



PROACTIVE REGULATION

ACCESSIBILITY REQUIREMENTS COMMAND ATTENTION

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With increasing frequency, some developers are facing claims that their condominium and apartment projects do not comply with legal accessibility requirements. Last year alone, numerous prominent developers either defended lawsuits alleging widespread accessibility deficiencies or entered into multimillion-dollar settlements to resolve these allegations. For example:

In June 2005, Englewood, Colorado-based Archstone-Smith Trust, a publicly traded real estate investment trust (REIT) and one of the largest multifamily developers in the nation, agreed to survey and retrofit 71 properties nationwide, at an anticipated cost of more than \$20 million. Archstone had been sued for allegedly violating accessibility requirements in its apartments, failing to provide sufficiently wide doorways, adequate maneuvering areas in kitchens and bathrooms, and accessible light switches, thermostats, and other controls.

Last September, a disability rights group, the Equal Rights Center, sued Greenbelt, Maryland-based Bozzutto Group, accusing the developer of violating accessibility requirements in 54 apartment buildings. The alleged violations ranged from too-narrow doorways to inaccessible light switches to bathrooms lacking the required reinforced walls for future, elective installation of grab bars.

Also in September 2005, AvalonBay Communities Inc., headquartered in Alexandria, Virginia, a publicly traded REIT and a national developer of multifamily housing, was sued for allegedly violating accessibility requirements at 100 developments currently or formerly owned by AvalonBay. The alleged violations included inadequate doorways, kitchens, and bathrooms. Mere allegations, and even generous legal settlements, do not mean that every alleged accessibility violation has occurred. The fact remains, however, that ignorance surrounds the many accessibility requirements that apply to multifamily developments. The entire multifamily development team on every project requires a better understanding of, and a program for complying with, the many accessibility requirements applicable to multifamily housing. While the Americans with Disabilities Act (ADA) is widely known and usually implemented in commercial projects, the accessibility requirements of the Fair Housing Act (FHA) are equally important in residential projects but are often overlooked. The FHA accessibility law and related guidelines have been in effect for years. Yet, recent vigilance among concerned wheelchair users and affiliated civil rights organizations has brought to light surprisingly widespread inattention to these important construction requirements. In 1988, the FHAs anti-discrimination requirements were amended to extend protection to people with disabilities. In this amendment and in subsequent

guidelines and regulations, the FHA established seven fundamental construction requirements for multifamily housing:

- An accessible building entrance on an accessible route
- Accessible common and public use areas
- Doors usable by a wheelchair user
- An accessible route into and through the dwelling unit
- Environmental controls in accessible locations
- Reinforced bathroom walls for later installation of grab bars
- Usable kitchens and bathrooms

In addition to these construction requirements, the FHA requirements permit residents to make reasonable accessibility-related modifications to dwelling units and, in certain circumstances, to public and common areas, too. Generally, all of these FHA requirements apply to all new residential construction comprising at least four attached dwelling units built for first occupancy after March 13, 1991. More specifically, the FHA requirements apply to all new residential units in structures served by elevators and to the first floor of new residential units in buildings not served by elevators.

When violations of these requirements occur, all parties involved in the design and construction of the project can be held responsible. The parties liable for violations can include architects, builders and contractors, and the owner/developer. It is important to note that builders and contractors can be held responsible for FHA accessibility violations even in instances where they have no responsibility for design and, on the contrary, are obligated to construct the project in accordance with plans that violate applicable legal requirements. Similarly, the owner/developer is responsible even when design obligations have been delegated to the designers.

The U.S. Department of Housing and Urban Development (HUD) is the federal agency charged with primary responsibility for enforcement of the FHA accessibility requirements. However, aggrieved individuals and concerned organizations can also seek enforcement of these requirements. Indeed, concerned individuals and nonprofit organizations in recent years have been the catalyst for much, if not most, of the identification and correction of accessibility flaws.

Penalties for accessibility violations can include payment of damages, orders requiring corrective work, significant fines, and payment of attorneys fees. Given the tremendously high cost of litigation today, the ability of aggrieved individuals and organizations to recover attorney fees enables accessibility advocates to pursue cases of noncompliance with the reasonable assurance that the cost of their efforts will be recovered, in addition to procuring compliance with the mandated accessibility requirements.

