U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity
1670 Broadway Street, 24th Floor
Denver, Colorado 80202-4801

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

September 30, 2022

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

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

SUBJECT: Letter of Findings of Noncompliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act
Case Name: *NAME REDACTED and NAME REDACTED v. City and County of Denver, et al.*
Case Nos. 08-21-3770-4; 08-21-3770-D

Dear Parties:

On July 20, 2022, NAME REDACTED and NAME REDACTED (Complainants) filed a complaint with the Office of Fair Housing and Equal Opportunity ("FHEO") of the U.S. Department of Housing and Urban Development ("HUD") alleging discrimination on the basis of disability, including a failure to provide a reasonable accommodation. Complainants, both residents of Denver, filed a complaint under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and its implementing regulation at 24 C.F.R. Part 8, and Title II of the Americans with Disabilities Act ("ADA"), and its implementing regulation at 28 C.F.R. Part 35 against the City and County of Denver ("Denver" or "the City"). This letter sets forth the preliminary findings of the investigation conducted by FHEO under Section 504 and the ADA. Denver is required to comply with Section 504 and the ADA because it receives federal financial assistance from HUD in the form of Community Development Block Grants (CDBG), Emergency Solutions Grants (ESG), HOME Investment Partnership Program (HOME) grants, and Housing for Persons with AIDS (HOPWA) grants and is a public entity. Additionally, HUD enforces complaints filed pursuant to Title II of the ADA using the same process as it does when investigating complaints filed pursuant to Section 504. *See* 28 C.F.R. § 35.171(a)(3)(i) (the designated agency "shall process [the ADA] complaint according to its procedures for enforcing Section 504"); *see also* DOJ Memorandum to Federal Agency Civil Rights Directors and General Counsels from John M. Gore, Acting Assistant Attorney General, Coordination of Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, April 24, 2018.

HUD's investigation revealed Denver's noncompliance with Section 504 and the ADA with respect to the City's zoning processes. In general, HUD finds that Denver violated its obligations under Section 504 and the ADA as follows:

- Denver failed to provide a reasonable accommodation to Complainants in violation of 24 C.F.R §§ 8.4, 8.20, 8.33; 28 C.F.R. §§ 35.130(b)(7); and
- Denver lacks sufficient mechanisms to ensure compliance with its obligations to provide reasonable accommodations, resulting in discrimination against individuals with disabilities under Section 504 and the ADA in violation of 24 C.F.R §§ 8.4, 8.20, 8.33; 28 C.F.R. §§ 35.130(a), 35.130(b)(3), and 35.130(b)(7).

We note that the Complainants also filed claims under the Fair Housing Act, 42 U.S.C. § 3601, et seq., as amended, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations at 24 C.F.R. Part 1 ("Title VI") and Section 109 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5309, and its implementing regulations at 24 C.F.R. Part 6 ("Section 109"). Our office referred the Fair Housing Act complaint to the Department of Justice on May 10, 2022, pursuant to 42 U.S.C. § 3610(g)(2)(C). The Title VI and Section 109 investigation into allegations that Denver discriminated against Complainants on the basis of race and sex remains open. As detailed below, this letter details Denver's failure to comply with its obligations under Section 504 and the ADA.

I. BACKGROUND

Complainants NAME REDACTED and NAME REDACTED are a married couple who own the subject property in Denver, Colorado. Complainants allege disability discrimination based on Complainant NAME REDACTED's mother, NAME REDACTED ("NAME REDACTED"), who is a person with disabilities as defined by 24 C.F.R. § 8.3 and 28 C.F.R. § 35.108. The subject property is a single-family home and lot located at ADDRESS REDACTED, Denver, CO ADDRESS REDACTED. Complainants intend to construct an accessory dwelling unit (ADU) in the rear of the subject property lot. The ADU will have accessible features necessary for NAME REDACTED, whom Complainants intend to have reside within the constructed ADU.

Denver Zoning Code

The Denver Zoning Code is regularly revised. The Zoning Code in effect when Complainants initially applied to Denver's Community Planning and Development Department ("CPD") for permitting of the ADU was entitled *Denver Zoning Code, effective June 25, 2010, restated in its entirety on May*

24, 2018, as amended on October 10, 2019 ("DZC, October 2019"). The Zoning Code in effect when Complainants applied to Denver's Board of Adjustment for Zoning ("BOA") for a variance was entitled *Denver Zoning Code, effective June 25, 2010, restated in its entirety on May 24, 2018, as amended on November 12, 2020 ("DZC, November 2020")*. At the time Complainants applied for permitting for the ADU, there were two pathways to make reasonable accommodation requests under the Denver Zoning Code. The first pathway was through an "Administrative Adjustment." The Zoning Code defines an Administrative Adjustment as a change in the zoning code that is approved by the CPD Zoning Administrator. The Zoning Code further defined these specific types of Administrative Adjustments as "Reasonable Accommodations under Federal Fair Housing Act (FFHA)." The second pathway was through a Variance Request based on hardship due to disability. The Zoning Code defines a Variance Request as a change in the Zoning Code that is approved by the BOA. Although there were two distinct pathways with their own processes, they both acted as a way for persons to request reasonable accommodations under Section 504 and Title II, as they allowed for changes to the Denver Zoning Code when needed for disability-related reasons. For the purposes of this letter, we will use the terms Administrative Adjustment and Variance Hardship Request. The following two sections provide further detail on these two processes as they existed during the relevant time period.

Denver Zoning Code: Administrative Adjustments

During the relevant time period, the Denver Zoning Code stated that reasonable accommodation requests related to zoning were made through an Administrative Adjustment process. In relevant part, subsection 12.4.5.3(B)(2) of *DZC, October 2019* described the reasonable accommodation request requirements:[1]

> **12.4.5.3(B)(2). Reasonable Accommodations under Federal Fair Housing Act (FFHA)[2]**
>
> a. The Zoning Administrator may grant administrative adjustments to provide reasonable accommodations under the Federal Fair Housing Act. In the application for an administrative adjustment under this subsection, the applicant shall identify the type of housing being provided and cite the specific provisions of the Federal Fair Housing Act that require reasonable accommodations be made for such housing. The Zoning

[2] We note from the outset that the Code refers only to the Fair Housing Act and does not appear to refer to, or otherwise account for, the City's obligations under Section 504 and the ADA. Though there is significant overlap between reasonable accommodation obligations under the Fair Housing Act and Section 504/ADA, they are not the same: for example, obligations under Section 504 and the ADA are more affirmative in nature. To some extent, then, the Code sets up the City for failure: it conflates its obligations under multiple statutes under the banner of the "Federal Fair Housing Act."

