

### Mixed-Use Condominium Projects: Cautionary Tales

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**Mixed-use condominium projects have increased significantly over the last several years. These innovative and diversified projects bring unique design challenges and exposures that should be carefully considered by design professionals and their legal counsel in designing such projects and defending any resulting litigation.**

#### Introduction

In most modern construction settings, the architect and engineer (design professional)<sup>2</sup> are usually at the center of project decisions and controversies. All the awe-inspiring commercial buildings and most high-end buildings are the product of the artistic and technical input of an architect and the hidden work of an engineer who ensures that the architect's vision can be transformed into a safe and livable structure. While often charged by owners to come up with the most innovative, cutting-edge designs, the design professional is placed in the liability line of fire for using those same innovative processes.

Recently, mixed-use condominium projects have grown in popularity and frequency. Developers favor these projects because they offer diversification (commercial, residential, and retail). Mixed-use condominium projects are also trendy and attractive to potential tenants and purchasers. To stimulate development of this project type, cities often offer public incentives. For these reasons, developers and builders are increasingly asking design professionals to assist in the design and construction of these projects.

Design professionals must be aware of the particular risks associated with each project, and mixed-use condominium projects have their share of unique challenges and nuances. For example, condominiums have acoustical issues that come into play when the design is developed and the building is being constructed. Should concrete and steel be used in lieu of wood framing? Carpet versus hard flooring? How will these issues impact noise reduction and other problems? On top of that, add a bar, restaurant, and movie theater at the base of the residential building and now noise issues are exacerbated and other issues continue to emerge, including smoke ventilation, fire protection, fire separation, parking, ingress and egress, security, exhaust, etc. Further, with retail and commercial uses, a design professional has to be concerned and cognizant of trash disposal, laundry, and the delivery of goods. Since many of these mixed-use condominium projects are in urban, downtown areas, space is tight and expensive. Thus, design professionals have to be creative and careful in balancing the functional goals of the building with the footprint and space limitations. These are some of the many issues that will leave design professionals scratching their heads and brainstorming with their colleagues on these unique projects. With developers leaving little room for error in their goal to meet their high expectations while staying under their conservative financial radar, design professionals must be prepared to proactively deal with these issues.

To address these issues in the context of mixed-use condominium projects, it is important to look at the benchmark for assessing a design professional's performance—the applicable standard of care. Additionally, code compliance, the Americans with Disabilities Act, and the Fair Housing Act are important in analyzing the unique issues surfacing on these projects.

### Standard of Care<sup>3</sup>

When designing and performing contract administration services for a complex project like a mixed-use condominium project, should design professionals expect to be held to a higher standard of care? Is there an inherently higher level of expertise needed for a design professional to handle such projects?

Design professionals must perform requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances.<sup>4</sup> The design professional is not liable for defective plans and specifications if the plans and specifications reflected the standard of common knowledge at the time of preparation. *Quality Inn South, Inc. v. Weiss*, 505 So.2d 509 (Fla. 3d DCA 1987). Contractual provisions, however, can further increase the design professional's standard of care. This type of additional contract language can increase the likelihood of litigation stemming from errors and omissions and can impact the design professional's insurance coverage since the design professional has raised the professional liability bar and increased exposure. Consequently, design professionals need to prudently consider language proposed by a client that raises the standard of care governing the design professional's performance on the project.

Further, architects can be held to a standard care based on other disciplines when their scope of work exceeds architectural review and design. *Tomberlin Associates, Architects, Inc. v. Free*, 174 Ga.App. 167, 329 S.E.2d 296 (1985). In this case, the architect rendered civil engineering services to the housing authority, which the architect was qualified to perform in conjunction with its architectural practice. Since the architect undertook the performance of civil engineering services, such services should have been judged by civil engineering standards. When multiple uses are involved, more disciplines and areas of practice are involved. This creates fertile ground for architects to inadvertently exceed their practice area and undertake responsibilities beyond their typical practice area and skills set.

Although design professionals generally focus on their duties to their client, and not third parties with whom the design professional has no privity, these third parties and the duties owed to them are a significant source of exposure and litigation. Courts continue to expand and clarify the third parties to whom a design professional owes a professional duty. Generally, courts agree that design professionals have a professional duty to the contractors, subcontractors, general public, and the owner or developer client on a construction project.<sup>5</sup> For condominium projects, the frequent litigation plaintiff is the condominium homeowner's association.

