IN THE UNITES STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN DISABLED FOR ATTENDANT PROGRAMS TODAY, et al.	:	CIVIL ACTION
	:	No. 96-5881
v.	:	
	:	
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT	:	

O'Neill, J. August 1, 2003

M E M O R A N D U M

Plaintiffs are organizations which serve, represent, and advocate for individuals with disabilities on the national, state, and community levels. Bringing suit on behalf of themselves and their members under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, plaintiffs allege that defendant, the United States Department of Housing and Urban Development ("HUD"), has unlawfully abdicated its duty under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3613, and HUD's own regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to ensure that federally-funded multifamily housing is constructed to be accessible and adaptable to persons with disabilities. Defendant has moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. Proc. 12(b)(6).

INTRODUCTION

Recognizing that architectural barriers unnecessarily exclude individuals with disabilities from mainstream life and opportunities, the federal government has undertaken to foster the creation of residential housing accessible to and usable by such individuals. In June 1988, pursuant to Section 504 of the Rehabilitation Act of 1973,[1] HUD issued regulations requiring that multifamily housing built or altered with federal financial assistance incorporate specified features of design and construction to accommodate persons with disabilities. See 24 C.F.R. Part 8. In addition to requiring that buildings and common areas be accessible, the regulations mandate that 5% (or one, whichever is greater) of the dwelling units in each covered building be accessible and adaptable to people with mobility impairments, and that 2% of the units be designed to accommodate people with sensory impairments.

In August 1988, Congress imposed accessibility requirements more broadly through the Fair Housing Act Amendments (FHAA). In contrast to the set-aside approach and limited applicability of the Section 504 regulations, the FHAA effectively requires uniform, nationally-applicable changes in the design and construction of multifamily housing.[2] The FHAA applies to

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[1] Section 504 provides "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . ." 29 U.S.C. § 794.

[2] As with Section 504 of the Rehabilitation Act, the FHAA was intended to manifest and further "a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179. The FHAA added disabled persons to the classes of persons protected from both public and private housing discrimination, making it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter" on the basis of handicap. 42 U.S.C. § 3604(f)(1). Discrimination on the basis of handicap is defined to include the failure to incorporate the accessibility and adaptability features specified in the Act in covered multifamily housing built for first occupancy

all multifamily buildings-- whether privately or publicly financed -- and, in addition to mandating that buildings and their common areas be accessible, requires that all dwelling units on "accessible routes" (i.e., on floors accessible via building entrances or elevator) be accessible and adaptable to persons with mobility impairments. The FHAA thus seeks to make multifamily housing generally usable by individuals with disabilities while having little to no impact on non-disabled persons.[3]

Plaintiffs allege that HUD has received complaints of routine, nationwide non-compliance with the accessibility requirements of its Section 504 regulations, including a 1994 complaint by advocates for the disabled in response to which HUD officials allegedly acknowledged widespread compliance problems. Nonetheless, plaintiffs allege, HUD fails to (1) collect data on whether disabled persons benefit from its funding; (2) monitor grants before or after funds are spent to determine whether they are used to create accessible housing; (3) conduct prompt investigations of possible noncompliance; or (4) take enforcement action upon notice of noncompliance. Plaintiffs assert that this inaction amounts to "wholesale abdication" by HUD of its duty to enforce its own Section 504 regulations. Plaintiffs also claim that this inaction is in violation of the agency's duty under the FHAA to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of

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after 1991. 42 U.S.C. § 3604(f)(3)(C); see also H.R. Rep. No. 100-711, at 18, 25.

