worked for the City, contracted with the City to implement public services, programs or activities, or were controlled by the City[.]" No. LA CV17-09003 JAK (PJWx), 2020 WL 8837146, at *12 (C.D. Cal. Feb. 21, 2020). By contrast, here, the evidence demonstrates the affordable housing program as a whole was a public program, the City provided developers with public funding, and it contracted with developers to provide

[7] *See United States v. Georgia*, 461 F. Supp. 3d 1315, 1323 (N.D. Ga. 2020) (distinguishing *Bacon* where plaintiff "alleged far more than only that Defendant is the funding source for [the challenged program]").

affordable housing to City residents.[8] Pl.'s SOMF at ¶¶ 2–16

Finally, the City asserts "the existence of contractual relations is, by itself, insufficient." MSJ at 10. But its cases stand only for the proposition that a housing authority whose sole involvement is the operation of a rent subsidy program—and which has nothing to do with the development of the housing units at issue—cannot be held liable under the ADA for accessibility violations in the units where a tenant sought to use the subsidy. *See Liberty Res., Inc. v. Phila. Hous. Auth.*, 528 F. Supp. 2d 553, 570 (E.D. Pa. 2007); *Louis v. N.Y.C. Hous. Auth.*, 152 F. Supp. 3d 143, 153 (S.D.N.Y. 2016); *see also Jackson v. Chi. Hous. Auth.*, No. 21 C 3313, 2022 WL 991968, at *2 (N.D. Ill. Apr. 1, 2022), *appeal dismissed*, 2022 WL 16569186 (7th Cir. Oct. 12, 2022).

Taken as a whole, the record evidence is more than sufficient for a jury to find the Program is a program of the City, as defined under Section 504 and the ADA.

d. Access Living's Program Definition Is Workable.

The City next argues Access Living's definition of the Program is "unworkable," MSJ at 12, but this claim only serves to show how "[the City's] arguments are premised on a definition of the applicable program . . . not found in the complaint" or the record evidence, and should be rejected. *Powell v. Illinois*, No. 18 CV 6675, 2019 WL 4750265, at *13 (N.D. Ill. Sept. 30, 2019).

To illustrate the "problem" with Access Living's claims, the City points to Coronado Apartments, a development that received tax credits from the City for rehabilitation thirty years ago. MSJ at 12. Under its view of the Program, the City claims that Coronado Apartments would

[8] Nor is this case anything like *Alford v. City of Cannon Beach*, where the court rejected ADA liability based solely on allegations that a city issued building permits to noncompliant third parties. No. CV-00-303-HU, 2000 WL 33200554, at *21 (D. Or. Jan. 17, 2000).

have been "under City management for the last 30 years[,]" and the City is at risk of liability if a single accessible unit were offered to a non-disabled person over that period. *Id.* at 12–13. But that is a major distortion of Access Living's claims; Access Living does not challenge accessibility violations at any individual development, and it certainly does not seek to hold the City responsible for the day-to-day management of any individual development. Rather, Access Living's claims are premised on the City's legal obligation to exercise its oversight authority to ensure developments in its Program comply with the Federal Accessibility Requirements. The City's liability is based on its failure to adopt mechanisms to ensure that Program developments are designed and constructed in compliance with the Requirements, and operated in a way that reserves accessible units for people with disabilities, as they are required to do under federal law. Pl.'s SOMF at ¶ 36 (documenting 100% architectural noncompliance); *id.* at ¶ 37 (documenting systemic noncompliance with program accessibility requirements).

This is precisely the kind of discrimination Section 504 and the ADA were meant to combat. *Lacy v. Cook County*, 897 F.3d 847, 863 (7th Cir. 2018) (both statutes were meant to combat discrimination that is "often the product, not of invidious animus, but rather of thoughtlessness and indifference") (quoting *Alexander v. Choate*, 469 U.S. 287, 295) (1985)).

ii. A Reasonable Jury May Find the City Liable Under Section 504.

Having dispatched the City's arguments about the "program" analysis, we turn to the City's remaining Section 504 arguments: (1) that Access Living cannot show that it was qualified to assert its Section 504 claims or subjected to discrimination; and (2) that Section 504 does not apply to non-federally funded developments. MSJ at 13–16. These arguments fail.

a. Access Living Was Subjected to Discrimination Under Section 504.

The City argues "Access Living does not have standing or otherwise cannot assert its claims under Section 504" because it does not purport to "participate in the City's funding

process" and it has "no private right of action" under HOME and CDBG statutes. MSJ at 13–14. As an initial matter, Section 504 extends a private right of action to "any person aggrieved by any act or failure to act by any recipient of Federal assistance[.]" 29 U.S.C. § 794a(a)(2). Judge Dow has already rejected the City's standing arguments in this case, concluding Access Living has standing to bring its Section 504, ADA, and FHA claims. Dkt. 35 at 11 (applying *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990)); *see also Access Living of Metro. Chi. v. Chi. Transit Auth.*, No. 00 C 0770, 2001 WL 492473, at *5 (N.D. Ill. May 9, 2001) ("Congress also granted standing to sue to organizations such as Access Living under . . . the ADA and the Rehabilitation Act."). The City has not identified any new facts or authorities undermining Access Living's right to bring such claims or to alter Judge Dow's well-reasoned decision.