Administrator may grant the following types of administrative adjustments to assure reasonable accommodations required by law:

i. **Modify any minimum distance or spacing requirements, building setback, height, open space or building coverage, or landscaping requirement by no more than 10 percent** *[emphasis added]*; or

ii. Reduce any off-street parking requirement by no more than 1 space.

b. The Zoning Administrator may approve a type of reasonable accommodation different from that requested by the applicant if the Zoning Administrator concludes that a different form of accommodation would satisfy the requirements of the Federal Fair Housing Act with fewer adverse impacts on adjacent areas. The decision of the Zoning Administrator shall be accompanied by written findings of fact as to the applicability of the Federal Fair Housing Act, the need for reasonable accommodations, and the authority for any reasonable accommodations approved. Requests for types of accommodation that are not listed above may only be approved through a Variance or Official Map Amendment (Rezoning) process.

In effect, subsection 12.4.5.3(B)(2)(a)(i) served as a cap in the Administrative Adjustment process to what could be requested for a reasonable accommodation because it allowed for no more than a 10% difference above what was permitted in the Zoning Code.

According to the City's Zoning Administrator, making a reasonable accommodation request through the Administrative Adjustment process is an administrative process; a public notice is not required. In order to make the reasonable accommodation request, CPD staff hold a pre-application meeting with the requester, during which staff explain what is needed to make a reasonable accommodation request. The requester submits their formal reasonable accommodation request to CPD. CPD staff process the request within three to four weeks. In the scope of processing the request, CPD staff consult with other City staff who are trained in the Fair Housing Act.

Denver Zoning Code: Variance Hardship Requests

As a matter of practice in the City and County of Denver, construction projects are first submitted to Denver's CPD office for approval. In general, when a construction project does not meet the requirements of the Denver Zoning Code—either because it violates the code on its face or because an Administrative Adjustment is not approved— CPD denies the project. The individuals or entities managing the project are then allowed to request a variance in the Zoning Code based on various defined hardship criteria. The BOA is responsible for hearing and making decisions on these hardship requests. Cases are heard before the BOA after the appropriate party receives a formal denial from the

CPD office and claims a hardship. If the BOA determines the hardship criteria have been satisfied, the BOA approves the variance request, and the project is able to proceed. If the BOA determines the hardship criteria have not been satisfied, the BOA denies the variance request. Section 12.4.7.5 of the Denver Zoning Code describes the hardship criteria:[3]

> 12.4.7.5 Review Criteria – Showing of Unnecessary Hardship
> The Board of Adjustment may grant a variance only if it finds that there is an unnecessary hardship whereby the application satisfies the criteria of any one of paragraph A. or B. or C. or D. or E. of this subsection and satisfies the criteria of Section 12.4.7.6, Review Criteria – Applicable to All Variance Requests.

There are five types of hardship for which a variance can be requested: disability, unusual physical conditions or circumstances, designated historic property or district, compatibility with existing neighborhood, and nonconforming or compliant uses in existing structures. In relevant part, subsection 12.4.7.5(A) defines the disability hardship category:

> A. Disability
> 1. There is a disability affecting the owners or tenants of the property or any member of the family of an owner or tenant who resides on the property, which impairs the ability of the disabled person to utilize or access the property.

In addition, once the appellant has met the hardship requirement, their variance request must also meet all of the following review criteria, described in Section 12.4.7.6 of the Denver Zoning Code:

> 12.4.7.6 Review Criteria – Applicable to All Variance Requests
> The Board of Adjustment may grant a variance only if the Board finds that, if granted, the variance:
> A. Would not authorize the operation of a primary, accessory, or temporary use other than those uses specifically enumerated as permitted primary, accessory, or temporary uses for the zone district in which the property is located.
> B. Would not grant a change to either (a) a waiver or condition attached to an approved rezoning, or (b) an approved PUD District plan that would constitute an "amendment" under Section 12.3.7.2, Amendments to Approved Applications, Plans and Permits, or (c) an approved GDP that would constitute an "amendment" under Section 12.3.7.2, Amendments to Approved Applications, Plans and Permits.

[3] *DZC, November 2020*

C. Would not, other than allowed in Section 12.4.7.5.A. above to accommodate persons with disabilities, relate to either the persons, or the number of persons, who do, will, or may reside in a residential structure.
D. Would not substantially impair the intent and purpose of this Code.
E. Would not substantially impair the intent and purpose of the applicable zone district.
F. Would not substantially or permanently impair the reasonable use and enjoyment or development of adjacent property.
G. Would be the minimum change that would afford relief and would be the least modification of the applicable provisions of this Code. *[emphasis added]*
H. Would adequately addresses any concerns raised by the Zoning Administrator or other city agencies in their review of the application.

Denver relied on subsection 12.4.7.6(G) to defend its denial of Complainants' reasonable accommodation request, which request is described more fully below.

Timeline of Events

Complainants submitted their initial project plans to CPD for permitting in the summer of 2020. Complainants' project was to build an ADU living space on top of a preexisting garage. Complainants did not apply for an Administrative Adjustment (reasonable accommodation request) at that time based on the previously referenced restrictive language in the Denver Zoning Code for an Administrative Adjustment. Complainants needed to construct an ADU that was larger than what was permitted by the Zoning Code, and the square footage needed for Complainants' project was greater than the 10% cap allowed by the Zoning Code to be eligible for a reasonable accommodation. Thus, Complainants planned from the outset to forego seeking an Administrative Adjustment and instead apply for a Variance Hardship Request. On December 2, 2020, Complainants received the formal denial from CPD, signed by the CPD project reviewer. This denial stated Complainants' project had the following zoning code violations:

1. The dwelling unit had a floor area of 691-square feet, when 650-square feet was permitted.
2. The dwelling unit had a habitable space of 732-square feet, when 650 square feet was permitted.
3. The building footprint was 748-square feet, when 650-square feet was permitted.