Accessibility enforcement has become analogous to the advent of red-light cameras spitting out photos and tickets, where the revenue derived from enforcement readily funds continuing and increased enforcement. The lesson here is that overlooking accessibility requirements is no longer like speeding on an empty road. Development teams should expect wheelchair users and other accessibility advocates to descend on virtually every new project, inspecting for accessibility violations large and small and with good reason.

In reality, many development teams appear to have abided by ADA requirements, but overlooked FHA and other accessibility requirements entirely, while in other situations there seems to have been a complete failure to address accessibility requirements. Some recent FHA enforcement actions include the following:

In April 2005, the U.S. Department of Justice (DOJ) sued the owner, architect, and engineers of Applegate Apartments in metropolitan St. Louis, Missouri, for failing to make the apartment complex accessible to wheelchair users. The allegations included claims that the project failed to include doors in ground-floor units that were wide enough for wheelchair passage; that the units did not contain wheelchair accessible routes into and through the apartments; that the bathrooms and kitchens were not wide enough for wheelchair maneuvering; and that electrical outlets, thermostats, and other controls were not accessible to wheelchair users.

Last September, the DOJ announced a settlement with a developer and architecture firm requiring the retrofitting of more than 700 ground-floor units in ten apartment complexes in Spokane, Washington, plus the payment of compensation to harmed individuals and fines. The alleged violations ranged from the relatively minor such as closet rods that were too high to major failures, such as lack of an accessible path of travel.

Also in September 2005, the DOJ entered into a settlement with a developer and several architecture firms in Michigan, Indiana, Illinois, Ohio, Wisconsin, Virginia, and Nebraska requiring the retrofitting of 5,400 units in 49 apartment complexes. In addition to the numerous FHA accessibility violations, the lawsuit alleged that inaccessible rental offices at a number of the apartment complexes also violated the ADA.

Indeed, it is vital to understand that in addition to local building codes, a variety of national code requirements affect multifamily construction. While the FHA accessibility requirements affect most new multifamily projects and do so comprehensively, other federal laws also apply. For example, the ADA requirements applicable to public accommodations require that rental offices meet the ADA accessibility requirements. Similarly, if any portion of a new multifamily project is regularly made available to the public, such as a clubhouse or meeting hall rented out for events, then the ADA requirements will apply to these public facilities, too.

Other less-known federal laws may apply as well. Section 504 of the Rehabilitation Act of 1973, for instance, requires that any project receiving federal financial assistance must be accessible to individuals with disabilities. In 2004, in a landmark settlement, the Housing Authority of Baltimore City agreed to spend \$50 million to build housing units accessible to disabled people, marking the first time

the DOJ successfully sued under the Rehabilitation Act to require housing that is accessible to handicapped persons.

Likewise, the Architectural Barriers Act (ABA) of 1968 imposes accessibility requirements on any residential facility owned, leased, or financed by the U.S. government. ABA compliance is guided by the Uniform Federal Accessibility Standards. In addition, state and even local city and township codes may, and often do, impose accessibility requirements that supplement FHA and other federal guidelines.

While some accessibility laws, such as the ADA, generally permit only specific means of compliance, others, such as the FHA, allow for numerous ways of achieving compliance. For example, the Final Fair Housing Accessibility Guidelines, Published in March 1991, contain technical assistance for complying with the FHA accessibility requirements. Compliance with the guidelines assures you of a safe harbor; that is, if you comply with the guidelines you will be deemed to have complied with the applicable FHA accessibility requirements.

More important than any particular guideline or book, however, is a program designed to ensure compliance with accessibility requirements in multifamily projects. First, the development team must have an understanding of the very relevance and existence of the myriad legal requirements affecting multifamily construction. Here, the key is education, training, and the guidance of experienced architects, engineers, consultants, and counsel. Second, responsibility must be clearly allocated. The applicable contracts guiding the performance of the development team must identify and assign responsibility for compliance with all legally mandated accessibility requirements. Typically, any complex construction project involves layers of architectural and engineering expertise.

Consequently, there must be a process of determining which members of the team are most qualified to identify and satisfy the applicable legal requirements. Appropriate insurance and indemnification obligations should also accompany this allocation of responsibility. Third, every compliance program should involve a review process in which a second set of eyes provides a fresh examination for compliance. Ideally, this review would be conducted by professionals well versed in the applicable legal requirements, but who are not involved in the development process and whose view of the project is not clouded by other concerns, such as creative or budgetary requirements.

In almost no other instance can the saying measure twice, cut once have greater application. Success in avoiding costly, disruptive, and unpopular accessibility failures can be easily prevented with the appropriate compliance program.

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