

REALTY LAUA LLC, formerly known)
as R & L Property Management LLC, a)
Hawaii limited liability company,)
)
Defendants.)
)

DEFENDANTS REPLY MEMORANDUM

I. INTRODUCTION

Plaintiffs filed this Complaint as a putative class action for past and future residents of Kuhio Park Terrace (“KPT”) and Kuhio Homes (“KH”) “who have disabilities affected by architectural barriers and hazardous conditions.” Their asserted causes of action allege discrimination in violation of the Fair Housing Act (“FHA”), the Americans with Disabilities Act (“ADA”), and Section 504 of the Rehabilitation Act of 1978 (“504”). Plaintiffs claim they are disabled tenants who have been denied program access (benefit) by Hawaii Public Housing Authority (“HPHA”) because of their disabilities and because of the architectural barriers and hazardous conditions at KPT and KH.

However, Plaintiffs claims are without merit for the following reasons: (1) Neither Plaintiffs’ Complaint nor their Opposition to Defendants’ Motion to Dismiss (hereinafter Opposition) shows how Plaintiffs were denied a benefit because of their disability; (2) Defendants already provide program access to those who request it; (3) ADA does not require Defendant to provide program access or modifications to an existing building, if it creates an undue financial or administration burden; and (4) many of Plaintiffs’ claims are moot or are pending in State Court, *Faletogo, et al. v. State of Hawaii, et al.*, Civil No. 08-1-2608-12 SSM.

II. ARGUMENTS

A. **PLAINTIFFS FAIL TO SHOW THEY WERE DENIED ANY HOUSING BENEFIT**

Plaintiffs' Opposition fails to address how HPHA either excluded or denied them the benefits of the "program," i.e. housing, because of their disability. Unlike almost all of the ADA/504 cases cited by the Plaintiffs, HPHA was never been put on notice of the Plaintiffs need for any type of accommodation. Plaintiffs argue in their Opposition that they are not required to fill out or submit any written documentation for an accommodation request, or that the accommodation they needed was "obvious"¹ (Implicitly, Plaintiffs admit that they never followed HPHA's procedures and never submitted the required documentation). Plaintiffs Memorandum in Opposition, "Argument A.2", at p. 14. However, as argued before, that is not the law.

Verbal or oral requests to the management company Realty Laua, are insufficient and not in accordance with U.S. Department of Housing and Urban Development ("HUD") regulations. 24 C.F.R. § 960.202; 24 C.F.R. § 966.7. HPHA cannot be accused of "denying" their requests when it never received any from them in the first place. A reading of the HUD regulations and the law makes it clear that HPHA is required to have procedures in place (which it does) in order to obtain written documentation of, among other things, that the resident is eligible for the accommodation, that the accommodation is required based on the resident's

¹ It is improper for a housing provider to ask if an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or resident has a disability. 24 C.F.R. § 100.202.

disability, and to keep a record of these accommodation requests for purposes of any reporting to HUD.

Plaintiffs' Complaint and Opposition fail to allege or provide any relevant evidence of how they were "denied" a benefit which was made available to non-disabled tenants. They have neither pled nor demonstrated that any of the Plaintiffs were treated any differently than any other tenants at KPT or KH. "[C]overage of [Section 504] is not open-ended or based on every dream or desire that a person may have." *Knapp v. Northwestern Univ.*, 101 F.3d 473, 481 (7th Cir.1996); *Flight v. Gloeckler*, 68 F.3d 61, 63-64 (2d Cir.1995) (refusal by New York State Education Department to fund plaintiff's modifications to a van did not rise to discrimination under ADA/504).

The requirements for stating a claim under the ADA are virtually identical to those under 504 of the Rehabilitation Act. *See Martin v. Voinovich*, 840 F.Supp. 1175, 1192 (S.D.Oh.1993); *Galloway v. Superior Court*, 816 F.Supp. 12, 19 (D.D.C.1993). Stated in the ADA's terms, a plaintiff is expected to show that: (1) he or she is a "qualified individual with a disability"; (2) he or she is being excluded from participation in, or being denied the benefits of some service, **program**, or activity by reason of his or her disability; and (3) the entity which provides the service, **program** or activity is a public entity. *See, Ellen S. v. Florida Board of Bar Examiners*, 859 F.Supp. 1489, 1492-93 & n. 4 (S.D.Fla.1994); *People First of Tennessee v. Arlington Developmental Center*, 878 F.Supp. 97, 100 (W.D.Tenn.1992); *see also, Staron v. McDonald's Corp.*, 51 F.3d 353, 355-56 (2d Cir.1995).