Instead, the City intentionally misconstrues Access Living's claim. Access Living is not seeking funding or to participate in a "funding process" to develop housing; it asserts the City's failure to ensure that housing developments in the Program comply with Federal Accessibility Requirements effectively excludes people with disabilities from the Program, including the consumers to whom it provides services. And while Access Living cites HUD's HOME and CDBG regulations as evidence that HUD also applies the Federal Accessibility Requirements to the City and its subrecipients, Access Living does not seek to enforce those regulations in this suit. The City identifies no legal authority requiring Access Living to engage in the challenged process to be qualified to sue or to show that it was subjected to discrimination. Indeed, several other analogous cases have held the opposite. *See*, *e.g.*, *Access Living*, 2001 WL 492473, at *2–5; *Indep. Living Ctr. of S. Cal.*, 2012 WL 13036779, at *8.

The City's attack on Access Living's organizational standing and injuries musters

authorities involving individual plaintiffs seeking redress for their own inability to access certain services. *See, e.g.*, *Louis*, 152 F. Supp. 3d at 150–51 (concerning plaintiffs' request for accommodations and benefits); *Straw v. City of S. Bend*, No. 3:16-CV-342-JD, 2016 WL 6996047, at *3–4 (N.D. Ind. Nov. 30, 2016) (finding no injury-in-fact in *pro se* individual plaintiff's claims for ADA violations in buildings he had no concrete intention to visit). Analysis of those injuries is clearly inapposite.

b. The City Is a Recipient of Federal Funds.

Entities that receive federal funds are subject to Section 504's anti-discrimination provisions. *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015); *Carter v. City of Chicago*, 520 F. Supp. 3d 1024, 1030 (N.D. Ill. 2021). The City concedes it has received federal funds. Pl.'s SOMF at ¶ 1. While acknowledging that nearly three quarters of the developments in the Program received federal funding, the City makes the bizarre argument that its accessibility obligations pursuant to Section 504 do not apply to the remaining housing developments that did not receive federal financial assistance. MSJ at 15–16.[9] But Access Living is not asserting its Section 504 claims against individual developments. Rather, Access Living challenges the role of *the City*—the sole defendant in this case—which was indisputably the recipient of qualifying federal funds, and is thus obligated to ensure the architectural and programmatic accessibility of the Program as a whole, even if certain subparts (i.e. individual developments) within the Program did not directly receive such federal funding.

As discussed in Section IV.A.i *supra*, when an entity accepts federal financial assistance,

[9] Curiously, the City's own Statement of Material Facts (Dkt. 309) and exhibits provide example after example of housing developments built exclusively with non-federal funds where the City imposes on a borrower the obligation to comply with Section 504. *See, e.g.,* Dkt. 309-20, at § 2.29 (imposing Section 504 obligation on a project funded solely by LIHTC); Dkt. 309-27 (project funded by multi-family revenue bonds); Dkt. 309-33 (Multi-Family Loan Program funding).

it is bound to adhere to the mandates of Section 504 in **"all of [its] operations**." *T.S. by & through T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 742 (7th Cir. 2022) (emphasis added) (quoting 29 U.S.C. § 794(b)). This requirement "reflected a deliberate move by Congress . . . to repudiate the notion that 'program or activity' referred *only* to the part of an organization directly receiving federal funds." *Id.* at 742–43. Accordingly, the City cannot carve out parts of the Program it claims did not receive direct financial assistance from Section 504's anti-discrimination provisions. "'All operations' means 'all operations,' after all." *T. S. by & through T.M.S. v. Heart of CarDon, LLC*, No. 120-CV-01699-TWP-TAB, 2021 WL 981337, at *9 (S.D. Ind. Mar. 16, 2021). Thus, the funding mix distributed to each individual development that participated in the Program has no bearing on the City's Section 504 obligations over the Program as a whole.

This case is entirely different from the authorities on which the City relies, where the plaintiffs attempt to impute Section 504 obligations on *private* parties solely on the basis of their receipt of tax credits. *See, e.g.*, *Cerda v. Chi. Cubs Baseball Club, LLC*, 405 F. Supp. 3d 780, 794 (N.D. Ill. 2019); *McKeon v. Cent. Valley Cmty. Sports Found.*, No. 1:18-CV-0358-BAM, 2019 WL 7282047, at *6 (E.D. Cal. Dec. 27, 2019). Here, Access Living is not suing private developers based on their receipt of LIHTC funds. And while the City disbursed LIHTC funds to developments in the Program, Pl.'s SOMF at ¶ 7, Access Living bases its Section 504 claim principally on the City's undisputed receipt of HUD funds, which it used to fund the Program. Pl.'s SOMF at ¶ 2. Because that is certainly enough to hold the City liable under Section 504 for discrimination in all of its operations, the City's argument fails.

iii. A Reasonable Jury May Also Hold the City Liable Under the ADA.