[3] The FHAA requirements also appear to require less departure from conventional design and construction per unit than do HUD's Section 504 regulations.

the Act. 42 U.S.C. § 3608(e)(5).[4]

Plaintiffs seek review of HUD's alleged abdication of its statutory duties under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-710. The APA waives the federal government's sovereign immunity in certain circumstances to allow equitable relief from agency action or inaction. 5 U.S.C. § 702. If review is authorized, the court may "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action" that is determined to be "arbitrary, capricious, an abuse of discretion," or "short of statutory right." 5 U.S.C. § 706. Plaintiffs request, among other things, that this Court declare HUD in violation of Section 504 and of the FHAA and enjoin HUD to "(1) administer its housing and urban development programs and activities so as affirmatively to further the Fair Housing Act's

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[4] Plaintiffs assert that in order to fulfill its obligation under the FHAA to affirmatively further integration of disabled persons into community housing, HUD must enforce its Section 504 regulations. This claim is implausible. HUD did not purport to issue the Section 504 accessibility regulations to "affirmatively further" the FHAA (indeed, the regulations were issued before enactment of the FHAA extended fair housing protections to persons with disabilities), but to fulfill its obligations under the Rehabilitation Act. As previously noted, moreover, the Section 504 regulations and the FHAA manifest significantly different approaches to providing accessible housing for the disabled and, while overlapping insofar as both apply to federally-funded housing providers, differ as to the units covered and design and construction elements required. The FHAA plainly rejects a quota approach in favor of generally-applicable requirements making most multifamily units minimally accessible to the disabled. Moreover, while resort to the legislative history is unnecessary in light of the clear implication of the statute, it nonetheless bears note that in the FHAA floor debates the Senate considered and rejected an amendment that would have adopted a set-aside approach requiring that 20% of units in covered buildings be accessible. In the debates on this amendment, HUD's section 504 regulations were frequently noted and, while neither the statute nor the legislative history suggests that Congress intended to pre-empt the section 504 regulations insofar as they overlapped in application with the FHAA, the set-aside approach of the regulations was rejected. See, e.g., 134 Cong. Rec. 19877-88 (1988) (statements of Senators Harkin and Humphrey).

It is also implausible that HUD's "affirmatively to further" duty can of itself be construed to require that HUD undertake the other specific enforcement actions plaintiffs would like to see (e.g., data collection and monitoring of grant expenditures) given the enumerable specific ways in which HUD could undertake to further fair housing. Reading the complaint as generously as possible, however, I take plaintiffs' claim to be that, though the particulars would be up to the agency, HUD must undertake some program of general, self-initiated enforcement of the FHAA.

policy of promoting integration of people with physical disabilities into the community through the creation of accessible housing" and "(2) assure that recipients of HUD funding comply with Section 504's housing accessibility requirements." (Compl. ¶ 64.)

DISCUSSION

In considering defendant's motion to dismiss the complaint, I accept as true well-pleaded factual allegations in the complaint and construe them in the light most favorable to plaintiffs. I may grant the motion only if I determine that plaintiffs may not prevail under any set of facts that may be proven consistent with their allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Because I conclude that HUD's alleged nonenforcement of the FHAA and Section 504 regulations is not subject to judicial review under the APA, I will grant defendant's motion as to these claims. However, insofar as plaintiffs seek to allege that HUD directly discriminates against persons with disabilities in administration of its programs, they will be granted leave to amend their complaint to plead such claims.[5]

[5] In their brief, plaintiffs argue that HUD directly discriminates against persons with disabilities in violation of Section 504 by (1) maintaining unlawfully inaccessible housing in projects administered by the agency itself and (2) failing to collect data on persons with disabilities even while it does collect data on the race and gender of persons served by HUD-financed housing. However, these claims and plaintiffs' standing to maintain them are not supported by factual allegations in the complaint and therefore will be dismissed with leave to amend.

I. Reviewability of Agency Enforcement Inaction Under the APA[6]

Under § 701 of the APA, judicial review of agency action or inaction is not permitted if "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,." 5 U.S.C. § 701(a).[7] "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Institute, 467 U.S. 340, 345-46 (1984). Similarly,

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[6] As is perhaps not uncommon in APA challenges to agency inaction, "[t]he greatest difficulty presented by this case is determining the proper method of analysis." Sierra Club v. Yeutter, 911 F.2d 1405, 1410 (10th Cir. 1990). Courts examining similar generalized claims of agency nonenforcement have focused on varied but closely-related questions of justiciability and reviewability under the APA. See, e.g. Freedom Republicans v. Federal Election Commission, 13 F.3d 412 (D.C. Cir. 1994) (standing); Seafarers International Union v. United States Coast Guard, 736 F.2d 19 (2d Cir. 1984) (ripeness and finality of agency action); Washington Legal Foundation, Inc. v. Alexander, 984 F.2d 483 (D.C. Cir. 1993) (adequate alternative remedy); Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990) ("WEAL") (same); Council of and for the Blind v. Regan, 709 F.2d 1521, 1530 n. 67 (1983) (same).