After Complainants received the denial from CPD they submitted a request to the BOA on December 9, 2020, to grant a variance based on disability hardship. On December 31, 2020, CPD issued

a revised, but unsigned, formal denial for Complainants' project. In this denial, CPD cited the following zoning code violations:

1. The dwelling unit had a floor area of 691-square feet, when 650-square feet was permitted
2. The dwelling unit had a habitable space of 732-square feet, when 650 square feet was permitted.
3. The building footprint was 832-square feet, when 650-square feet was permitted.
4. Access to the south side of the structure would result in a change of grade violation.

This revised denial contained two deviations from the initial denial: for item (3), the building footprint calculation was raised from 748 square feet to 832 square feet;[4] and item (4), the grade violation, was mentioned for the first time. Complainants were not given a specific explanation as to why the revised denial was issued.

January 12, 2021, BOA Hearing

On January 12, 2021, Complainants' case was heard by the BOA, via Zoom. During that hearing, Complainants stated that NAME REDACTED is a person with disabilities and described her disabilities as being cognitive and physical. Additionally, in their variance request application packet submitted to the BOA prior to the hearing, Complainants submitted documentation supporting NAME REDACTED's disability and disability-related need for the ADU's accessible features: a letter from the Social Security Administration verifying NAME REDACTED's disability diagnosis, and a letter from NAME REDACTED's medical provider verifying NAME REDACTED's disability diagnosis and stating her required accommodations. The Social Security Administration document stated that NAME REDACTED's disabilities were neurological, mental, and intellectual. The letter from NAME REDACTED's medical provider stated, "NAME REDACTED is disabled due to left-side paralysis…It is important that she have appropriate accommodations, including wheelchair accessibility, and will benefit from having a caretaker close by."

[4] Complainants and their Builder contacted the BOA Technical Director, who reached out to CPD, for an explanation as to why the footprint calculation had changed. Apparently, to reach the 832 square feet footprint calculation, the City added square footage from roof overhangs to the extant 748 square feet footprint. However, according to the City's own memorandum on the topic, roof overhangs should not have counted because in Complainants' design, the overhangs were less than 3 feet from the base of the structure. The erroneous 832 square feet calculation appears to have been accepted by the BOA and served as a basis for the BOA's denial issued pursuant to the January 12, 2021 BOA hearing. As for the second (March 2, 2021) BOA hearing, at that point CPD—despite never formally addressing the error—appears to have accepted the lower calculation and the BOA appears to have based its decision on this lower calculation. Because this erroneous calculation is relevant only with respect to the first hearing, references made to it will henceforth be limited to the facts and findings related to that first hearing.

Regarding NAME REDACTED's specific disability-related accommodations, Complainants and their architect stated multiple times that NAME REDACTED needed a functional, safe space and a straight staircase where a chairlift could be installed. Complainants and their architect explained that due to zoning requirements, the square footage of the second story of the structure could be no greater than 75% of the area of the lower level. Complainant's architect explained that the Zoning Code allowed Complainants to build a 1.5 story ADU with a maximum 650 square foot footprint on the first level. Per the Zoning Code, this would mean that the second story could only be 488 square feet (75% of the lower level), which was not enough to meet NAME REDACTED's needs. By expanding the living area of the second floor, the structure would meet NAME REDACTED's needs by providing sufficient space for her to maneuver and an enclosed staircase onto which a chairlift could be installed. BOA Member Penny Elder asked whether 832 square feet was the correct footprint. Complainants' architect stated that the building footprint was 748 square feet. He stated that the City included the roof overhangs in the building footprint, and Complainants and their team did not know why the City did that. In response, CPD Senior City Planner, Ronnie Jones stated that the roof overhangs counted towards the building footprint.

During this hearing, BOA members and Denver staff questioned NAME REDACTED's disability and her disability-related need for the increased square footage. BOA Member Elder stated multiple times that she did not understand why NAME REDACTED needed more space. In response, Complainant NAME REDACTED and Complainants' architect explained that they were constrained by the Zoning Code's proportionality requirements: because the code required that the upper level must consist of no more than 75% of the area of the lower level, Complainants needed the lower level to have a larger footprint so that the upper level could accommodate NAME REDACTED's needs and still be in compliance with the 75% requirement. In other words, and as Complainant NAME REDACTED stated during this hearing, the extra space downstairs was inconsequential; its purpose was to accommodate the larger space upstairs without running afoul of the 75% requirement. CPD Senior City Planner Jones asked several questions about whether NAME REDACTED needed a wheelchair and how it was possible for her to navigate stairs in the backyard but not stairs into the unit. Ultimately, the Denver CPD staff stated at the hearing that the City was "not opposed" to Complainants' project. Notwithstanding, the BOA voted to deny Complainants' variance hardship request and allow Complainants a continuance to redesign the project to be more closely aligned with the Zoning Code. The BOA made their decision, in part, based on their understanding that the building footprint was 832 square feet. BOA Member Elder specifically stated to Complainants that they should minimize the variances they were requesting. In response to the HUD complaint, Respondents told the Department that Complainants had demonstrated an unnecessary hardship as required by Denver Zoning Code,

Section 12.4.7.5, but Complainants were not seeking the minimum relief necessary to meet NAME REDACTED's needs, as required by Denver Zoning Code, Section 12.4.7.6.G.