The regulation pertaining to public housing agencies and 504 contains virtually identical language and refers to “existing housing programs or activity.” Clearly, in the broader context, the “program” which HPHA administers is “public housing” under HUD’s Public Housing program. In that regard, there is absolutely no evidence that HPHA ever denied Plaintiffs the “benefits” of the “public housing program.”

Indeed, Plaintiffs’ Complaint and Opposition failed to show how Defendant discriminated against the named Plaintiffs. Had the Plaintiffs submitted a Reasonable Accommodation form (“RA”), HPHA would have responded. HPHA has been, and is, addressing all reasonable accommodation requests of KPT disabled residents, such as installation of grab bars, or being wait-listed for an accessible unit at another housing project.

As is required by law, HPHA accommodates all medically qualified “reasonable” accommodation requests that it receives. Declaration of Stephanie Fo, para.7, Memorandum in Support of Motion to Dismiss. As discussed in detail in Defendant’s Motion, HPHA has a thorough evaluation process and accommodates those disabled tenants who medically qualify. If HPHA cannot reasonably accommodate a qualified disabled tenant in their present building, they are offered the option of moving to another housing project, where they can be better accommodated. Declaration of Chad Taniguchi, at para, 7.

HPHA would have handled any of the Plaintiffs’ requests, just as it does with all other residents’ requests, had they properly submitted any in the first place.

Id. However, four of the five² Plaintiffs never submitted the proper written documents to request any kind of “accommodation” because of their disability.³ In addition, Plaintiffs have provided no evidence or verification from a “professional”⁴ that the modification of a specific condition at KPT was necessary to accommodate their particular disability. The law requires such verification and justification that the accommodation requested is directly needed because of the person’s disability. 24 C.F.R. § 8.11(a). Complaints about the general conditions at KPT and KH are not enough for an ADA/504 action. *Flight*, 68 F.3d 61 at 63-64. Plaintiffs must show that they were “denied” benefits because of their disabilities and they have failed to meet this burden.

B. ADA DOES NOT REQUIRE DEFENDANTS TO PROVIDE PROGRAM ACCESS OR MODIFICATIONS TO AN EXISTING PROGRAM, IF IT CREATES AN UNDUE FINANCIAL OR ADMINISTRATIVE BURDEN

Assuming Plaintiffs submitted RA forms, they would have been moved to another (“alternative”) housing community, because the cost of modification to KPT and/or KH is not financially possible.⁵ Declaration of Chad Taniguchi, para. 5, 6. Instead, over the last decade, HPHA invested in converting and creating

² As previously noted in Defendants’ Memorandum in Support of Motion to Dismiss, at p.12, HPHA only has records of Plaintiff LEE SOMMERS submitting an accommodation request of any kind.

³ Plaintiffs essentially admit this in their Memorandum in Opposition, at p. 14.

⁴ The Admissions and Continued Occupancy Policy (“ACOP”), at p. I-3 states: “[R]equests for reasonable accommodation from persons with disabilities will be granted upon **verification that they meet the need presented by the disability...**” (Emphasis added); *See*, Exhibit “5”, Declaration of Glori Inafuku, Memorandum in Support of Motion to Dismiss.

⁵ As we discussed in great detail in our Motion, the financial cost of making KPT and KH Title II/§ 504 compliant is significant due to the age and structure of the buildings.

ADA/504 units at other more compatible housing projects. Relying on the text of ADA⁶ and 504⁷, HPHA has taken a system-wide approach to addressing the needs of disabled tenants at KPT and KH by moving them into appropriate units which may include ADA/504 compliant units in other nearby public housing projects.

Declaration of Chad Taniguchi, at para. 8.