The reviewability requirements of the APA frequently function in the same manner as more general requirements of judiciability. See Seafarers International Union v. United States Coast Guard, 736 F.2d 19 (2d Cir. 1984). For example, the justiciability requirement of ripeness, like the requirement that an agency action be "final" to be subject to review under the APA, serves

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967); see Seafarers International Union, 736 F.2d at 26. Similarly, precluding judicial review of agency action where plaintiffs have other, adequate remedies or have failed to exhaust administrative remedies may serve both to limit drains on and interference with administrative resources and decision-making, and to preserve and effectuate the legislative intent behind statutory remedial schemes. See Seafarers International Union, 736 F.2d at 26-29; Washington Legal Foundation v. Alexander, 984 F.2d at 486. I will analyze plaintiffs' claims for reviewability because that is the issue on which the parties have joined battle in their briefs.

[7] If not barred by § 701, review may be had if either expressly authorized by a statute or if the agency action at issue is a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. See infra note 17.

determining whether agency action is "committed to agency discretion by law" requires "construction of the substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions." Heckler v. Chaney, 470 U.S. 821, 828-29 (1985).[8]

In Heckler the Supreme Court established that agency decisions to undertake or forego investigative or enforcement action, because of their unique quasi-prosecutorial nature and "general unsuitability" for judicial review, [9] should be presumed committed to agency discretion, and therefore unreviewable. Id. at 838. This presumption of unreviewability may, however, be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Id. at 832-33. Such guidelines may both indicate Congress'

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[8] The two inquiries are not always functionally equivalent:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decision-making to the agency's judgment absolutely.

Heckler, 470 U.S. at 830.

[9] The Court explained, id. at 831 -32:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. . . .
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> In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

intent to circumscribe agency discretion and give courts judicially manageable standards, or "law to apply," with which to evaluate the agency's action under the APA.[10]

In this case, far from rebutting the presumption of unreviewability, the FHAA and the Section 504 regulations compel me to conclude that HUD's alleged inaction with regard to self-initiated enforcement activities is not reviewable. Review of the sort plaintiffs seek -- broad-gauged review of HUD's entire agency-initiated enforcement program (or lack thereof), sought prior to any apparent recourse by plaintiffs to the privately-initiated administrative enforcement schemes established by both the statute and the regulations -- is implicitly precluded by these laws and inconsistent with the discretion they grant the agency, and therefore is barred by both § 701(a)(1) and (2).

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[10] Plaintiffs appear to argue that this case presents an "exception" to the Heckler rule because HUD is alleged to have "totally abdicated" its enforcement responsibilities, thus seeking refuge in a footnote in Heckler indicating, in dicta, one possible situation in which review of agency enforcement inaction may be allowed:

> we [are not faced with] a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. See, e.g., Adams v. Richardson, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 702(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

470 U.S. at 833, n. 4.

As the last sentence makes clear, however, the scenario noted in this passage is not an "exception" in any real sense; rather, it is just one instance of the rule established by Heckler that enforcement is presumptively committed to agency discretion "[u]nless Congress has indicated otherwise." Id. at 838. Merely alleging that HUD has "consciously and expressly" abdicated its enforcement duties does not end the reviewability inquiry; it must further be determined that the "statute conferring authority on the agency . . . indicate[s] that such decisions were not 'committed to agency discretion.'" Id. at 833, n. 4. In other words, the presumption that agency enforcement decisions are unreviewable, "like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent" to the contrary. Block v. Community Nutrition Institute, 467 U.S. at 349.