Courts read the relevant provisions and implementing regulations of Section 504 and the ADA "in a consistent manner," *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 592

(7th Cir. 2018) (quoting *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004)), except that the ADA applies to state and local entities irrespective of receipt of federal assistance. *Jackson v. City of Chicago*, 414 F.3d 806, 810 at n.2 (7th Cir. 2005). Courts are required "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998). Many of the arguments above concerning Section 504 apply with equal force to the ADA.

a. Access Living Was Subjected to Discrimination Under the ADA.

The ADA's enforcement provision extends relief not just to "qualified individuals with a disability," but to "any person alleging discrimination on the basis of disability[.]'" 42 U.S.C. § 12133. Simply put, "[c]ourts have held that Title II confers a private right of action on everyone who meets constitutional standing requirements." *Access Living of Metro. Chi. v. Uber Techs., Inc.*, 351 F. Supp. 3d 1141, 1153 (N.D. Ill. 2018), *aff'd*, 958 F.3d 604 (7th Cir. 2020). For the reasons explained in Section IV.A.ii.a, the Court should reject the City's "funding process" challenge to Access Living's ADA claim.

b. Title II of the ADA Applies to Privately-Owned Facilities.

The City is wrong as a matter of law in its attempt to disclaim any responsibility for the Program's 100% architectural accessibility failure rate by arguing that the developments are "not facilities of a public entity," MSJ at 16–18, and it may not secure summary judgment by relying on inferences from disputed facts regarding the City's involvement with private developers.

Access Living asserts its ADA claims pursuant to the "general prohibitions against discrimination" found in 42 U.S.C. § 12132 and 28 C.F.R. § 35.130, which provide that people with disabilities shall not "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 any public entity." *Id.* Ignoring the ways in which the evidence suggests the City has violated the

ADA's "general provisions against discrimination," the City seeks refuge in an exceedingly narrow reading of a more specific provision relevant to facilities "constructed [or altered] by, on behalf of, or for the use of a public entity." 28 C.F.R. §§ 35.151(a)(1), (b)(1); *see* MSJ at 16–18.

Based on the more specific provision, the City erroneously claims the ADA "is inapplicable to facilities that are not facilities of a public entity." MSJ at 17. But that reading is untenable. In *Ashby,* the Seventh Circuit held that ADA liability turns not on ownership but on a "complicated" and highly "fact-intensive" analysis of the relationship between the public entity and the private entity. 908 F.3d at 232–34; *see also Armstrong*, 622 F.3d at 1066 (rejecting as "baseless" the State of California's contention that "public entities [may] not be subject to liability for violations of the ADA when they provide programs or services through arrangements with third parties"). Each of the cases on which the City relies, MSJ at 17, is distinguishable in that defendants on those cases lacked any authority over the decisions or physical premises resulting in alleged ADA violations. *See* Section IV.A.1.c, *supra.* In short, the City need not own the subject facilities for ADA liability to attach.

Despite the City's best efforts to narrow the ADA's protections, there is sufficient evidence on which a jury could find the City liable for developments constructed by third parties "on behalf of" the City, even in the absence of an agency or joint venture relationship between the City and owners of Program developments. According to Black's Law Dictionary, "[t]he phrase in behalf of traditionally means 'in the interest, support, or defense of' [and] on behalf of means 'in the name of, on the part of, as the agent or representative of.'" *Behalf*, *Black's Law Dictionary* (11th ed. 2019). For instance, the record supports a finding that the City created the Program for the benefit of its municipal goals—expanding and diversifying the affordable housing stock in the City. Pl's SOMF at ¶¶ 4–5, 10–12. Indeed, many of these buildings likely

exist only *because of* the City's efforts to facilitate and fund affordable developments. Pl.'s SOMF at ¶¶ 2, 4–11.

Nor does the phrase "for the use of" require that the City itself occupy the units or receive rent. MSJ at 18. *See Use, Black's Law Dictionary* (11th ed. 2019) (defining beneficial "use" as "the right to use property and all that makes that property desirable or habitable, such as light, air, and access, even if someone else owns the legal title to the property"). Given the extent to which DOH uses the Program to "work with and through local partners to invest in targeted development that builds on the existing assets in these neighborhoods to pave the way for private investment," Pl.'s SOMF at ¶ 11, there is ample evidence upon which a jury could find that the apartment units were built "on behalf of" or "for the use of" the City.

B. A Reasonable Jury May Find the City Liable Under the Fair Housing Act.

By virtue of its central role in the design, funding, approval, and oversight of more than 500 affordable rental housing developments, the City can also be held liable for its failure to ensure that the Program's developments comply with the accessibility requirements of the FHA.

As relevant to this litigation, the FHA makes it "unlawful . . . to discriminate against any person . . . in the provision of services or facilities in connection with such dwelling, because of a handicap . . . ." 42 U.S.C. § 3604(f)(2). The statute further provides that "discrimination includes . . . a failure to design and construct those dwellings in such a manner that . . . [they] are readily accessible to and usable by handicapped persons . . . [and] contain [specified] features of adaptive design." 42 U.S.C. § 3604(f)(3)(C). With or without animus or intent, a party that violates these provisions can be held liable. *United States v. Quality Built Const., Inc.*, 309 F. Supp. 2d 756, 760 (E.D. N.C. 2003); *United States v. Pacific Nw. Elec., Inc.*, No. CV-01-019-S-BLW, 2003 WL 24573548, at *16 (D. Idaho 2003).