### Code Compliance

The design professional has a professional responsibility to prepare drawings and plans that conform to applicable building and zoning codes. See, e.g., *Atlantic National Bank of Jacksonville v. Modular Age, Inc.*, 363 So.2d 1152, 1155 (Fla. 1st DCA 1978). "It is clearly an architect's function and responsibility to design walls which will meet code requirements [and] to [e]nsure that the plans and specifications comply with the applicable building codes for the area where the structure is to be built." *Robsol, Inc. v. Garriss*, 358 So.2d 865, 866 (Fla. 3d DCA 1978).

The law is clear that an architect owes a duty of due care to his client in arranging site plans and drawing buildings which are in conformance with building and zoning codes as well as other similar local ordinances. The architect is liable to his client in tort and contract when that duty is breached as to any damages proximately caused by such breach.

Further, "[t]his duty of the architect cannot be avoided by delegating the responsibility of [e]nsuring that portions of this design comport with the applicable laws and regulations." *Atlantic National*, 363 So.2d at 1155.

Generally, design professionals are entitled to rely on the assurances and commitments of a zoning authority (and other governmental entities), and if the design professional does so, the zoning authority (or governmental entity) is bound by the subject representations. See, e.g., *The Florida Companies v. Orange County, Florida*, 411 So.2d 1008, 1011 (Fla. 5th DCA 1982). Further, when a design professional complies with applicable codes and regulations, while not an absolute defense to claims alleging errors and omissions, such compliance is evidence that the design professional met the applicable standard of care. For example, in *Edward J. Seibert A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Association, Inc.*, 573 So.2d 889 (Fla. 2d DCA 1991), the court held that an architect who designed a condominium development fulfilled his duty to design second-floor units so that the fire exits complied with the building code by first determining that, in his professional opinion, only one exit was required, and then obtaining and relying on the city's building permit. Generally, a design professional is entitled to rely on a building official's interpretation of a given code even though another interpretation may be possible.<sup>6</sup>

On the other hand, when applicable codes are violated by a design professional, significant weight is given to such violations, and the violations are often used by claimants to support claims of errors or omissions. In *Henry v. Britt*, 220 So.2d 917, 920 (Fla. 4th DCA 1969), the court held that violation of a State Board of Health regulation establishing the minimum standard of design "would be (at least) *prima facie* evidence of negligence." See, also, *Conroy v. Briley*, 191 So.2d 601, 602 (Fla. 1st DCA 1966). "The violation of the city ordinance and the Hotel and Restaurant Commission regulation was, at the least, *prima facie* evidence of negligence."

Further, there are exceptions to the general rule that evidence of code non-compliance establishes that the design professional breached the duty of care. For example, if a design professional relies upon a lawyer for zoning classifications, submits plans according to the zoning classification, and the zoning classification ultimately is in error, the design professional may still be deemed to have met the duty of reasonable care. See, *Krestow v. Wooster*, 360 So.2d 32, 33 (Fla. 3d DCA 1978).

The law is clear that an architect owes a duty of due care to his clients in arranging site plans and drawing buildings in conformance with building and zoning codes as well as other similar local ordinances. That duty is discharged, however, when the architect, as in the instant case, reasonably relies on the legal advice of the client's lawyer concerning the nature of the applicable zoning classification and submits architectural plans in conformance with such zoning. There can be no action against the architect in tort or contract if it later develops, as here, that the legal advice was wrong and the zoning classification is different from that represented by the lawyer.

The design professional owes the client a duty of care in arranging site plans and drawing improvements that conform with building and zoning codes and local ordinances and is liable to the client in tort and contract for damages proximately caused by breach of this duty. *Robsol, Inc. v. Garris*, 358 So.2d 865 (Fla. 3d DCA 1978). This burden is properly placed on the shoulders of the design professional, who is best qualified to interpret the impact of applicable municipal bulkhead lines (*Robsol*), zoning restrictions (*Graulich v. Frederic H. Berlowe & Associates, Inc.*, 338 So.2d 1109 (Fla. 3d DCA 1976)), or zoning requirements regarding parking space ratios (*Maritime Construction Co. v. Benda*, 262 So.2d 20 (Fla. 1st DCA 1972)). In reversing a judgment in favor of the architect, the *Maritime* court observed:

Arranging site plans and drawing buildings so that they conform to local ordinances and building codes are expertises within the field of architecture. A person...who is licensed as an architect holds himself out as possessed of this expertise. We know of no legal concept which requires a layman to suggest to an architect that he has employed how such architect should perform his professional services. *Id.* at 22.