A. The Fair Housing Amendments Act of 1988

The FHAA's enforcement scheme, like that of other civil rights laws (e.g., Title VII), depends almost entirely upon complaints initiated by victims of discrimination. The statute provides in detail for two privately-initiated enforcement mechanisms to redress violations of the Act.[11] First, pursuant to § 3610, a person "aggrieved" by a discriminatory housing practice may file an administrative complaint with HUD. Upon finding reasonable cause for the complaint, HUD must then bring a charge on behalf of the aggrieved person before an administrative law judge or, at the election of either party, in district court. HUD's duties to investigate and process complaints are mandatory. See e.g., § 3610(a) (the Secretary "shall . . . make an investigation of the alleged discriminatory housing practice . . . "); § 3610(g) (the Secretary "shall" make a determination of reasonable cause and, if such cause is found, "shall . . . immediately issue a charge . . . "). Alternatively, pursuant to § 3612 an aggrieved person may bring suit directly against the alleged discriminator in federal district court. A private action may be maintained under § 3612 regardless of prior recourse to the administrative complaint process (unless a conciliation agreement has already been agreed to or a proceeding before an administrative law judge has already commenced). Whichever of these two remedial routes is taken, the aggrieved person may obtain compensatory and punitive damages, injunctive relief, and attorney fees and costs.

The statute also authorizes self-initiated enforcement by HUD itself, but does so in the broadest and most permissive of terms: the "Secretary, on the Secretary's own initiative, may

[11] The enforcement provisions draw no distinction between federally-financed and privately-financed housing.

also file a . . . complaint" alleging a discriminatory housing practice, § 3610(a)(a)(A)(I); the "Secretary may also investigate housing practices to determine whether a complaint should be brought under this section," § 3610(a)(a)(A)(iii). The Attorney General "may commence" a civil action against "any person or persons" he or she has reasonable cause to believe is engaged in a pattern or practice of housing discrimination. Id. at § 3614.

Implicit in this statutory scheme is Congress' determination that (1) an enforcement scheme dependant on individual initiation of administrative complaint procedures or private civil actions directly against discriminating housing providers is both adequate and desirable to enforce the FHAA, and (2) non-discretionary duties would be imposed on HUD only with regard to processing privately-initiated complaints filed pursuant to § 3610, while the agency's own, self-initiated enforcement efforts would be left to the agency's discretion.[12] The "affirmatively

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[12] One of the primary motivations behind the 1988 amendments was bipartisan recognition that the Fair Housing Act had "fail[ed] to provide an effective enforcement system to make [the promise of fair housing] a reality." H.R. Rep. No. 100-711, at 13; see also id. at 15-17. The bill which became the FHAA filled the enforcement void "by creating an administrative enforcement system, which is subject to judicial review, and by removing barriers to the use of court enforcement by private litigants and the Department of Justice." Id. at 13. Whereas HUD previously could only investigate complaints filed by aggrieved persons and attempt informal conciliation, the FHAA gave HUD power to bring cases before an administrative law judge, which also gave the agency more leverage in conciliation discussions. Id. at 15. In addition, the amendments extended the statute of limitations for private actions, authorized punitive damages, and allowed attorney's fees to be awarded as they were under other civil rights statutes. Id. at 17, 39-40 (the House Committee "intends for administrative proceeding to be a primary, but not exclusive, method for persons aggrieved by discriminatory housing practices to seek redress").

Significantly, Congress recognized when it enacted the FHAA that possibly millions of discriminatory housing practices continued to occur every year. Id. at 15-16. Yet, in contrast to its manifest concern with strengthening administrative enforcement and facilitating private actions, there is no indication that Congress was concerned about or even took notice of inadequate monitoring or other self-initiated enforcement action by HUD. See id. at 16-17, 33-40. The enforcement role contemplated for HUD was that of investigating and prosecuting administrative complaints. See id. at 17 ("H.R. 1158 creates an administrative enforcement mechanism, so the federal government can and will take an active role in enforcing the law."). Cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-211(1972) (in support of its holding that Congress intended to permit standing under the FHA as broadly as the Constitution permitted, observing of the FHA's pre-1988 enforcement scheme: "[i]t is apparent, as the Solicitor General says, that complaints by private persons are the primary method of obtaining

to further" duty imposed on HUD, upon which plaintiffs exclusively rely to maintain this action, cannot be construed to undo Congress' considered judgment in these regards. Review of the sort sought here would allow plaintiffs to bypass the statute's elaborate remedial scheme and disrupt the Act's careful division of enforcement responsibilities between individual grievants and the government in contravention of legislative intent.