Access Living alleges the City violated both provisions. The material facts relevant to the extent of the City's involvement in the design and construction process of the Program developments are disputed, making summary judgment inappropriate. Access Living has marshalled substantial evidence that the City of Chicago has been a central participant in the design and construction process leading to the creation of the Program. Pl.'s SOMF at ¶¶ 2, 4–20. For more than 30 years, the City has closely managed many elements of the Program's operations while neglecting its obligations to ensure accessibility for people with disabilities. Pl.'s SOMF at ¶¶ 13–34. A reasonable jury could find that by funding and approving the development of inaccessible housing developments, the City discriminated on the basis of disability "in the provision of services or facilities" in connection with those developments, in violation of (f)(2). Further, its deep involvement in the "design and construct" process makes the City liable under (f)(3)(C), as other courts have repeatedly observed in similar cases.

i. The City Discriminated in the Provision of Services or Facilities.

The City recycles its same arguments with respect to the FHA—it claims it can avoid liability under § 3604(f)(2) because it "does not own, operate, or manage the housing [in the Program], so . . . cannot be said to be involved in discriminatory rental of housing." MSJ at 18.

The Supreme Court and the Seventh Circuit have repeatedly held the FHA's protections must be interpreted broadly, consistent with their remedial purpose. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977). As Judge Easterbrook observed in a seminal decision, the FHA's prohibitions are written "in the passive voice—banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence . . . ." *N.A.A.C.P. v. Am. Fam. Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992). In short, if the City engages in behavior

to "discriminate against any person . . . in the provision of services or facilities" in connection with housing because of a disability, 42 U.S.C. § 3604(f)(2), then it cannot be saved from liability merely because it does not "own, operate or manage the housing."

In the context of the Program, the City is responsible for how it uses whatever authority it has to ensure compliance with the FHA. A number of federal courts have made that clear in analogous § 3604(f) cases with respect to the exercise of municipal powers involving zoning, licensing, or other powers in circumstances where municipalities did not own, operate, or manage the housing at issue. *See, e.g., Oconomowoc Res. Programs, Inc.,* 300 F.3d at 782 (discriminatory denial of a zoning permit for a group home); *Dadian v. Vill. of Wilmette,* 269 F.3d 831, 838–39 (7th Cir. 2001) (discriminatory refusal of a driveway permit for disabled homeowner); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 846 (N.D. Ill. 2001) (discriminatory denial of special use permit for group home); *All. for Mentally Ill v. City of Naperville,* 923 F. Supp. 1057, 1078–79 (N.D. Ill. 1996) (discriminatory enforcement of life safety code), *abrogated on other grounds by Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437 (7th Cir. 1999); *N. Shore-Chi. Rehab. Inc. v. Vill. of Skokie*, 827 F. Supp. 497, 508 (N.D. Ill. 1993) (discriminatory refusal to issue occupancy permit).

Rather than advise the Court of the breadth of its potential (f)(2) liability, the City cites to a single, unpublished, out-of-Circuit case that is entirely off point. MSJ at 18. In *Dinapoli v. DPA Wallace Ave II, LLC*, the court rejected a disabled litigant's claim that a housing authority bore responsibility under the FHA for the inaccessibility of a private landlord's premises. No. 07 Civ. 1409(PAC), 2009 WL 755354, at *3 (S.D.N.Y. Mar. 23, 2009). The court dismissed that case because the plaintiff did not allege how the housing authority "participate[d] in the alleged discrimination against him by failing to take action against [the] private landlord." *Id.* at *4.

Here, a reasonable jury could conclude from the summary judgment record that the City was deeply involved in the creation and oversight of inaccessible dwelling units in the Program such that it can be held liable for violation of 42 U.S.C. § 3604(f)(2).

ii. The City Discriminated in the Design and Construction of Housing.

The City seeks to escape § 3604(f)(3)(C) liability by claiming it "did not design or construct any of the housing at issue," that it "was designed and constructed by multiple third party developers, owners, contractors, and architects," and the City had only "a regulatory role to issue building permits for construction projects." MSJ at 19. But that argument is clearly wrong. Courts have consistently held that "liability under the Fair Housing Act for discriminatory design and construction should be imposed broadly." *United States v. Tanski*, No. 1:04-CV-714, 2007 WL 1017020, at *22 (N.D.N.Y. Mar. 30, 2007) (citing *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1148–49 (D. Idaho 2003); *Montana Fair Hous., Inc. v. Am. Cap. Dev., Inc.,* 81 F. Supp. 2d 1057, 1068 (D. Mont. 1999); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.,* 3 F. Supp. 2d 661, 665 (D. Md. 1998)).