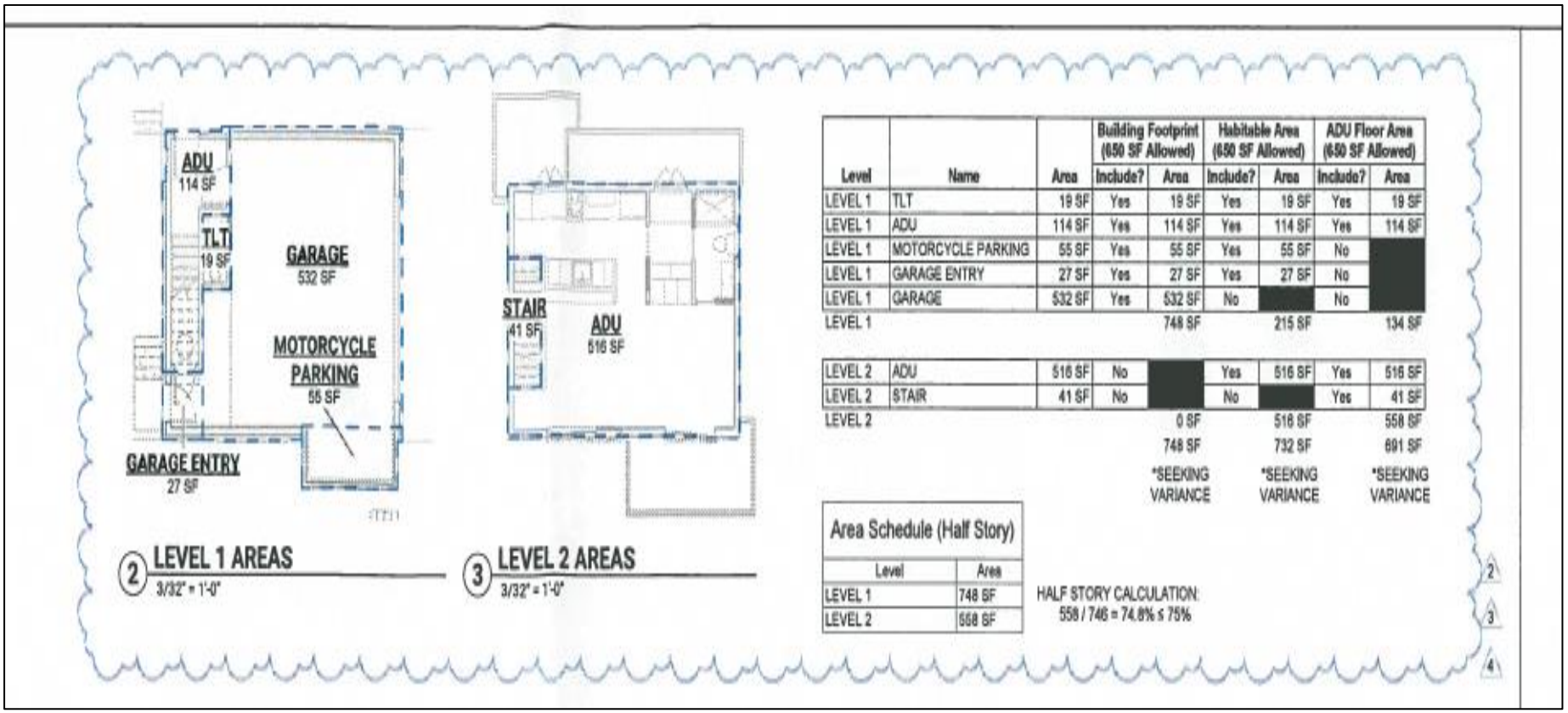
March 2, 2021, BOA Hearing

On March 2, 2021, Complainants' case was again heard by the BOA via Zoom. Complainants presented a revised design featuring the following variance requests:

1. Allow for the ADU dwelling unit to have a floor area of 663-square feet, when 650-square feet was the maximum normally permitted.
2. Allow for a building footprint of 745-square feet, when 650-square feet was the maximum normally permitted.

With the revised design, Complainants reduced both the number of variances being requested and the square footage impacts of the ADU. The habitable space concern and change in grade had been eliminated, leaving two variance requests instead of four. The proposed floor area had been reduced from 691 square feet to 663 square feet, and the building footprint was reduced by three square feet from Complainants' original design that CPD denied on December 2, 2020 (the original design was 748 square feet; the revised design was 745 square feet). The images on the following pages show the differences and similarities between the January 12, 2021, and March 2, 2021, designs.

January 12, 2021, design

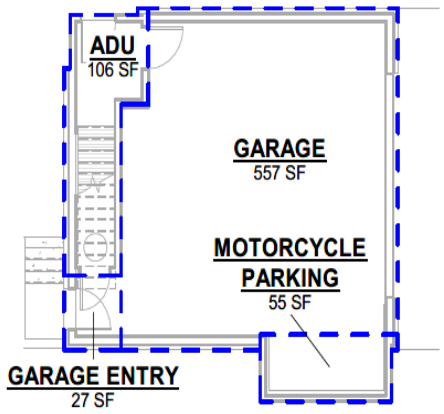


Level	Name	Area	Building Footprint (650 SF Allowed)		Habitable Area (650 SF Allowed)		ADU Floor Area (650 SF Allowed)	
			Include?	Area	Include?	Area	Include?	Area
LEVEL 1	TLT	19 SF	Yes	19 SF	Yes	19 SF	Yes	19 SF
LEVEL 1	ADU	114 SF	Yes	114 SF	Yes	114 SF	Yes	114 SF
LEVEL 1	MOTORCYCLE PARKING	55 SF	Yes	55 SF	Yes	55 SF	No	
LEVEL 1	GARAGE ENTRY	27 SF	Yes	27 SF	Yes	27 SF	No	
LEVEL 1	GARAGE	532 SF	Yes	532 SF	No		No	
LEVEL 1				748 SF		215 SF		134 SF
LEVEL 2	ADU	516 SF	No		Yes	516 SF	Yes	516 SF
LEVEL 2	STAIR	41 SF	No		No		Yes	41 SF
LEVEL 2				0 SF		516 SF		558 SF
				748 SF		732 SF		691 SF
				*SEEKING VARIANCE		*SEEKING VARIANCE		*SEEKING VARIANCE

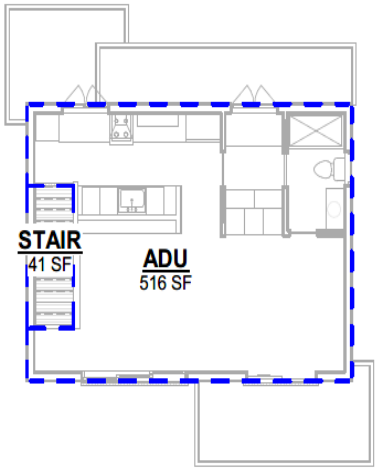
Area Schedule (Half Story)	
Level	Area
LEVEL 1	748 SF
LEVEL 2	558 SF

