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ARCHITECTS & ENGINEERS NEWSLETTER

DESIGN AND ACCESSIBILITY REQUIREMENTS UNDER THE FAIR HOUSING ACT

Central Ohio and the Columbus Metropolitan areas continue to grow in population and with that growth there has been a significant increase in the design and construction of multi-family apartments and condominiums and mixed-use developments. Hand in hand, we have seen an increase in litigation for claims of violations under the Fair Housing Act ("FHA") filed against designers and developers. Generally, the FHA is a civil rights statute designed to protect individuals from discrimination in the housing market. It is unlikely that a federal law is at the forefront of a designer's mind during the design phase of a new project. However, the statute includes accessibility requirements for individuals with disabilities in the design and construction of covered multi-family dwellings. As such, it is important for a designer to understand the requirements of the FHA in order to produce an accessible and usable dwelling, and to understand how litigation may unfold if such a claim is filed.

The FHA makes it unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap. 42 U.S.C. § 3604(f)(1). Discrimination includes the failure to design and construct dwellings with the following features:

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
(iii) all premises within such dwellings contain the following features of adaptive design:

I. an accessible route into and through the dwelling;
II. light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
III. reinforcements in bathroom walls to allow later installation of grab bars; and
IV. usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. § 3604(f)(3). All seven of the accessibility requirements must be achieved; it is no defense for a developer or designer to demonstrate that a project complies with some or most of the statutory requirements, but not all of them. *United States v. Edward Rose & Sons,* 384 F.3d 258, 263–65 (6th Cir. 2004). The accessibility requirements apply to multi-family residential buildings containing four or more units and built for first occupancy after March 13, 1991. All ground floor units and common use areas must comply with the requirements in buildings which are not serviced by an elevator, whereas all common use areas and units must comply in buildings serviced by an elevator. 42 U.S.C. § 3604(f)(7).

In order to assist designers and developers in navigating through and complying with the FHA accessibility requirements, the United States Department of Housing and Urban Development ("HUD") has developed ten "safe harbors" which establish design and construction standards which will be deemed to comply with the general accessibility requirements of the FHA.

Strict compliance with a safe harbor is not required in order for a covered dwelling to comply with the FHA. The safe harbors are not mandatory and do not establish minimum requirements. See *Barker v. Niles Bolton Associates, Inc.,* 316 Fed. Appx. 933 (11th Cir. 2009) and *United States v. Edward Rose & Sons,* 246 F. Supp. 2d 744 (E.D. Mich., 2003). Therefore, a covered dwelling which deviates from the safe harbors is not necessarily deemed inaccessible. *United States v. Noble Homes, Inc.,* 2016 U.S. Dist. LEXIS 37857 (N.D. Ohio 2016). Designers and developers may choose to design and construct covered dwellings to a different standard than those pronounced in the safe harbors, but must be able to demonstrate that the design and construction is accessible and meets an objective "comparable standard" of accessibility. *Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co.,* 2004 U.S. Dist. LEXIS 30880 (W.D. Tenn. 2004).

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But reliance upon anything less than an objective standard of accessibility is dangerous, as courts have held that a plaintiff establishes a prima facie case of liability where non-compliance with safe harbors is demonstrated. See, *United States v. Tanski,* 2007 U.S. Dist. LEXIS 23606 (N.D.N.Y. 2007). Some courts have held that where a plaintiff has established a violation of the safe harbors, then the burden of proof is shifted to the defendants to demonstrate that the design and construction of the subject property is accessible and meets a "comparable standard" of accessibility.

The current Ohio Building Code adopts and incorporates the accessibility standards of ANSI A117.1 (2009). While ANSI A117.1 (2009) is not a recognized safe harbor by HUD, it is generally acknowledged as having stricter accessibility requirements than ANSI A117.1 (1986) and should qualify as an "objective comparable standard" to the recognized safe harbors.