The federal government's own guidance on (f)(3)(C) makes clear that "[a]ny person or entity involved in the noncompliant design and construction of buildings or facilities subject to the Act's design and construction requirements may be held liable for violations of the Act." Joint Statement, U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, *Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act* 27 (Question 56) (Apr. 30, 2013), https://www.hud.gov/sites/documents/JOINTSTATEMENT.PDF; *see also* Robert G. Schwemm, *Housing Discrimination Law And Litigation*, § 11D:9 at n.39 (updated July 2023) (collecting cases and concluding that "[t]he basic standard is that every person or entity that participates in

the design-and-construction process may be held liable [under § 3604(f)(3)(C)]").

One of the earliest cases to articulate the breadth of "design and construct" liability was *Baltimore Neighborhoods, Inc. v. Rommel Builders*. 3 F. Supp. 2d 661. Denying summary judgment, the court held that "Congress intended the FHAA to impose liability on more than just the developer or owner in light of the broad language in the statute[.]" *Id.* at 664. The builder defendant sought to escape FHA liability "because it has no ownership or control of the development and thus cannot satisfy the injunctive remedies requested by the plaintiffs." *Id*. at 665. The *Rommel* court rejected that reasoning, noting that "all participants in ***the process as a whole*** are bound to follow the FHAA. To hold otherwise would defeat the purpose of the FHAA to create available housing for handicapped individuals." *Id.* (emphasis in original).

In this very district, Judge Gottschall relied on *Rommel* to reject a defendant's attempt to escape FHA liability for inaccessible housing. *Doering v. Pontarelli Builders, Inc.*, No. 01 C 2924, 2001 WL 1464897, at *4 (N.D. Ill. Nov. 16, 2001). In reaching that conclusion, she reasoned that the FHA's "design and construct" provision "is not a description of *who* is liable. Rather, it is a description of what actions constitute discrimination. And what it says is that discrimination occurs when a nonconforming structure is designed and constructed." *Id.* (emphasis in original). *See also United States v. Hartz Construction Co.*, No. 97 C 8175, 1998 WL 42265, at *1 (N.D. Ill. Jan. 28, 1998) (describing as "a frank absurdity" the notion that participants can escape liability if they do not participate in all aspects of the design and construct process); *Tanski*, 2007 WL 1017020, at *22 (observing that "[t]here are no express statutory limitations on possible defendants" and "[a] participant cannot escape liability merely by showing reliance on the expertise or assurances of another participant").

The Hecker Report shows a 100% failure rate among surveyed properties. Pl.'s SOMF at

¶ 36. The City's Motion does not dispute a single finding in that report. By failing to raise any evidence disputing this widespread failure to comply with accessibility requirements, the City concedes that "nonconforming structure[s]" have been "designed and constructed." *Doering*, 2001 WL 1464897, at *4. Nor does the City contest that "discrimination [has] occur[red]." *Id.* Rather—in the face of its deep involvement in the design, funding, approval, and oversight of more than 500 affordable rental housing developments—it seeks to shift the blame onto others by misrepresenting its involvement as merely issuing building permits for construction projects. MSJ at 19. In fact, evidence on the record shows it was a full partner in each development in the Program. Pl.'s SOMF at ¶¶ 4–20.

The City seeks refuge in the argument that the FHA "expressly stat[es] that governmental entities were not subject to FHA claims based on accessibility review and approval of dwellings." MSJ at 19. But this language, which provides that cities are not required to conduct accessibility reviews of apartment buildings developed entirely by private sector entities, *see* 42 U.S.C. § 3604(f)(5)(B) and (C), does not apply when DOH has funded a 50,000-unit program and brought thousands of units into existence.

Four City entities assumed an oversight role with respect to the units in the Program. First, DOH reviewed and approved the design plans developers submitted with their applications for funding. Pl.'s SOMF at ¶¶ 6–7. Second, the City Council approved funding for each individual development in the Program. Def.'s SOMF at ¶ 33. Third, MOPD conducted plan review for each development in the Program, Pl.'s SOMF at ¶¶ 25, 28, and evidently approved the plans for each Program development that was built, including the developments cited in the Hecker Report as failing to comply with the Federal Accessibility Requirements. Pl.'s SOMF at ¶¶ 25, 30, 36. Fourth, DOB inspected each development once construction was completed and

issued an occupancy permit notwithstanding any failure to comply with the Federal Accessibility Requirements. Pl.'s SOMF at ¶¶ 19–20, 23, 33.

Once DOH, the City Council, MOPD, and DOB insert themselves in the funding, oversight, and operation of the Program and the result is "noncompliant structures," then a reasonable jury could determine that the City was a "wrongful participant[ ] in the design and construction process." *Rommel Builders*, 3 F. Supp. 2d at 665; *see also Tanski*, 2007 WL 1017020, at *22 (discussing the indicia of involvement in the design and construction process). And where—as here—the City has promised HUD it will comply with the accessibility provisions of the FHA as a condition of receiving billions of dollars in federal funding, 24 C.F.R. § 92.504(c)(2)(iv) (incorporating by reference 24 C.F.R. §§ 5.105 *et seq.*), it cannot now claim to be a mere bystander with no responsibility for ensuring such compliance by developers to whom it has provided Program funding, despite its clear authority and its clear obligation to do so.