Likewise, it is the design professional's responsibility to ensure that the plans and specifications comply with the applicable building codes of the area in which the structure is to be built. *Atlantic National Bank of Jacksonville v. Modular Age, Inc.*, 363 So.2d 1152 (Fla. 1st DCA 1978); *See, also, Whitehead v. Rizon East Association*, 425 So.2d 627, 630 (Fla. 4th DCA 1983). Notwithstanding apparent code compliance by the engineer, a cause of action existed for "negligent advice" regarding the design of bathroom venting. *Palm Bay Towers Corp. v. Crain & Crouse, Inc.*, 303 So.2d 380 (Fla. 3d DCA 1974), *quashed*, 326 So.2d 182.

States have their own set of building codes of which design professionals have to be cognizant. Moreover, some states also have specific statutes or requirements that govern residential projects versus commercial projects, which must be considered for these mixed-use developments.<sup>7</sup>

### ADA and FHA Considerations

The Americans with Disabilities Act of 1990 (ADA) and the Fair Housing Act (FHA) come into play during the design and construction phase of commercial and residential facilities. The ADA governs the construction of "places of public accommodation," while the FHA generally deals with accessible design and construction for "covered multi-family dwellings." Since mixed-use condominium projects involve both "places of public accommodation" and "covered multi-family dwellings," it is important to consider the impact of the application of the FHA and ADA on mixed-use projects.

In most jurisdictions, design professionals on commercial facilities are subject to claims by third parties under the ADA, 42 U.S.C. §§12182B12183. *See, Johanson v. Huizenga Holdings, Inc.*, 963 F.Supp. 1175 (S.D. Fla. 1997). In this case, a complaint was filed by the father of a disabled, minor hockey fan, which stated a cause of action against the architectural firm that planned a hockey arena. In some jurisdictions, the courts have strictly construed the scope of the ADA and held that design professionals are not subject to ADA claims by third parties. Even in those jurisdictions, however, design professionals are liable to the hiring party, and thus, will have some exposure for errors and omissions involving ADA or FHA compliance.

Primarily because of the complexities of balancing the rights of the physically disabled and the technically specific requirements of the built environment, no single agency has been charged with enforcement of all issues pertaining to accessibility. Under 28 C.F.R. §36.503, the Department of Justice may file lawsuits in federal court to enforce the ADA, and courts may order compensatory damages and back pay to remedy discrimination if the department prevails. The department may also obtain civil penalties of up to \$55,000 for the first violation and \$100,000 for any subsequent violation. 28 C.F.R. §36.503.

Private parties may also sue for discrimination under 28 C.F.R. §36.501 and receive injunctive relief. Lawyers and interest groups are the most frequent enforcement mechanism of FHA and ADA requirements. Over the last several years, new ADA suits are almost a daily occurrence in federal courthouses. This explosion of ADA lawsuits has led to some increased judicial scrutiny over suits by "drive-by" plaintiffs.<sup>8</sup>

Compliance with the FHA, ADA, and applicable state codes is mandatory, however. Consequently, design professionals need to be weary of these important requirements, violation of which can result in litigation and exposure, either directly or through the client.

The policy of the FHA, 42 U.S.C. §3601B3631, is to ensure that the United States provide "for fair housing throughout the United States," including making housing accessible to "handicapped" people. "Handicap" is defined by §3602(h) as:

(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

The FHA should be read in conjunction with the ADA, which provides overlapping and independent protection for people with disabilities.

Title 42 U.S.C. §3603 states the dwellings that are subject to the FHA, which include single-family homes when the owner owns more than three single-family homes offered for sale or rent at any one time. The FHA applies to those in the business of selling or renting dwellings (with business separately defined in part (c)) and those dwellings receiving federal aid. The FHA prohibits discrimination in housing against people with disabilities. Discrimination includes falsely representing that a unit is unavailable and denying the opportunity to buy or rent the dwelling.