HALF STORY CALCULATION:
558 / 746 = 74.8% ≤ 75%

March 2, 2021, design



2 LEVEL 1 AREAS
3/32" = 1'-0"



3 LEVEL 2 AREAS
3/32" = 1'-0"

Level	Name	Area	Building Footprint (650 SF Allowed)		Habitable Area (650 SF Allowed)		ADU Floor Area (650 SF Allowed)	
			Include?	Area	Include?	Area	Include?	Area
LEVEL 1	ADU	106 SF	Yes	106 SF	Yes	106 SF	Yes	106 SF
LEVEL 1	GARAGE ENTRY	27 SF	Yes	27 SF	Yes	27 SF	No	
LEVEL 1	GARAGE	557 SF	Yes	557 SF	No		No	
LEVEL 1	MOTORCYCLE PARKING	55 SF	Yes	55 SF	No		No	
LEVEL 1				745 SF		132 SF		106 SF
LEVEL 2	ADU	516 SF	No		Yes	516 SF	Yes	516 SF
LEVEL 2	STAIR	41 SF	No		No		Yes	41 SF
LEVEL 2				0 SF		516 SF		558 SF
				745 SF		649 SF		663 SF
				*SEEKING VARIANCE				*SEEKING VARIANCE

Area Schedule (Half Story)	
Level	Area
LEVEL 1	745 SF
LEVEL 2	558 SF

HALF STORY CALCULATION:
558 / 745 = 74.9% ≤ 75%

5

During the March 2, 2021, hearing, Complainants presented the updated, smaller floorplan. Complainant NAME REDACTED again described NAME REDACTED's disabilities. A BOA member asked whether NAME REDACTED used a wheelchair and whether Complainants were requesting stairs or an elevator. Complainant NAME REDACTED explained that NAME REDACTED did not need a wheelchair at that time; she used a cane and a walker. Complainant NAME REDACTED explained that the upper level of the unit needed to be accessible for NAME REDACTED. Complainants' architect stated that the entry to the ADU was designed to have a wheelchair turning radius in case NAME REDACTED needed a wheelchair in the future. Complainants' builder stated that the garage included space to park an accessible van, should NAME REDACTED need that in the future. Complainant NAME REDACTED again reiterated that, due to the 75% proportionality rule in the Zoning Code, the larger lower level was necessary to accommodate the living space on the upper level.

As in the January 12, 2021, hearing, BOA Member Elder insisted she did not understand NAME REDACTED's need for additional space. Complainants' builder responded that the additional space was a result of the interior staircase that was needed for NAME REDACTED's safety. The City Attorney present at the hearing stated that he did not understand how the total footprint related to NAME REDACTED's disability. CPD staff stated that the City's position on Complainants' project was "opposed." Note that at the January 2021 hearing, when the floorplan and footprint designs were larger than what had been proposed for this March 2021 hearing, the City staff stated the City's position was "not opposed." When the Department asked Respondents why the City's opinion changed, the Zoning Administrator stated that the City's position had always been "opposed" to Complainants' project.

During the BOA's deliberation on the project, BOA members offered conflicting opinions on Complainants' project. Some BOA members stated that there was not enough living space on the second level for someone in a wheelchair. BOA Member Elder stated that Complainants were not asking for what was minimally necessary and that she would be opposed to granting any variance. The BOA again voted to deny Complainants' variance hardship request. In response to the HUD complaint, Respondents told the Department that Complainants had demonstrated an unnecessary hardship as required by the Denver Zoning Code, Section 12.4.7.5, but that the relief Complainants requested did not directly address NAME REDACTED's needs to utilize or access the property.

March 23, 2021, BOA Hearing

Complainants believed that their reasonable accommodation request had been improperly denied, so they made a request to the BOA for reconsideration. On March 23, 2021, the BOA held a reconsideration hearing for Complainants' project. During this hearing, BOA Member Jim Keavney stated that during the previous hearings, there had not been much discussion on evidence supporting

NAME REDACTED's "handicap issue." BOA Member Keavney stated that he had wanted the Complainants to provide more information than just stating that NAME REDACTED needed larger rooms. BOA Member Keavney further opined that the bathroom was not large enough to be disability accessible. BOA Member Elder stated the ADU space was not open enough to be wheelchair accessible. BOA Member Elder stated, "I know that everyone wants to focus on, 'Oh my gosh if we don't give them this variance, they can't have the size stairs that they need,' but they can. They just have to make choices and can't have some of the other things that they're asking for…If we say no, it doesn't mean oh they can't have an ADU with a wide enough stairs. They can. They just can't have some of this additional space that they want as well. It's a choice. Everybody makes choices." The BOA voted to deny the request for reconsideration.

Still believing their reasonable accommodation request had been improperly denied by the BOA, Complainants attempted to engage with other Denver offices, the City Council, non-profits, and even talked with the media. On May 14, 2021, after Complainants had aired their dissatisfaction to third parties, the CPD Zoning Administrator reached out and offered Complainants the opportunity to reapply for project approval via an Administrative Adjustment. Via email, the CPD Zoning Administrator told Complainants that CPD had reviewed Complainants' application and had determined that Complainants had provided sufficient documentation to substantiate NAME REDACTED's disability. The CPD Zoning Administrator invited Complainants to apply for a reasonable accommodation under Section 12.4.5.3.B.2 of the Denver Zoning Code, which addresses reasonable accommodations as part of the Administrative Adjustment process.[5] Section 12.4.5.3.B.2 states:

> **2. Reasonable Accommodations under Federal Fair Housing Act (FFHA)**
> a. The Zoning Administrator may grant administrative adjustments to provide reasonable accommodations under the Federal Fair Housing Act. In the application for an administrative adjustment under this subsection, the applicant shall identify the type of housing being provided and cite the specific provisions of the Federal Fair Housing Act that require reasonable accommodations be made for such housing. The Zoning Administrator may grant relief from any standard in this Code to assure reasonable accommodations required by law.
> b. The Zoning Administrator may approve a type of reasonable accommodation different from that requested by the applicant if the Zoning Administrator concludes that a different form of accommodation would satisfy the requirements of the Federal Fair Housing Act with fewer adverse impacts on adjacent areas. The decision of the Zoning Administrator shall be accompanied by written findings of fact as to the applicability of the Federal Fair Housing Act,

[5] *Denver Zoning Code, effective June 25, 2010, restated in its entirety on May 24, 2018, as amended on March 31, 2021*. Note that this version of the Code was revised after Complainants made their initial reasonable accommodation requests to the BOA. This updated version of the code eliminated the previous 10% overage cap.