Ignoring a substantial number of cases that are directly on point concerning (f)(3)(C) liability—including within this district—the City relies on a single case for the proposition that "Congress indicated a clear intent that the responsibility of complying with the provisions of the FHA would fall solely on the person actually responsible for the property." MSJ at 20 (citing *Indep. Living Ctr. of S. Cal.*, 2012 WL 13036779, at *9). In its FHA holding, that case—which resolved well short of summary judgment without a full evidentiary record—stands only for the proposition that the FHA does not impose such obligations where all the city does is review and issue permits in its "regulatory capacity." 2012 WL 13036779, at *9. Here, however, the record is replete with evidence that the City did much more than Los Angeles "with and through local partners to invest in targeted development that builds on the existing assets in these neighborhoods to pave the way for private investment." Pl.'s SOMF at ¶ 11.

Extensive evidence supports the allegations in Access Living's Complaint that the City of Chicago was deeply involved in the review, approval, funding, and oversight of the developments in the Program, thereby distinguishing it from *Independent Living* and the cases it relied upon. At the very least, because there are disputed issues of fact upon which a reasonable jury could conclude that the City bears responsibility under 42 U.S.C. §§ 3604(f)(2) and 3604(f)(3)(C) for the Program's noncompliance with the accessibility provisions of the FHA, summary judgment on those claims is inappropriate.

C. Access Living's Claims Are Timely.

Undeterred by this Court's previous rejection of its statute of limitations argument on a motion to dismiss, Dkt. 35 at 13–14 (finding that the continuing violations doctrine applies to Section 504, ADA, and FHA claims), the City recycles the same argument now. MSJ at 20–25. It does so by mischaracterizing Access Living's claims, and it remains without merit. Because the City offers no new evidence or argument beyond that rejected at the motion to dismiss stage, the Court should adopt Judge Dow's well-reasoned determination that the City's continuing violations of Section 504, the ADA, and the FHA toll any applicable statute of limitations.

i. Pervasive Accessibility Noncompliance Constitutes a Continuing Violation.

The City is correct that claims brought under Section 504, the ADA, and the FHA are subject to a two-year statute of limitations. MSJ at 20–21 (citations omitted). But from the inception of this litigation, Access Living has made clear that it is challenging the City's decades-long neglect of its obligation to ensure that the Program as a whole complies with the Federal Accessibility Requirements, and not merely the built conditions at any individual development in the Program. *See* Compl. at ¶¶ 1–2, 6–12; *see also* Dkt. 33 at 12 (Pl.'s Opp'n to Def.'s Mot. to Dismiss) ("There is no reason to single out particular properties in the Complaint because the discrimination alleged here applies to the Program as a whole."). Access Living

challenges the City's failure to comply with its own accessibility obligations, and evidence adduced in discovery confirms that the City's widespread violations continue today.

Access Living's claims are timely because they challenge continuing violations of the City's architectural and program accessibility obligations. In his decision denying the City's motion to dismiss, Judge Dow confirmed that Access Living's allegations could constitute continuing violations if borne out in the evidentiary record, *see* Dkt. 35 at 13–14, and they have been. As detailed *supra*, Access Living has marshalled extensive evidence of the City's widespread failure to comply with Federal Accessibility Requirements. For example, Access Living's programmatic accessibility expert, John L. Wodatch, submitted a detailed report attesting to the City's failure *to this day* to adopt any mechanisms to ensure that developments in the Program comply with architectural accessibility requirements; to ensure that accessible units in the Program are identified, reserved, or marketed to the people with disabilities who need them; or to conduct an appropriate self-evaluation to identify accessibility barriers, among other failures. Pl.'s SOMF at ¶ 37.

Similarly, Access Living's architectural accessibility expert found that *none* of the 173 housing developments he reviewed, including those built or rehabilitated as recently as 2022, met Federal Accessibility Requirements. Pl.'s SOMF at ¶ 36. Moreover, between March and June 2022, the City conducted on-site inspections of a handful of developments in the Program that it had earlier approved at plan review, and discovered meaningful accessibility violations at all of them. Pl.'s SOMF at ¶ 30. The City does not dispute any of these findings; rather, it attempts to avoid liability for its continuing failures by distorting Access Living's claims.

Independent Living Center is again instructive here. There, the court found that a city's failure to ensure its affordable housing program's compliance with federal accessibility laws

constituted a continuing violation that was not subject to the statute of limitations so long as the failure persisted. *Indep. Living Ctr. Of S. Cal.*, 2012 WL 13036779, at *4–5. Just like the City of Chicago, the municipal defendants "misstate[d] the nature of Plaintiffs' Complaint" by arguing that the statute of limitations had expired two years after the plaintiff organizations had begun to help people with disabilities find housing in the city, because "the design-and-construction phase ended when the allegedly non-compliant housing was built." *Id*. at *5.