I recognize that the FHAA's accessibility requirements are unique in that HUD could (given adequate resources) enforce them on its own initiative by reviewing building plans or inspecting new construction, whereas other types of housing discrimination, such as denying housing on the basis of race, sex, or disability, ordinarily cannot be discovered until someone is victimized and complains. Thus, plaintiffs' contention that HUD should act on its own to monitor and enforce compliance with the accessibility requirements is at least understandable. Congress, however, foresaw such a contention and expressly decided against imposing any such

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compliance with the Act . . . . Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority"); § 3616a (Secretary shall encourage investigative and enforcement initiatives by local governments and non-profit organizations). As of 1993, HUD had filed only eight complaints on its own initiative under the FHAA; one of these alleged noncompliance with the accessibility requirements. The Fair Housing Amendments Act of 1988: The Enforcement Report, A Report of the United States Commission on Civil Rights 136-42 (Sept. 1994). But see "DOJ Probe Targets Chicago-Area Builders," 12 Fair Housing-Fair Lending (Aspen Law & Business) ¶ 2.9 (Feb. 1, 1997) (Department of Justice sends letters to as many as two dozen housing builders warning them of noncompliance with FHAA's accessibility standards following investigative effort in cooperation with local advocacy group).

obligation on HUD in sections 3604(f)(4) - (6).[13] Insofar as HUD must be involved in enforcement of the accessibility requirements at all, it is only in "receiv[ing] and process[ing] complaints" pursuant to § 3610's administrative complaint procedures. §3604(f)(6)(A). Prophylactic enforcement of the requirements, if any, is to be undertaken by states and local

[13] Having set forth specific design and construction accessibility requirements in subsection (3)(C), section 3604(f) further provides:

> (4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).
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> (5) (A) If a State or unit of local government has incorporated into its laws the [accessibility] requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.
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> (B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.
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> (C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).
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> (D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).
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> (6) (A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

governments in keeping with their traditional authority over building construction.[14] Again, the general "affirmatively to further" provision cannot be construed to countermand Congress' express limitation on HUD's self-initiated enforcement obligations and corresponding emphasis on enforcement by individual complainants and, in this matter, local governments. Whether I look to the FHAA's general enforcement scheme or its particular provisions for enforcement of the accessibility requirements, then, I must conclude that the review sought here is precluded by the statute and therefore barred by § 701(a)(1).

I also conclude that HUD's general, self-initiated enforcement activities are committed to the agency's discretion by law and therefore unreviewable under § 701(a)(2). The statutory provisions granting authority for such enforcement activity -- "the Secretary, on the Secretary's

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[14] Subsections 3604(f)(4) to (6), quoted above, were added by means of a Senate substitute to the bill already passed by the House specifically to meet criticisms that the bill was creating a federal building code. Supporters of the bill reiterated over and over in the floor debates that ensuring compliance with the accessibility requirements would not be the federal government's responsibility. A typical statement is that of Senator Karnes:

> The bipartisan substitute relieves HUD of any obligation to develop or enforce a Federal building code or to generally review and approve the plans, designs, and construction of covered multifamily dwellings . . . As a result of compromise, the substitute bill strengthens the antidiscrimination provisions protecting the handicapped and at the same time defers to and encourages State and local enforcement. Thus it avoids Federal monitoring of the more than 400,000 multifamily units constructed in our country each year.