The Department of Housing and Urban Development (HUD) provides examples of how the FHA's accessibility requirements may be met. See, 24 C.F.R. §100.203B100.205. The FHA requires that public buildings be made accessible to people with disabilities. The FHA's technical requirements include: a) accessible entrances on accessible routes; b) accessible public and common use areas; c) usable doors; d) accessible routes into and through the dwelling unit; e) accessible light switches, electrical outlets, and environmental controls; f) reinforced walls in bathrooms to allow installation of grab bars; and g) usable kitchens and bathrooms such that a person in a wheelchair can maneuver.

The FHA specifically references the American National Standards Institute (ANSI) for guidelines in construction, thereby encouraging use of ANSI standards as guidance for compliance with the FHA's accessibility requirements. Accordingly, in using the ANSI standards as a reference point for FHA accessibility guidelines, HUD issued guidelines based on existing and familiar design standards and promoted uniformity between federal accessibility standards and those commonly used in the private sector. ANSI and the FHA, however, have differing purposes and goals. The purpose of the FHA is to describe minimum standards of compliance with the specific accessibility requirements of the act.

Some of the applicable ANSI provisions impose more stringent design standards than those required by the FHA. Compliance with these ANSI construction standards, therefore, should ensure compliance with FHA guidelines. The emphasis of the FHA on design and construction standards that are compatible with the needs of wheelchair users is realistic because the requirements for wheelchair access (e.g., wider doorways) are met more easily at the construction stage. Individuals with non-mobility impairments can be accommodated more easily by post-construction adaptations to dwelling units. The FHA and the implementing regulations ensure the right to make such later adaptations. See, 24 C.F.R §100.203.

The ADA, 42 U.S.C. §§12101 *et seq.*, is a comprehensive civil rights law for people with disabilities. The Department of Justice enforces the ADA's requirements in three areas: Title I, employment practices by units of state and local government; Title II, programs, services, and activities of state and local government; and Title III, public accommodations and commercial facilities.

Furthermore, Title III of the ADA applies to any (1) public accommodation; (2) commercial facility; or (3) private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes. 28 C.F.R. §36.102.

The ADA supplements the FHA with more stringent regulations in some areas, but does not invalidate or limit the remedies, rights, and procedures of any other federal, state, or local laws, including state common law. For example, the ADA covers all public areas, whereas the FHA covers public areas and private areas such as apartment bathrooms. Further, the regulations implementing the ADA provide for the removal of barriers, which is not required under the FHA:

- a. **General.** A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.
- b. **Examples.** Examples of steps to remove barriers include, but are not limited to, the following actions:
  1. Installing ramps;
  2. Making curb cuts in sidewalks and entrances;
  3. Repositioning shelves;
  4. Rearranging tables, chairs, vending machines, display racks, and other furniture;
  5. Repositioning telephones;
  6. Adding raised markings on elevator control buttons;
  7. Installing flashing alarm lights;
  8. Widening doors;
  9. Installing offset hinges to widen doorways;
  10. Eliminating a turnstile or providing an alternative accessible path;
  11. Installing accessible door hardware;
  12. Installing grab bars in toilet stalls;
  13. Rearranging toilet partitions to increase maneuvering space;
  14. Insulating lavatory pipes under sinks to prevent burns;
  15. Installing a raised toilet seat;
  16. Installing a full-length bathroom mirror;
  17. Repositioning the paper towel dispenser in a bathroom;
  18. Creating designated accessible parking spaces;
  19. Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
  20. Removing high pile, low density carpeting; or
  21. Installing vehicle hand controls. 28 C.F.R. §36.304.

State regulations (i.e., the Florida Americans with Disabilities Accessibility Implementation Act) often supplement federal ADA regulations.<sup>9</sup>

### **Design Issues For Mixed-Use Condominium Projects**

Mixed-use condominium projects typically create structural challenges due to the different mechanical, electrical, and plumbing components of the different portions of the project. Based on the architectural and engineering requirements of the different "uses," it is difficult to coordinate the various areas of the project.

For example, entrances, exits, stairwells, escalators, and elevators can present practical and aesthetic challenges on mixed-use projects. Residential, retail, and office spaces prefer different styles and capacities for ingress and egress. Further, these areas, and their ingress and egress, are often segregated so that residential occupants and visitors are not entering and exiting through the same means as retail and office occupants and visitors. Separation, segregation, and duplication of these entry, exit, stairway, and elevator systems can be costly both financially and spatially.