Refuting this argument, the *Independent Living* court determined that plaintiffs' claims were not barred by a statute of limitations because, in fact, plaintiffs had "allege[d] a past and continuing failure to ensure that housing projects receiving state and federal funding comply with statutory requirements," thereby challenging "the legality of the overall housing program." *Id.* That is precisely the case here. Access Living does not challenge the legality of any one building, but rather, the City's accessibility failures across the Program overall.[10]

ii. The Continuing Violations Doctrine Applies Here.

The City's attempt to cast doubt on the applicability of the continuing violations doctrine in this Circuit is similarly unsupported. While the Seventh Circuit may not have spoken directly on the application of the continuing violations doctrine to the construction of facilities under the FHA, ADA Title II, or Section 504, MSJ at 22, other courts have offered persuasive analysis. Just a few months ago, Judge Bucklo denied summary judgment against the City of Chicago on Section 504 and ADA claims brought by a disability rights nonprofit challenging the City's failure to ensure safe street intersections for vision-impaired Chicagoans. *Am. Council of Blind of*

[10] Finally, although the misstatement does not affect the statute of limitations inquiry, the City attempts to deflect from its conduct by claiming that Access Living "waited until 2016" to initiate the investigation leading to this lawsuit. MSJ at 21. In fact, Access Living raised concerns to the City about violations in purportedly accessible units in the Program for years prior to 2016. Rather than initiate its own investigation to assess compliance, the City ignored Access Living's concerns.

Metro. Chi., 2023 WL 2744596, at *12–13. Finding that the claims were not time-barred, Judge Bucklo noted that "keeping public entities on the hook for injunctive relief as the years go by" effectuated the intended purpose of federal accessibility laws by "incentiviz[ing] [public entities] to remedy non-compliant services, programs, or activities in a reasonable yet efficient manner." *Id.* at *12 (internal citation omitted).

Judge Bucklo's interpretation fits neatly within the Seventh Circuit's genuine continuing violation doctrine, which applies when a "state actor has a policy or practice that brings with it a fresh violation each day." *See Woody v. City of Granite City*, No. 17-CV-534-SMY-RJD, 2019 WL 1326884, at *4 (S.D. Ill. Mar. 25, 2019) (citing *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1012–14 (7th Cir. 2003)); *see also Turley v. Rednour*, 729 F.3d 645, 654 (7th Cir. 2013) (Easterbrook, J., concurring). In the FHA context, courts have held that plaintiffs' claims are not time-barred when defendants have engaged in a "pattern or practice of construction-based violations of the FHA." *Nat'l Fair Hous. All. v. A.G. Spanos Const., Inc.*, 542 F. Supp. 2d 1054, 1061–62 (N.D. Cal. 2008) (citing *Havens Realty Corp.*, 455 U.S. at 380); *see also Nat'l Fair Hous. All. v. HHHUNT Corp.*, 919 F. Supp. 2d 712, 717–18 (W.D. Va. 2013).

So it is here—the City of Chicago's policies and practices (or lack thereof) have resulted in ongoing accessibility violations across the Program. Pl.'s SOMF at ¶¶ 34, 36–38, 40. These "fresh violation[s]," *Woody*, 2019 WL 1326884, at *4, continue to prevent people with disabilities from accessing safe, appropriate housing in Chicago. Pl.'s SOMF at ¶¶ 38, 40. The evidence shows that these violations continue to the present day, Pl.'s SOMF at ¶¶ 36–37; *see also id.* at ¶¶ 21–23, 27, 30, 34.

Cases cited by the City are inapposite, as they focus on the date of construction of individual buildings rather than the failure to comply with accessibility obligations across a

program that it designed, funded, approved, and oversaw. *See*, *e.g.*, *Stevens v. Hous. Auth. of S. Bend*, 720 F. Supp. 2d 1013, 1027 (N.D. Ind. 2010) (holding time-barred plaintiff's claim for a single decision concerning location of apartment building); *Sentell v. RPM Mgmt. Co.*, 653 F. Supp. 2d 917, 921–22 (E.D. Ark. 2009) (holding time-barred plaintiff's claim against architect for his noncompliant design of one complex). Furthermore, these distinguishable cases are contradicted by factually analogous authorities. *See*, *e.g.*, *HHHUNT Corp.*, 919 F. Supp. 2d at 717–18; *A.G. Spanos Const., Inc.*, 542 F. Supp. 2d at 1061–62.

Of course, "the City is not liable forever; it is responsible only for correcting its own mistakes." *Am. Council of Blind of Metro. Chi.*, 2023 WL 2744596, at *12 (quoting *Frame v. City of Arlington*, 657 F.3d 215, 239 (5th Cir. 2011) (en banc)). But Chicago's "affirmative, ongoing duty" to comply with federal accessibility laws will not cease until it remedies its violations. *Id*. (quotation omitted). Because in-circuit cases and principles underlying federal accessibility laws confirm that Plaintiff's claims are timely, the City's motion should be denied.