Contrary to the Plaintiffs' assertion, ADA does not require HPHA to make each of its existing facilities (like KPT or KH) accessible to and usable by individuals with disabilities.⁸ 28 C.F.R. § 35.150 (a)(1). Instead, ADA/ 504 requires that HPHA review the entire system for accessible units. 28 C.F.R. § 35.150(a); 24 C.F.R. § 8.24(a)

Moreover, neither the ADA nor 504 requires the alteration or modification to any of its programs, or existing facilities, if by doing so it would create an "undue financial hardship or administrative burden." 28 C.F.R. § 35.150(a)(3); 24 C.F.R. § 8.24(a)(2). The language in the respective regulations is virtually identical in this regard. As to the ADA, 28 C.F.R. § 35.150(a)(3) states:

"(a) General. A public entity shall operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to, and usable by, individuals with disabilities. This paragraph does not:

...(3) General. Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of the service,

⁶ 28 C.F.R. § 35.150(a)

⁷ 24 C.F.R. § 8.24(a)

⁸ In *Martin v. City of Los Angeles*, 162 Cal.App.3d 559, 209 Cal.Rptr. 301 (1984), one of the few cases construing the ADA's and the Rehabilitation Act's accessibility requirements, the California court of appeal stated that "the facility (or building) is only one factor to be considered in determining whether the program is accessible." *Martin*, 162 Cal.App.3d at 565, 209 Cal.Rptr. at 304.

program or activity, or **in an undue financial or administrative burdens.** ...” (Emphasis added)

As to 504, 24 C.F.R. § 8.24(a)(2) states:

“(a) A recipient shall operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to, and usable by, individuals with handicaps. This paragraph does not--

...(2) Require a recipient to take any action that it can demonstrate could result in a fundamental alteration in the nature of its program or activity or **in an undue financial or administrative burdens.**” (Emphasis added)

It is true that the removal of architectural or physical barriers is one of the “central purposes” of the Rehabilitation Act, *Alexander v. Choate*, 469 U.S. 287, 297 (1985). However, the regulations implementing both the ADA and 504 explicitly do not require removal of all architectural barriers where such removal is not required to achieve program accessibility. *See, Garrity v. Gallen*, 522 F.Supp. 171, 240 (D.N.H.1981) (court ordered defendant either to make cottages accessible to non-ambulatory students of residential school or improve other residential buildings to be as nice as the cottages with respect to privacy, ambience, etc.). Here, the program (public housing) is accessible even if architectural barriers exist at KPT or KH because HPHA offers disabled tenants ADA/504 compliant housing at other housing projects. 28 C.F.R. § 35.150(a)(3); 504, 24 C.F.R. § 8.24(a)(2); *See also, Campos v. San Francisco State University*, 1999 WL 1201809, 5 (N.D.Cal.,1999) (ADA and 504 do not require each facility to be accessible to disabled persons).

Plaintiffs cannot dispute the fact that ADA does not require HPHA to make each of its existing facilities (like KPT or KH) accessible to and usable by

individuals with disabilities” where it would result...”in undue financial and administrative burdens.” 28 C.F.R. § 35.150 (a)(3); 24 C.F.R. § 8.24(a)(2); *See also*, ACOP, attached as Exhibit “5” to the Declaration of Glori Inafuku, attached to the Memorandum in Support of Motion to Dismiss. As a result, Plaintiffs ADA/504 claims should be dismissed.

C. DEFENDANTS DO PROVIDE PROGRAM ACCESS TO THOSE WHO REQUEST IT

Contrary to the Plaintiffs’ assertions, Defendants are not claiming that HPHA only deals with accessibility problems at KPT and KH when they “actually arise.”

HPHA presently has several expensive measures in the works to address the physical accessibility issues at its housing projects. The agency has scheduled the planning, design and construction of approximately 60 additional accessible units in housing projects statewide. Declaration of Chad Taniguchi, at para. 8.

Although ADA and 504 require eventual implementation of the plans to make a particular program readily accessible, there is a financial inability exception (discussed above) which directly applies to KPT and KH. *Putnam v. Oakland Unified School Dist.*, 1995 WL 873734, 10 (N.D.Cal. 1995); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (504 contains a financial inability exception to the accessibility requirements.) Courts should be hesitant to second-guess government agencies who in good faith have established their accessibility plans. *Putnam*, 1995 WL 873734 at 10. (Had the District in good faith made such an accessibility plan, this Court would have been hesitant to second-guess it.)