Design professionals, owners, and developers also try to stack structural systems to avoid transferring structural columns and systems. With most commercial projects that are limited to one type of usage, this is easily handled by designing the parking garage and upper floors in accordance with the structural components of the parking areas. When designing and building a mixed-use project, however, it is much more difficult to design the residential and non-residential areas with the same structural framework. To do so can save significant amounts of money by avoiding the costly transfers of structural columns, but may compromise layout and space plans. Thus, these considerations must be dealt with through increased planning, creativity, and communication with the developer.

Different uses are typically subject to different fire protection requirements. Thus, these projects require broader design knowledge to adequately design and detail the different systems for the diverse uses and areas. With the combination of residential and non-residential areas, noise reduction or elimination becomes an area of concern. Beachfront projects in the Southeast encounter many unique design issues not seen in other areas of the country. Due to the prevalence of hurricanes and tropical storms, as witnessed by the recent hurricane season in Florida, design professionals need to consider the impact of adverse weather and balance safeguarding the buildings from such weather versus striving for satisfying baseline building code requirements.

In sum, it is important to consider the impact of multiple uses when designing, building, or handling disputes over a mixed-use project. While the most cost-efficient systems typically are consistent throughout the project and serve multiple areas, this becomes problematic, if not impossible, with mixed-use projects.

### **Condominium Considerations**

As condominium development has continued to expand, condominium litigation has become commonplace. The number of lawsuits by homeowner condominium associations for alleged design or construction defects has grown by leaps and bounds. In part, this is due to an aggressive plaintiff's bar, particularly those specialized in condominium litigation. Association board members tend to be proactive and "trigger happy" because they are concerned with breach of fiduciary claims if they do not take aggressively proactive steps to protect owners' rights with respect to alleged design or construction defects. In addition, the legal structure of associations provides the opportunity for a few "crusaders" to lead the charge against the design and construction team. Moreover, since developers are often shell

entities, design professionals and their insurance policies may be viewed as the best target for such litigation.

Due to the likelihood of duplication of even the smallest errors or omissions, it is crucial that quality control procedures and oversight be implemented. One error can be multiplied over and over through multi-unit projects, causing a small problem to be exponentially expanded into a large damages claim.

If a design professional is involved in the development process early enough and can influence the declaration of covenants for the condominium, it may be possible for the design professional to minimize liability and tailor risk allocation. The declaration outlines the obligations and rights of the developers, owners, and association. After the declaration has been filed, it is difficult to attain the necessary approval for revisions, so it is important that this effort begin as early in the process as possible. Examples of provisions that can help manage risks and minimize claims exposure are: a) super majority provision to initiate litigation; b) pre-suit mediation requirement; c) jury trial waiver; d) limitation of liability clause; and e) prevailing party recovers attorneys' fee and costs.

Another idea for loss prevention and risk management is the inclusion of a requirement that an independent expert be retained to evaluate the alleged construction and design issues. This can be done as a requirement for associations prior to their pursuit of alternative dispute resolution or litigation. Alternatively, the parties can agree to jointly retain an independent expert and prepare a report or advise the parties about the alleged design or construction issues before any alternative dispute resolution or litigation. Maintenance requirements for the association, including annual maintenance inspections, are important for clarifying the parties' respective obligations and responsibilities. Lastly, multiple associations where different buildings are involved may be appropriate where different issues are likely to be encountered on the different buildings.

With respect to the design professional's contract, it is vital for the design professional to clearly lay out the scope of services and exclusions. For example, unless the parties bargain otherwise, long-term maintenance of the project should be carved out of the design professional's scope. Of course, limitation of liability provisions, mediation requirements, jury trial waivers, fee provisions, etc., are also good risk management options to consider.

Additionally, to avoid being the "last man standing," design professionals can request long-term bonds from the developer or contractor to cover construction defects and to increase the likelihood that design professionals and their insurers are not the only targets of any subsequent claims.

Given the requirements of the ADA and FHA, design professionals are obligated to ensure that structures are not only professionally designed and engineered, but also designed and engineered to reflect public policy. Often, when their innovative work results in less than desired results, design professionals face exposure to damages that are grossly disproportionate to the fees they receive for their designs.