D. Access Living Properly Relies on ADA and Section 504 Regulations.

The City's final argument is that Access Living cannot enforce regulatory requirements under Section 504 and the ADA. MSJ at 26–28. But the City again misconstrues the claims and the applicable law. Access Living brings statutory claims against the City under Section 504, the ADA, and the FHA, Compl. at ¶¶ 146–59, and references several regulatory requirements.[11] *See generally* Compl. The City misleadingly suggests these "are not enforceable by Access Living in

[11] These include regulatory requirements to conduct a comprehensive self-evaluation and enact a transition plan; to maintain and publish lists of accessible units; to ensure that accessible housing units are inhabited by people with disabilities who need those features; to assess whether accessible units are distributed throughout housing projects and in a range of sizes and amenities so as to provide choice; to adopt affirmative marketing procedures; and to ensure UFAS compliance, which requires that 5% of total dwelling units provide heightened mobility features, and an additional 2% provide heightened communication features. *See* Compl.

a private cause of action" and seeks summary judgment "for claims that regulatory non-compliance constitutes a violation of ADA Tile II, Section 504, or the FHA." MSJ at 26. Not so.

As an initial matter, there is no such blanket prohibition on enforcement of regulatory requirements. In *Alexander v. Sandoval*, the Supreme Court established that while regulations that go beyond statutory prohibitions do not fall within a statute's implied right of action, those that "authoritatively construe the statute itself" may be so enforced. 532 U.S. 275, 284 (2001); *see also Mitchell v. Murray Energy Corp.*, No. 17-CV-444-NJR-RJD, 2019 WL 718521, at *3 (S.D. Ill. Feb. 20, 2019) (finding that where regulation was "interpretative[,]" merely "clarif[ying] duties" under a federal statute, there was a cause of action under the regulation). That is, Access Living may enforce ADA and Section 504 regulations through an implied right of action if those regulations are "tightly enough linked to § 504 [and the ADA] that they 'authoritatively construe' [those] statutory section[s], rather than impose new obligations." *Mark H. v. Lemahieu*, 513 F.3d 922, 939 (9th Cir. 2008); *see also Indep. Living Ctr. of S. Cal.*, 2012 WL 13036779, at *6. Thus, Access Living can enforce regulations that contain "general compliance language," such as 24 C.F.R. §§ 8.4(b)(1)(v), (b)(4)(i) (*see Indep. Living Ctr. of S. Cal.*, 2012 WL 13036779, at *6); or 28 C.F.R. § 35.130(b)(3), 28 C.F.R. § 41.51(b)(3), or 45 C.F.R. § 84.4(b)(4) (*see Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1175 (N.D. Cal. 2009)).

Access Living does not seek to enforce any regulations that go beyond statutory obligations; rather, it cites to these regulations only as HUD's authoritative interpretation of what Section 504 requires of an entity like the City that undertakes an affordable housing program. Courts have consistently held that violations of regulations implementing Section 504 and the ADA may be used as evidence to show that an entity has failed to make its program accessible to

people with disabilities, even when those regulations are not themselves privately enforceable. *See, e.g.*, *Huezo v. L.A. Cmty. Coll. Dist.*, No. CV-04-9972 MMM (JWJx), 2007 WL 7289347, at *8 (C.D. Cal. Feb. 27, 2007) (noting that while failure to comply with ADA and Rehabilitation Act requirements to conduct self-evaluation and prepare a transition plan does not necessarily prove statutory violation, "it is evidence tending to show that [plaintiff] was discriminated against"); *Cherry v. City Coll. of S.F.*, No. C04-04981WHA, 2005 WL 2620560, at *4 (N.D. Cal. Oct. 14, 2005) (noting that evidence of regulatory violations may be relevant to plaintiffs' claims of discrimination); *see also Telesca v. Long Island Hous. P'ship, Inc.*, 443 F. Supp. 2d 397, 410 (E.D.N.Y. 2006) ("The Court notes that any of the HUD regulations . . . may be relevant in determining whether the defendants are liable under Section 504, and what remedies are available to address such violation.") (citing *Henrietta D.*, 331 F.3d at 273).

The City's arguments as to Access Living's reliance on these regulations have no merit. Because Access Living only seeks to enforce regulations that "authoritatively construe" Section 504 and the ADA, and otherwise merely points to regulations as evidence of the City's violations, the Court should reject the City's argument.

V. CONCLUSION

For the foregoing reasons, the City's Motion should be denied in its entirety.

DATE: November 17, 2023

Respectfully Submitted,

/s/ Michael G. Allen
Michael G. Allen*
Jennifer I. Klar*
Valerie D. Comenencia Ortiz*
Emily E. E. Curran*
RELMAN COLFAX PLLC
1225 19th Street NW, Suite 600

Washington, DC 20036
Tel: 202-728-1888
Fax: 202-728-0848
mallen@relmanlaw.com
jklar@relmanlaw.com
vcomenenciaortiz@relmanlaw.com
ecurran@relmanlaw.com

Kenneth M. Walden
Access Living of Metropolitan Chicago
115 West Chicago Avenue
Chicago, IL 60654
Tel: 312-640-2136
Fax: 312-640-2101
TTY: 312-640-2102
kwalden@accessliving.org

Attorneys for Plaintiff

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2023, a true and correct copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment was served via CM-ECF on all attorneys of record.

/s/ Michael G. Allen
Michael G. Allen