The "design and construction" language of the FHA is interpreted broadly, and all participants in the design and construction process of a covered dwelling are subject to its requirements. See *United States v. Taigen & Sons, Inc.,* 303 F. Supp. 2d 1129, 1149 (D. Idaho 2003). Under the statute, a plaintiff must demonstrate by a preponderance of the evidence that a party to the design and construction of a covered dwelling was a "wrongful participant" in the process that resulted in the creation of inaccessible features. *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.,* 3 F. Supp. 2d 661, 665 (D. Md. 1998). A prima facie case of an accessibility violation is established by showing a violation of the safe harbors. *United States v. Tanski,* 2007 U.S. Dist. LEXIS 23606 (N.D.N.Y. 2007). A defendant may then rebut the presumption established by the violation of a safe harbor by demonstrating compliance with a comparable objective measure of accessibility. *Nelson v. U.S. Dept. of Housing and Urban Dev.,* 320 Fed. Appx. 635 (9th Cir. 2009).

Further, defendants to design and construction accessibility litigation are prohibited from seeking indemnity or contribution from other defendants or third-parties under the obstacle preemption doctrine. See *Miami Valley Fair Hous. Ctr., Inc. v. Steiner & Assocs.,* 2010 U.S. Dist. LEXIS 63915 (S.D. Ohio 2010); "[T]he federal courts that have considered the question… are in universal agreement that there is no express or implied right to indemnity under the FHA…" *United States v. Murphy Development, LLC,* 2009 U.S. Dist. LEXIS 100149 (M.D. Tenn. 2009). Courts have determined that the obligation to design and construct accessible and usable covered multi-family dwellings is a non-delegable duty, and therefore participants in the design and construction process may not seek recovery from each other for damages that are established.

Unfortunately, there are several conflicts across the Circuit Courts of Appeal regarding several of the standards and defenses which may apply in design and construction accessibility claims. Our experience in these cases has dealt with complaints filed directly by non-profit Fair Housing advocacy groups against developers and architects, and the trend is likely to continue as new construction of covered multi-family dwelling expands. Litigation under the FHA can be drawn out and expensive due to the lengthy discovery process, the use of experts and damages which may include injunctive relief orders to retrofit properties, attorneys' fees, compensatory damages, and punitive damages. Understanding and complying with its requirements should be a primary consideration of designers from the initial phases of a project.

SAFE HARBORS

1. HUD Fair Housing Accessibility Guidelines published on March 6, 1991 and the Supplemental Notice to Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines, published on June 28, 1994.
2. HUD Fair Housing Act Design Manual published in 1996 and revised in 1998.
3. ANSI A117.1 (1986), used with the Fair Housing Act, HUD's regulations, and the Guidelines.
4. CABO/ANSI A117.1 (1992), used with the Fair Housing Act, HUD's regulations, and the Guidelines.
5. ICC/ANSI A117.1 (1998), used with the Fair Housing Act, HUD's regulations, and the Guidelines.
6. Code Requirements for Housing Accessibility 2000 (CRHA).
7. International Building Code 2000 as amended by the 2001 Supplement to the International Codes.
8. International Building Code 2003, with one condition; effective February 28, 2005 HUD determined that the IBC 2003 is a safe harbor, conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "ICC interprets Section 1104.1, and specifically, the exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7."
9. ICC/ANSI A117.1 (2003), used with the Fair Housing Act, HUD's regulations, and the Guidelines.
10. 2006 International Building Code®.

DESIGN BUILD – BEWARE OF "FLOW DOWN" OBLIGATIONS

The American Council of Engineering Companies (ACEC) Risk Management Committee published an article entitled **Design–Build Projects–Achieving Fair Allocation of Risk between the Contractor and Design Professional** soon after the 2014 American Institute of Architects (AIA) design build documents were available. The article is recommended reading for all designers who are considering entering into a design build-designer contract for a project. The central focus of the article is how a designer can protect itself if the design builder insists upon a "flow down" provision to bridge the Owner/Design Builder agreement and the Design Builder/Designer agreement. Although the AIA 2014 design build documents do not contain such a flow down provision, design builders are going to exercise as much protection as possible in their contract negotiations with designers.