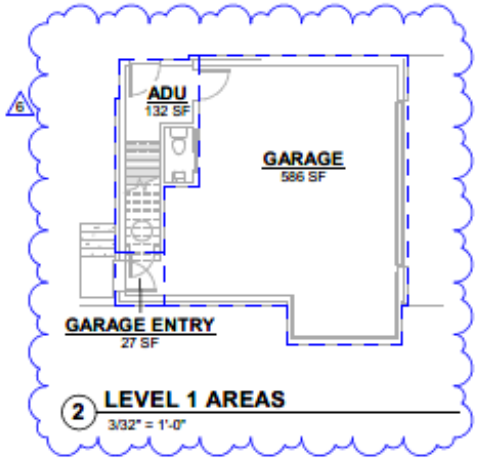
the need for reasonable accommodations, and the authority for any reasonable accommodations approved.

Despite the fact that the CPD Zoning Administrator told Complainants that they had provided sufficient disability documentation, and that Complainants had already made three reasonable accommodation requests to the BOA, Denver required Complainants to submit another reasonable accommodation request to the CPD office. In this request. Complainants articulated the adjustments to the Zoning Code required to meet NAME REDACTED's disability needs, as follows:

1. The living space in the upstairs portion of the ADU would replicate NAME REDACTED's current living space. This was needed as a result of NAME REDACTED's cognitive and physical disabilities.
2. An enclosed, straight staircase would allow for the installation of a chair lift. This was needed as a result of NAME REDACTED's physical disability.
3. A garage-level powder room would give NAME REDACTED bathroom access immediately upon exiting her vehicle. This was needed as a result of NAME REDACTED's physical disability.
4. Extra space was needed in the garage to accommodate an ADA vehicle and wheelchair accessibility. This was needed as a result of NAME REDACTED's physical disability.
5. The Zoning Code required that for a 1.5 story ADU, the square footage of the second story should be no more than 75% of the square footage of the first story. The second story of Complainants' ADU was designed to have sufficient space for NAME REDACTED's needs, which necessitated enlarging the first story so that the square footage of the top floor was 75% of that of the lower level.

Making a reasonable accommodation request through the Administrative Adjustment process was more streamlined for Complainants than using the Variance Hardship process. Complainants had a pre-application meeting with CPD on May 20, 2021. According to the City's Zoning Administrator, CPD provided Complainants with extensive "coaching" on the Fair Housing Act and how to make a reasonable accommodation request that connected NAME REDACTED's disability with her disability-related need for the accessible features of the housing. Complainants submitted their formal reasonable accommodation request to CPD on September 28, 2021. On October 22, 2021, less than four weeks from receipt of the request, CPD approved Complainants' reasonable accommodation request to build the accessible ADU. The plans that were approved for Complainants' ADU were substantially similar to the initial plans that were submitted to the BOA during the January 12, 2021, hearing. The approved plan required a building footprint of 745 square feet and 690 square feet of floor space. The following image shows the approved design

September 28, 2021, design



2 LEVEL 1 AREAS
3/32" = 1'-0"

3 LEVEL 2 AREAS
3/32" = 1'-0"

Level	Name	Area	Building Footprint (650 SF Allowed) Include?	Building Footprint (650 SF Allowed) Area	ADU Floor Area (650 SF Allowed) Include?	ADU Floor Area (650 SF Allowed) Area
LEVEL 1	ADU	132 SF	Yes	132 SF	Yes	132 SF
LEVEL 1	GARAGE ENTRY	27 SF	Yes	27 SF	No	
LEVEL 1	GARAGE	586 SF	Yes	586 SF	No	
LEVEL 1				745 SF		132 SF
LEVEL 2	ADU	516 SF	No		Yes	516 SF
LEVEL 2	STAIR	41 SF	No		Yes	41 SF
LEVEL 2				0 SF		558 SF
				745 SF		690 SF
				*SEEKING VARIANCE		*SEEKING VARIANCE

Area Schedule (Half Story)	
Level	Area
LEVEL 1	745 SF
LEVEL 2	558 SF

HALF STORY CALCULATION:
558 / 745 = 74.9% ≤ 75%

II. FINDINGS

1. Recipient violated Section 504 and the ADA by failing to afford individuals with disabilities an equal opportunity to participate in, or benefit from, the zoning permitting process, insofar as Recipient's process for requesting reasonable accommodations in that process was unduly restrictive, confusing, and burdensome. 24 C.F.R. §§ 8.4, 8.24, 8.33; 28 C.F.R. §§ 35.130(a); 35.130(b)(3); 35.130(b)(7).

Section 504 requires recipients of federal financial assistance to make reasonable accommodations to policies, practices, and programs to ensure equal opportunity for individuals with disabilities to participate in and benefit from programs and activities. *See* 29 U.S.C. § 794; *Alexander v. Choate*, 469 U.S. 287, 300-301 (1985); *Wilson v. City of Southlake*, 936 F.3d 326, 329-330 (5th Cir. 2019). HUD's Section 504 regulations likewise require recipients to make reasonable accommodations in policies, practices, and services for individuals with disabilities at the recipients' expense, unless doing so would result in a fundamental alteration in the nature of its program or activity or an undue financial and administrative burden. *See* 24 C.F.R. §§ 8.4, 8.33. Title II of the ADA has similar requirements. *See* 42 U.S.C. § 12132; *Olmstead v. L.C.*, 527 U.S. 581, 592 (1999); *Wilson*, 936 F.3d at 330. The regulation implementing ADA requires public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. *See* 28 C.F.R. § 35.130(b)(7)(i).