134 Cong. Rec. 19723 (1988). Senator Metzenbaum put it this way:

> To insure that there will be no Federal building code established, we have included provisions for State and local enforcement of the construction provisions. The provision for State and local enforcement will allow local government to continue its traditional role of supervising the construction of new buildings.

Id., at 19897; see also, e.g., id., at 19712 (Memorandum of Senators Kennedy and Specter Regarding Their Substitute Amendment); id., at 19884 (statement of Senator Simpson); id. 19892 (statement of Senator Domenici).

own initiative, may also file a . . . complaint"; the "Secretary may also investigate housing practices to determine whether a complaint should be brought" -- could not more clearly grant HUD complete discretion in whether it will or will not undertake investigations or more clearly fail to provide standards to guide the agency in exercising this discretion. Nor, contrary to plaintiffs' apparent contention, can the "affirmatively to further" provision be interpreted as changing these permissive grants of authority into mandatory obligations.

Even if it were plausible that the "affirmatively to further" provision imposes on HUD a mandatory, judicially-enforceable duty to undertake self-initiated enforcement activities, that provision would not supply this Court with the necessary substantive standards or "law to apply" to review HUD's alleged inaction on the general, nationwide scale plaintiffs seek. There are any number of ways HUD could affirmatively further fair housing policies, which, after all, include not only integration of the disabled into general community housing, but the creation of affordable, integrated housing and housing and lending markets free of intentional discrimination based on race, religion, sex, national origin, familial status, and disability. Given the magnitude and variety of obstacles to fair housing,[15] the multiple goals of the Act, and HUD's limited resources, the "affirmatively to further" language is patently insufficient to provide judicially manageable standards against which to judge HUD's general, self-initiated enforcement

[15] The House Report and Senate floor debates on the FHAA note again and again that as of 1988, 2 million racially-discriminatory housing practices alone were estimated to occur on an annual basis, only a small percentage of which were the subject of complaints to HUD. H.R. Rep. No. 100-711, at 15-16; see also, e.g., 134 Cong. Rec. S19711 (daily ed. August 1, 1988) (statement of Sen. Kennedy); id. at 19895 (August 2, 1988) (statement of Sen. McConnell).

activities.[16]

For these reasons, then, I conclude that review of HUD's alleged failure to undertake self-initiated enforcement actions to ensure compliance with the FHAA is barred by both § 701(a)(1) and (2) of the APA.[17]

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[16] I do not suggest that HUD's duty to affirmatively further the FHAA cannot be given substantive content and enforced in some circumstances, or that APA review of HUD enforcement action could never be available. Because an agency has wide discretion in its general enforcement program does not mean that particular exercises of that discretion are unreviewable, much less that non-discretionary activities may not be reviewed for their consistency with the Act's policies. See 3 Kenneth Culp & Richard J. Pierce, Jr., Administrative Law Treatise, at 131, § 17.6 ("a statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review an agency's exercise of its discretion to avoid abuse"). When HUD undertakes to exercise its discretion in a specific manner, or when it undertakes non-discretionary duties, it is bound to act to "affirmatively further" fair housing policies, and, depending on the particular circumstances in which it acts, the agency's discretion may be sufficiently constrained by this duty to allow judicial review. See e.g., Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970) (HUD's approval of low-income housing project was procedurally deficient and failed to take into account effects on local segregation). Cf. Sierra Club v. Yeutter, 911 F.2d at 1414 ("Because the Wilderness Act does not provide meaningful standards to review all land and water management decisions, we hold that the Forest Service's decision to use or not to use federal reserved water rights allegedly created by the Wilderness Act is "committed to agency discretion by law," except in those situations where the agency's conduct cannot be reconciled with the Act's mandate to preserve the wilderness character of the wilderness areas."); WEAL, 906 F.2d at 749 (denying review to broad claims that Department of Education was failing to enforce Title VI against segregated schools but suggesting that specific instances of inaction might be reviewable under some circumstances).