The prudential reasons for courts to refrain from judicial enforcement of an agency's implementation plans should be obvious; that is, as a possible intrusion into the legislative and executive branch prerogatives of prioritizing the funding of its agencies and its programs. Whether it is the State legislative branch, or a federal agency such as HUD, their decisions on funding priorities should be given wide discretion and due deference by the courts.

Specifically addressing Plaintiffs allegations regarding HPHA's lack of adequate policies and procedures for "reasonable accommodation" requests, as previously discussed in the Memorandum in Support of Motion to Dismiss, HPHA's forms and procedures to address RA requests are required by the HUD regulations as well as the ACOP. 24 C.F.R. § 960.202. These forms and procedures were established and implemented as a direct result of the recommendations of National Center for Housing Management ("NCHM") and the Transition and Self Evaluation Plans it developed for HPHA in 1999. There is no basis or validity for Plaintiffs to argue that HPHA does not have adequate or appropriate procedures in place. The fact is that HPHA has adequate and proper procedures implementing the ADA and 504 in place, but that Plaintiffs have failed to follow them.

D. THE REST OF PLAINTIFFS CLAIMS ARE PENDING IN STATE COURT, ARE NOT COGNIZABLE OR ARE OTHERWISE MOOT

Defendants acknowledge that there are a number of systems and equipment at KPT and KH that require repair and modification, given the age and the frequency of damage to them (especially by way of vandalism). But, as argued

previously in the Memorandum in Support of the Motion to Dismiss, as part of the ongoing maintenance, these matters are being addressed right now. As previously referenced,⁹ HPHA is modernizing a number of the systems at KPT and KH which the Plaintiffs cited in their Complaint and Opposition.¹⁰

Plaintiffs' Opposition failed to show how the general housing conditions at KPT form the basis for any of their claims under either the ADA or 504.¹¹ If this were the case, the nation's Federal courts would be flooded with an untold number of similar lawsuits. If, as they allege in their Complaint, that the "hazardous" conditions are also grounds for HPHA not "reasonably accommodating" them, then the same rules and procedures requiring them to submit proper RA documents, apply. Anything in their Complaint, therefore, regarding the conditions at KPT are either not cognizable as a basis for ADA or 504.

Regarding mootness, Plaintiffs' Opposition provided no evidence to rebut the significant and costly remedial measures that HPHA is presently undertaking at KPT and KH and which will substantially resolve all of the "hazardous conditions." As Defendants discuss in detail in their Motion, Plaintiff hazardous condition claims are moot and should be dismissed.

⁹ See, Memorandum in Support of Motion to Dismiss, Declaration of Stephanie Fo, at para. 7.

¹⁰ One of Plaintiffs' allegations is that the non-working elevators at KPT is also a basis for establishing their discrimination claim. However, it is ironic that the regulations do not require the provision of an elevator in a multi-family project to begin with: "This provision shall not be construed to require provision of an elevator in any multifamily housing project solely for the purpose of permitting location of accessible units above or below the accessible grade level." 24 C.F.R. § 8.26.

¹¹ Mere "complaints" about housing conditions at KPT on any given day, cannot be the basis for any ADA or 504 cause of action. *Flight*, 68 F.3d at 63-64.

III. CONCLUSION

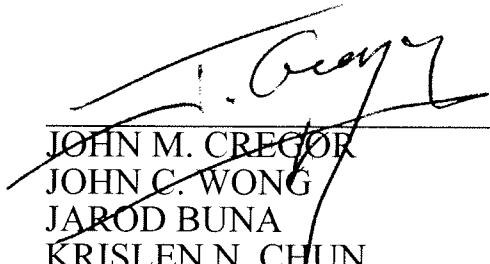
Plaintiffs' Opposition, notwithstanding all of its bulk, does nothing to rebut any of the fundamental issues raised by Defendants in the Motion To Dismiss. They have raised no genuine issues of material fact, nor have they shown Defendants are not entitled to judgment as a matter of law.

Plaintiffs have inappropriately tried to apply a narrow focus limited to KPT and KH. The law, on the other hand, requires an **entire system** focus.

Plaintiffs have readily admitted on the Record, that they failed to comply with HPHA's duly established and required procedures for requesting any type of "reasonable accommodation." They cannot use any of the alleged "housing conditions" as a basis to support their claims of ADA or 504 noncompliance, because the regulation and enforcement of those purported conditions is within the exclusive or, at least primary, purview and jurisdiction of HUD.