During the relevant timeframe, Denver's Zoning Code provided two avenues for individuals with disabilities to make a reasonable accommodation request related to zoning—either the Administrative Adjustment process with CPD or the disability Hardship Variance process with the BOA. Each avenue had its own set of requirements that had to be fulfilled, and there was little to no articulated difference between requesting an accommodation under either process. This setup was unduly complicated and confusing for a person making a reasonable accommodation request on the basis of a disability-related need. Complainants received no guidance on which route a requester should take to make a request, and the Department finds that Denver staff and BOA members were not trained in either reasonable accommodation request process such that they could provide adequate guidance upon request.

In addition, during the period in which Complainants submitted their initial application to CPD and then made their first reasonable accommodation request to the BOA, the reasonable accommodation request through Denver's Administrative Adjustment process contained restrictive language that put an arbitrary limit on what an individual could request. Specifically, the Zoning Code stated that a reasonable accommodation request would not be approved if the project design varied by more than

10% of what was allowed in the code. As a result of this limit, Complainants were rendered ineligible to make a reasonable accommodation request through the Administrative Adjustment process and thus could not avail themselves of its less burdensome process and requirements.

2. Recipient violated Section 504 and the ADA by failing to provide Complainants with a reasonable accommodation. 24 C.F.R. §§ 8.4; 8.24; 8.33; 28 C.F.R. §§ 35.130(b)(3) and (b)(7).

HUD finds that Complainants are covered under the Section 504 and the ADA on the basis of disability through their relationship with NAME REDACTED, a person who has physical and mental impairments that substantially limit one or more major life activities or major bodily functions. *See* 24 C.F.R. §8.3; 28 C.F.R. § 35.104. Complainants clearly asserted that NAME REDACTED was Complainant NAME REDACTED's mother, that she was disabled, and that she intended to reside in the ADU. In addition, Complainants submitted two documents to the BOA substantiating NAME REDACTED's disabilities.

HUD further concludes Complainants sought a reasonable accommodation on behalf of NAME REDACTED that was necessary to ensure NAME REDACTED's full participation in and benefit from the use and enjoyment of her dwelling. *See* 24. C.F.R. §§ 8.33, 8.4, 8.20; 28 C.F.R. §§ 35.130(b)(3), 35.130(b)(7)(i). Complainants made clear to Respondents that the reasonable accommodation was necessary to afford NAME REDACTED an equal opportunity to use and enjoy the dwelling due to her physical and cognitive impairments. Specifically, during the January 12, 2021, and March 2, 2021, hearings, Complainants explained to the BOA NAME REDACTED's disability-related needs for a larger living area that would be accessible for NAME REDACTED, an expanded footprint to accommodate an ADA vehicle and wheelchair, and a straight and enclosed staircase suitable for a chairlift. In their September 2021 Administrative Adjustment reasonable accommodation request to CPD, Complainants restated the need for a larger living area and footprint for the ADU to accommodate an ADA vehicle and wheelchair and a straight and enclosed staircase suitable for a chairlift. The Department verified the disability-related need for these various accommodations through NAME REDACTED's medical provider.

Denver therefore violated its obligations under Section 504 and the ADA when it failed to timely provide the reasonable accommodation requested by Complainants. Complainants made four reasonable accommodation requests to Denver on behalf of NAME REDACTED. The first three reasonable accommodation requests were made to the BOA on January 12, 2021, March 2, 2021, and March 23, 2021, during the first, second, and reconsideration hearings. The fourth request was made to the CPD office on September 28, 2021. Denver, through the BOA, denied the first three of Complainants'

reasonable accommodation requests. Then, Denver required Complainants to submit a fourth request, despite Complainants already having provided all of the information required to make a reasonable accommodation request. By the time Denver approved Complainants' reasonable accommodation request in October 2021, 10 months had passed since Complainants made the first request. In most contexts, particularly the context of seeking permitting approval for a designed dwelling, a 10-month period to accommodate a request is an unreasonable delay, and therefore tantamount to a denial. *See, e.g., Groome Resources, LTD v. Parish* of Jefferson, 234 F.3d 192, 199-200 (5th Cir. 2000) (Fair Housing Act case in which Fifth Circuit, agreeing with Fourth Circuit that a violation of the Act occurs upon the first denial of an accommodation regardless of subsequently-granted remedies, and upholding the lower court's ruling that a 127-day delay in processing a reasonable accommodation request to the local zoning code constituted an unjustifiable delay that was tantamount to a denial).

Additionally, at no point during the three BOA hearings did Respondents meaningfully engage in an interactive dialogue with Complainants about NAME REDACTED's disability-related needs and accommodations for those needs. Though CPD and BOA did ask questions related to disability during the BOA hearings, these questions were generally more focused on the nature of NAME REDACTED's disabilities—an inappropriate line of inquiry considering that her disabilities had been well-established—as opposed to a meaningful interaction about the accommodations sought. In other words, they focused more on the nuances of NAME REDACTED's disability and her request's legitimacy than the accommodation sought and its necessity. In this case, NAME REDACTED's disability was known, both through Complainants' testimony and through the supporting medical documentation. There was no need for Respondents to ask additional questions or engage in discussion about NAME REDACTED's disability.

Complainants provided sufficient information to support NAME REDACTED's needs. Complainants stated she had physical needs that necessitated a larger footprint and described the features the larger footprint would encompass. Respondents questioned specific details of the ADU but did not probe whether those details would impose an undue financial and administrative burden on the City or would fundamentally alter the City's zoning scheme. In doing so it appeared that Respondents were attempting to find a reason to deny Complainants request rather than affirmatively engage with Complainants to approve a plan that effectively met NAME REDACTED's disability related needs.

Furthermore, City staff and BOA Members' comments about why they were denying the variance request were illogical. BOA Members stated both that Complainants were not asking for the minimum relief necessary, and also that Complainants' design was not accessible enough for NAME REDACTED. CPD staff initially stated that the City was not opposed to Complainants' request, and then during a subsequent hearing, after Complainants reduced their variance request, stated that the City

was opposed to Complainants' request. Respondents told the Department that at both the January 12 and March 2 hearings, Complainants demonstrated an unnecessary hardship based on disability. These comments taken together further support the conclusion that City staff and BOA Members were looking for a reason to deny Complainants' request and not evaluate whether the requested variance was reasonable.