[17] Even if plaintiffs' claims met the prerequisites for reviewability of § 701 of the APA, I would conclude that review is barred by § 704 because they have not identified a "final agency action" for which there is "no other adequate remedy in a court." Plaintiffs do not claim that HUD has failed to issue regulations required by the FHAA, has issued regulations inconsistent with the statute, or has officially announced that it will not enforce the Act, and do not identify any other agency action or inaction that has legal consequences, such as releasing third parties from their legal duty to comply with the FHAA's accessibility requirements. They therefore have not identified a "final agency action" subject to review. See Seafarers International Union, 736 F.2d at 26-27. Cf. Heckler, 470 U.S. at 832 ("when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner").

In addition, plaintiffs have adequate alternative remedies to this suit in the form of private actions directly against federal-funding recipients under § 3612 or recourse to the administrative complaint procedures of § 3610. See 12 Fair Housing-Fair Lending (Aspen Law & Business) ¶6.15 (June 1997) (condominium settles claim that it failed to comply with FHAA accessibility requirements with promise to modify 37 first-floor units and $8,000); id. at ¶ 8.6 (August 1997) (similar claim against condominium landlord settled for $75,000 to be used to modify ground-level units and common areas and

B. HUD's Section 504 Regulations

Plaintiffs also claim that HUD has unlawfully abdicated its duty to enforce the accessibility requirements of regulations implementing Section 504 of the Rehabilitation Act of 1973. Again, plaintiffs do not allege that they have unsuccessfully filed specific complaints with HUD pursuant to the administrative enforcement procedures established by the regulations, or that recourse to these procedures would be futile.[18] The only question before the Court, therefore, is whether HUD's decisions concerning its self-initiated enforcement activities are sufficiently constrained to overcome the presumption that such decisions are "committed to agency discretion by law" and therefore unreviewable under § 701(a)(2). Heckler, 470 U.S. at

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to pay attorney fees). Plaintiffs argue that such individual suits would not be as effective as this broad-gauged action to remedy HUD's alleged nationwide abdication of its enforcement duties. "Adequate" does not, however, require identical convenience or effectiveness. See Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994); Gillis v. United States Department of Health and Human Services, 759 F.2d 565, 578 (6th Cir. 1985). Both § 3612 and § 3610 authorize equitable relief, compensatory and punitive damages, and attorney's fees and costs against housing providers who do not comply with the FHAA, and therefore offer complete relief for the injury of which plaintiffs complain -- housing providers' failure to comply with the Act's accessibility requirements.

Moreover, plaintiffs' belief that individual suits would be less effective than one big suit against HUD, even if correct, is irrelevant insofar as review of the sort they seek is incompatible with the legislative scheme. See Maugans, 24 F.3d at 507. Cf. Washington Legal Foundation v. Alexander, 984 F.2d at 486 (that Congress "considered private suits [directly against discriminators] to end discrimination not merely adequate but in fact the proper means for individuals to enforce Title VI" precluded APA review of agency nonenforcement).

[18] Similar to the FHAA, the Section 504 regulations impose non-discretionary duties on HUD to respond to and investigate complaints filed pursuant to the administrative complaint system established by the regulations. See id. at § 8.56(c). While unnecessary to disposition of this case, I note that it would seem plaintiffs would have allege unsuccessful recourse to this enforcement scheme before maintaining a well-pleaded claim that HUD has "wholly abdicated" enforcement of the regulations. Plaintiffs' failure to do so suggests that their claim could be barred on grounds that they have failed to exhaust administrative remedies, see Seafarers International Union, 736 F.2d at 27-28 (failure to resort to administrative remedies available under Coast Guard regulations is "crucial" to determination that plaintiff's challenge to agency's alleged nonenforcement of regulations is not ripe for review) , or have failed to identify a "final agency action" subject to review. See supra note 17.

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The statute itself does not speak to HUD's enforcement discretion. Section 504 requires that agencies promulgate implementing regulations, but is silent on agency enforcement of such regulations. 29 U.S.C. § 794. It therefore provides neither indication of Congress' intent to circumscribe agency enforcement discretion nor substantive standards for evaluating enforcement activities. Accord Marlow v. United States Department of Education, 820 F.2d 581, 582-83 (2d Cir. 1987).