Based on the substantial and credible evidence and facts presented by Defendants, the Motion to Dismiss should be granted by the Court.

DATED: Honolulu, Hawaii, May 28, 2009.



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; GENE)	CIVIL NO. CV 08 00578
STRICKLAND; TRUDY)	JMS/LEK
SABALBORO; KATHERINE)	(Class Action)
VAIOLA; and LEE SOMMERS,)	
each individually and on behalf of a)	
class of present and future residents)	DECLARATION OF CHAD
of Kuhio Park Terrace and Kuhio)	TANIGUCHI
Homes who have disabilities)	
affected by architectural barriers and)	
hazardous conditions,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE OF HAWAII; HAWAII)	
PUBLIC HOUSING AUTHORITY;)	
REALTY LAUA LLC, formerly)	
known as R & L Property)	
Management LLC, a Hawaii limited)	
liability company,)	
)	
Defendants.)	

DECLARATION OF CHAD TANIGUCHI

I, CHAD TANIGUCHI, Declarant, do hereby declare under penalty of perjury, that the foregoing statements are true and correct:

1. I am and have been since 2007 the Executive Director for the Hawaii Public Housing Authority (“HPHA”), I have direct and personal knowledge of the facts stated in this Declaration and I am competent to testify as to the facts in this case.

2. HPHA administers and manages approximately 5, 363 federally subsidized public housing dwelling units in 67 housing projects, including Kuhio Park Terrace (“KPT”) and Kuhio Homes (“KH”). No agency, including HUD, has ever found KPT or KH to be uninhabitable or in imminent health or safety code violations.

3. KPT and KH were constructed around 1965 and are approximately 44 years old. Repairs to various equipment and systems at both KPT and KH are continuously planned and scheduled, due to the project’s age as well as frequent vandalism.

4. KPT consists of two-twin 16 story buildings, A and B, constructed of concrete with reinforced steel rebars. Because of KPT’s solid concrete construction and age, HPHA has determined that it is not feasible to retrofit or construct first-floor accessible units in either building A or B. Even if it were physically feasible, HPHA itself has no plans to substantially rehabilitate or modernize KPT because of the infeasibility and substantial cost to do so.

5. KH consists of a series of two-story concrete buildings, with the dwelling units consisting of an upper and lower level.

6. HPHA has also determined that it is financially infeasible to retrofit or construct additional accessible units at KH, unless the project is substantially rehabilitated or modernized. HPHA itself has no plans to substantially rehabilitate or modernize KH.

7. Because it would create a substantial financial burden to construct or retrofit additional accessible units at KPT or KH, HPHA attempts to accommodate any resident from KPT or KH who requests and is eligible for an accessible unit, by offering them a transfer to another housing project which has such units or, if none is available, placing them on a wait-list for the next available unit based on their family size.

8. HPHA presently has approved and budgeted funds to design and retrofit approximately sixty (60) first-floor units at other housing projects statewide into accessible units under ADA/UFAS standards and we are awaiting the finalization of the procurement process to finalize the necessary contracts and agreements for the design and construction of these units to begin.

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED: Honolulu, Hawaii; 5/28/09.



CHAD TANIGUCHI
Declarant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; GENE)	CIVIL NO. CV 08 00578 JMS/LEK
STRICKLAND; TRUDY)	(Class Action)
SABALBORO; KATHERINE)	
VAIOLA; and LEE SOMMERS, each)	CERTIFICATE OF SERVICE
individually and on behalf of a class of)	
present and future residents of Kuhio)	
Park Terrace and Kuhio Homes who)	
have disabilities affected by)	
architectural barriers and hazardous)	
conditions,)	
)	
Plaintiffs,)	
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v.)	
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STATE OF HAWAII; HAWAII)	
PUBLIC HOUSING AUTHORITY;)	
REALTY LAUA LLC, formerly known)	
as R & L Property Management LLC, a)	
Hawaii limited liability company,)	
)	
Defendants.)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing document was served on the following parties at their last-known addresses electronically through CM/ECF as follows:

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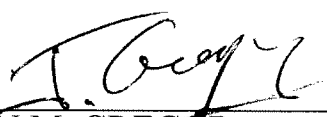
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