Under Section 504, a recipient may determine a requested accommodation is not reasonable if the request imposes an undue financial and administrative burden on the housing recipient or requires a fundamental alteration in the nature of the recipient's operations.[6] Here, as an initial matter, Complainants established a clear nexus between NAME REDACTED's disability and the unique structural modifications she sought to render the ADU accessible. To support their need for the accommodation, Complainant submitted letters from her medical provider and Social Security and provided more information in the various applications and at the hearings. The modifications, as submitted for the second BOA hearing in March 2021, would have resulted in a 13 square-foot overage with respect to permissible living area space (663 sq ft planned versus 650 sq ft allowed, and a modification of less than 10%) and a 95 square-foot overage with respect to permissible footprint (745 sq ft panned versus 650 sq ft allowed). The Department finds that Denver failed to establish that allowing the requested overages as a reasonable accommodation was not reasonable. The City evaluated whether the request met the BOA's interpretation of the hardship criteria and if the request was the minimum relief necessary. The City did not evaluate whether the variance request would impose an undue financial and administrative burden on the City or whether it would fundamentally alter the City's zoning scheme. A request for a variance is by definition a request for some amount of additional space beyond what is normally permitted, and Denver never articulated why these overages were outside the bounds of reasonableness as an accommodation or specified what spatial allowances beyond what was called for in the Zoning Code would be permissible. Further, to the extent that Denver had legitimate reasons for denying the accommodation as sought, it failed to meaningfully and effectively engage with Complainants to identify an effective alternative accommodation. Instead of asking questions to clarify any confusion about disability-related needs and the space these needs required, the BOA instead made the assumption that the additional space requested was a result of Complainants' choices, and not disability-related need. These questions were unnecessarily invasive concerning the disability—which had already been established—instead of focusing on how the disability was to be accommodated. CPD, likewise, acted with deliberate indifference in "not opposing" the plan as initially submitted and then, when the plan was modified to request even less space, opposing it. *See, e.g.*, *Barber v. Colorado*., 562 F.3d 1222, 1228-29 (10th Cir. 2009) (holding that, to establish an entitlement

[6] *See* Section 504: Frequently Asked Questions, Reasonable Accommodations, https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq#_Reasonable_Accommodation.

to compensatory damages under Section 504, private individual Complainants must show Respondents acted with deliberate indifference in denying an accommodation). As a result of Denver's resistance, the accommodation sought was denied multiple times and was not properly granted until after a delay of 10 months. Accordingly, Denver violated its obligations under Section 504 and the ADA with respect to Complainants' accommodation request.

III. REMEDIES AND OTHER CORRECTIVE ACTIONS

To resolve the findings of noncompliance with Section 504 and the ADA, the Department will require, at a minimum, the following remedies with corrective actions by Denver:

- Provide Complainants with appropriate relief, including any necessary monetary compensation.

- Implement policies and procedures to ensure reasonable accommodation requests are processed timely and in compliance with the law, including maintaining records of such requests beginning at the point when the request was made through a standardized or unified tracking system.

- Implement regular trainings for BOA members and Denver staff who work with the Denver Zoning Code on compliance with Section 504 and the ADA.

- Undertake processes to identify other individuals with disabilities who requested reasonable accommodations that were improperly denied, delayed, or otherwise unfulfilled and take action to redress such harms.

- Take any other actions that would amount to necessary and appropriate relief to resolve the findings, as determined by the Department.

IV. REVIEW PROCEDURES

The Recipient or Complainant may request a review of this Letter of Findings by the Reviewing Civil Rights Official. A request must be made in writing within thirty (30) days of receipt of this letter by submitting a written statement of the reasons the Letter of Findings should be modified in light of supplementary information. For purposes of a request for a review, supplementary information means new material not previously provided by the party requesting the review during the course of the

investigation. Requests for review may be submitted to Erik Heins, Director, Office of Enforcement Support, Office of Fair Housing and Equal Opportunity, at Erik.A.Heins@hud.gov.

If one party requests review, the Reviewing Civil Rights Official will send a copy of the request to the other party, who will have twenty (20) days to respond. 24 C.F.R. § 8.56(h)(2). If neither party requests that the Letter of Findings be reviewed, a formal Determination of Noncompliance will be issued within fourteen (14) calendar days after the 30-day period has expired. 24 C.F.R. § 8.56(h)(4).

HUD's Final Investigative Report ("FIR") will be made available upon request, to the Complainant and the Recipient, pursuant to 24 C.F.R. § 8.56(g)(3). A request for a copy of the FIR may be directed to me at the U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, 1670 Broadway, Denver, CO, 80202 or james.c.whiteside@hud.gov.

Any intimidation or retaliatory acts taken against a person because that person has filed a complaint, testified, assisted, or participated in any manner in a Section 504 investigation are prohibited. 24 C.F.R. § 8.56(k).

V. CONCLUSION

Based on HUD's investigation and the analysis described above, HUD finds that the City and County of Denver is not in compliance with Section 504 and the ADA. This noncompliance resulted in Denver discriminating against Complainants and NAME REDACTED because of NAME REDACTED's disabilities. Denver's noncompliance with Section 504 and the ADA has resulted in it administering its housing programs in a manner that discriminates against individuals with disabilities.

HUD seeks to resolve findings of noncompliance informally through voluntary means. *See* 24 C.F.R. § 8.56(j)(1). Any voluntary resolution will be through the execution of a voluntary compliance agreement. *See* 24 C.F.R. § 8.56(j)(2). Compliance with HUD's 504 regulations may be effectuated by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law including, but not limited to, referral of the matter to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the U.S. *See* 24 C.F.R. § 8.57(a).

Please note that HUD may also consider Denver ineligible for discretionary funding under any HUD Notice of Funding Opportunity until such time as the findings are resolved to HUD's satisfaction.

If there are any questions or if Denver would like to voluntarily resolve the findings of noncompliance with Section 504 and the ADA, please contact Christopher T. Vogel, Programs Compliance Branch Chief, at 303-672-5194 or Christopher.T.Vogel@hud.gov.

Sincerely,

James C. Whiteside
Acting Regional Director
Region VIII Office of Fair Housing and
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Copies furnished (Via email only):

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