Plaintiffs contend, however, that HUD's own regulations impose non-discretionary enforcement duties on the agency and provide this Court with law to apply for review of the agency's alleged inaction. Cf. Kirby v. United States Dep't of Housing and Urban Dev., 675 F.2d 60, 68 (3d Cir. 1982) (HUD regulations provide explicit limitation on the agency's discretion to fund housing project); Shannon, 436 F.2d at 818 ("We think it clear that we are empowered to review the agency's adherence to its own procedural requirements."). Plaintiffs first argue that "law to apply" is provided by the regulations' requirements that 5% of covered housing built with federal funds be accessible and adaptable to persons with mobility impairments and that 2% be accessible and adaptable to persons with sensory impairments. While indeed clear in what is required of housing providers, however, the "5% - 2%" standards are simply not "law to apply" because they do not speak to HUD's enforcement discretion one way or the other.[19] Compare Heckler, 470 U.S. at 835-36 ("[W]e reject respondents' argument that the Act's substantive prohibitions of 'misbranding' and the introduction of 'new drugs' absent agency approval . . .

[19] In other words, the "5%-2%" standards of HUD's regulations no more constrain HUD's discretion in enforcing the regulations than the substantive prohibitions of a criminal statute constrain a prosecutor's discretion in deciding whether or not to bring charges under the law.

supply us with 'law to apply.' These provisions are simply irrelevant to the agency's discretion to refuse to initiate proceedings.")

Plaintiffs next argue that the enforcement provisions of the regulations constrain HUD's discretion and provide "law to apply." Again, I must disagree. Under the regulations, HUD "may" require compliance reports from funding recipients "at such times, and in such form and containing such information, as the responsible civil rights official or his or her designee may determine to be necessary to enable him or her to ascertain whether the recipient has complied or is complying . . ." 24 C.F.R. § 8.55(b). The official "may periodically review the practices of recipients to determine whether they are complying with this part and where he or she has a reasonable bases to do so may conduct on-site reviews." Id. § 8.56(a). HUD "shall make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part." Id. at § 8.56(b). If actual or threatened non-compliance is found, HUD "may" refer the case to the Department of Justice for legal action or initiate proceedings for debarment or termination of federal funding. Id. at § 8.57.

These provisions cannot overcome the presumption that HUD's investigative and enforcement actions are committed to the agency's discretion and therefore unreviewable. With the exception of § 8.56(b)'s command that HUD "shall make a prompt investigation" upon information indicating a "possible failure to comply" with the regulations, the enforcement provisions do not purport to impose mandatory enforcement duties on HUD; rather, they plainly commit enforcement duties to the agency's complete discretion. Even as to the apparent mandatory duty to investigate imposed by § 8.56(b), the regulations does not set forth significant, substantive standards as to the circumstances in which HUD will find "possible failure to

comply." Cf. Marlow, 820 F.2d at 582-83 (Office of Civil Rights' Section 504 regulations do not impose "significant substantive limitations" on the agency's investigation and resolution of administrative complaints). In sum, the regulations neither indicate an intention on the part of the agency to circumscribe its enforcement discretion in any specific ways nor give this Court manageable, substantive standards with which to review the agency's decisions, and therefore do not overcome the presumption that the agency's investigative and enforcement decisions are committed to the agency's discretion.[20] Accordingly, HUD's alleged failure to ensure compliance with the regulations is unreviewable.[21]

[20] Plaintiffs' final argument, that the regulations implementing the FHAA's accessibility requirements, see 24 C.F.R. Part 121, provide law to apply to HUD's enforcement of its Section 504 regulations, is meritless.

[21] As with the FHAA claim, review of HUD's alleged failure to enforce its Section 504 regulations could also be barred under § 704 of the APA because plaintiffs have adequate alternative remedies in the form of private actions against federal-funding recipients who violate the regulations. Accord, e.g., Marlow, 820 F.2d at 583 n. 3 (Rehabilitation Act); Gillis v. United States Department of Health and Human Services, 759 F.2d 565 (6th cir. 1985) (Hills-Burton Act).