There are two striking areas in the Owner/Design Builder agreement that create liability for the design builder that is not imparted to the designer unless there is a mechanism created in the documents to impart this responsibility and potential liability on the designer. First, the design builder warrants defect free performance under Section 3.1.12 of AIA A140-2014 Owner/Design Builder contract. Second, under Section 3.1.3.1 of the Owner/Design Builder contract, the design builder warrants that all work will be in compliance with applicable laws, statutes, ordinances, codes, rules, and regulations and lawful orders of public authorities. The term "work" is defined as the "…design, construction, and related services required to fulfill the design builder's obligation under the design build documents." Therefore, the design builder obligates itself to projects free of defects and compliance with all laws, ordinances, regulations, rules, and the like. The standard of care for a designer does not require a perfect or non-defect design nor does it require complete adherence to all rules, laws, ordinances, regulations, and rules, which is simply unachievable. Although the Owner/Design Builder contract puts these requirements on the design builder, the design builder will be looking to pass these obligations onto the designer requiring perfection as the designer's standard of care.

It is important for a designer to be wary of any flow down agreements or provisions in any design builder/designer agreement. It is also equally important to look at what documents are integrated into the design builder/designer agreement typically at the end of the agreement. When the design builder incorporates the Owner/Design Builder into the Design Builder/Designer agreement, the designer arguably has taken on responsibility for a defect pre-project that complies with all laws, regulations, ordinances, rules, etc.

In conclusion, many designers at one time or another are involved in a design build project. Typically, those projects are contractor led projects. It is critical to understand what obligations the design builder is attempting to impose upon the designer by adding "flow down" provisions or by integrating the Owner/Design Builder contract into the Design Builder/Designer contract.

DESIGN BUILD – LICENSE TO USE IOS AFTER TERMINATION

Design build is a delivery system that goes back to the ancient times when architects were trained in all phases of design and construction. The master builder's responsibilities extended well beyond design. The master builder was responsible for the project from concept, through design, and finally construction. In 2014, the American Institute of Architects updated its documents pertaining to design build. I have been advised by practitioners that design build projects are on the rise. The idea of a single point of contact for the owner is an advantage not offered by the traditional design-bid-build. There is also belief that the design build delivery system allows for better budget control, faster project completion, and better quality control. But what happens when the optimism and goodwill that exists at the start of a project turns into pessimism and ill will? How does the owner protect himself? How does the design builder protect himself? How does the architect protect himself? How do the design consultants protect themselves?

The design builder provides a license to use the instruments of service to the owner. For those projects in which the design builder must employ an architect to prepare the instruments of service, the 2014 AIA documents include licensing language that provides the design builder with the rights necessary to satisfy its obligations to the owner. Section 7.4.2 states the architect grants to the design builder a limited license to use the architect's instruments of service for purposes of "constructing, using, maintaining, altering, and adding to the Project…" In the architect's agreement with its consultant, the AIA C441-2014 provides a license by the consultant to the architect to use its instruments of service in order for the architect to meet its obligations to the design builder.

Since the owner does not have a direct contractual relationship with the project participants that actually prepared the instruments of service, the owner is exposed if it is forced to terminate the design builder. A similar result would occur if the design builder were not paying its architects and contractor and they chose to terminate their agreement with the design builder. In either case, the owner has no rights as to the instruments of service unless otherwise provided in the contract documents. In order to provide the owner some protection, the licensing language in the A141- 2014 Owner/Design Builder agreement requires that the design builder obtain from its architects and contractors a right to allow the owner to obtain from the architect and contractors a license to use the instruments of service in the event of a termination. In order to avail itself of this right, the owner must (1) agree to pay the architect or the contractor all amounts due, and (2) provide the architect or consultants with the written agreement to indemnify and hold harmless the architect or contractor from all costs and expenses, including defense costs, related to claims and causes of actions asserted by any third person or entity to the extent such costs and expenses arise from the owner's alteration or use of the instruments of service. This provision is only available to the owner in the event the Owner/Design Builder agreement is terminated other than by the default of the owner. In other words, in order to enforce the license chain, the owner must have "clean hands." If the termination is a result of the owner's default, the owner does not have the right to enforce the chain of license.

In conclusion, the owner is protected in its ability to proceed with the project in the event of termination not related to the owner's default by being able to bypass the design builder and obtain a license from the architect to use the instruments of service. The architect and its consultants are protected as to fees and indemnity from the owner in exchange for the license.

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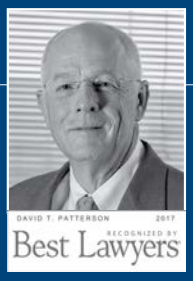

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