Further, on some projects, today's design professional has a much narrower role in the construction process than in earlier days. Because of various court decisions and the increasing knowledge and capability of large, experienced contractors, some design professionals now generally attempt to limit their construction phase involvement, arguably the most risk-intensive phase, to periodic observation of construction activities, thus hoping to avoid or minimize claims spawned by conduct construed as supervision or control. See, e.g., *Shepard v. City of Palatka*, 414 So.2d 1077 (Fla. 5th DCA 1981); AIA Document B141-1997, *Standard Form of Agreement Between Owner and Architect*, Article 2.6. Design

professionals, however, should be wary of projects where the design professional will have limited or no contract administration. While contract administration services do bring some additional risks and exposure, it is often critical that design professionals perform these services. This enables the design professional to document the contractor's compliance with the design requirements and minimizes coordination problems and confusion. Also, documentation of construction issues and client decisions may be essential for future defense. These concepts and approaches hold true for mixed-use condominium projects.

If a private entity operates or leases space to different types of facilities and only a few are places of public accommodation, the entire private entity is a public accommodation. ADA Title III obligations are only triggered for the operation of places of public accommodation. When portions are used for both residential (non-public) uses and public accommodation (i.e., entrances, exits), those portions are covered by the broad Title III requirements.

### Conclusion

Based on the unique issues surrounding mixed-use condominium projects, design professionals should tailor their risk management and design approaches to meet the nature of the project. With respect to risk management, risk allocation is important. Design professionals need to carefully define the scope of services, maintenance requirements, maintenance obligations, project close-out, training, etc. For condominiums, ensure the pertinent requirements are included in the purchase documents.

When mixed-use projects are involved, different areas of the project are subject to different requirements and standards. Close consideration of the use of the facilities is key. Some condominiums have characteristics of both residential dwellings and places of public accommodation, and thus, may be subject to both FHA and ADA requirements. Moreover, in addition to the FHA and ADA, there are many state-specific requirements and codes that become applicable to mixed-use condominium projects. Since there is an abundance of parties overlooking these projects both before and after construction, design professionals should take special precautions to comply with all applicable requirements and to ensure that all of their respective disciplines are coordinated properly.

Mixed-use projects require a great deal of effort to maximize the efficiency and effectiveness of space allocation and coordination among the different disciplines. As far as disciplines and coordination, depending on the various uses of the project, additional consultants may be used. The design professional may need to retain food service equipment, laundry service equipment, lighting design, and acoustical consultants, in addition to the consultants already in the design professional's arsenal, on a project of this magnitude.

As final food for thought, add into the mix another dimension: the project is a historic renovation, adaptive reuse, and converts a single-use building into a mixed-use condominium project. The spirit and intent behind the code requirements, above and beyond merely the letter of the code requirements, become overarching talking points in dealing with the many players involved. The project is also in hurricane prone Florida where wind-driven rain and heavy winds are the norm. There are now a plethora of issues and potential problems to consider, and, of course, little room for any errors or omissions.

## Endnotes

1. Mr. Keiner wishes to acknowledge the assistance of Trevor B. Arnold, Esquire, (also with Gray Robinson, P.A.) in the preparation of these materials.
2. The term "design professional" denotes architects and engineers. The following definitions are quoted from AIA Document M103, *Glossary of Construction Industry Terms*:
  - **Architect:** Designation reserved, usually by law, for a person or organization professionally qualified and duly licensed to perform architectural services.
  - **Professional Engineer:** Designation reserved, usually by law, for a person professionally qualified and duly licensed to perform engineering services such as structural, mechanical, electrical, sanitary, civil, etc.
3. Portions of "Standard of Care," "Code Compliance," and "ADA and FHA Considerations" are from the Rights and Liabilities of Architects and Engineers portion of the *Florida Bar Florida Construction Law and Practice Manual (5th edition)*, which Trevor B. Arnold, Esquire, of GrayRobinson, P.A., assisted in preparing.
4. *Lochrane Engineering, Inc. v. Wilingham Realgrowth Investment Fund, Ltd.*, 552 So.2d 228 (Fla. 5th DCA 1989); *Ahimsa Technic, Inc. v. Lighthouse Shores Town Homes Development Co.*, 543 So.2d 422 (Fla. 5th DCA 1989); *MacIntyre v. Green's Pool Service, Inc.*, 347 So.2d 1081 (Fla. 3d DCA 1977); *Gleason v. Title Guarantee Co.*, 317 F.2d 56 (5th Cir. 1963).
5. Many courts have abolished privity requirements exposing the design professional to lawsuits by the contractor, the contractor's surety, subcontractors, materialmen, ultimate purchasers, lenders, mortgage note endorers, and other foreseeable third parties. See, e.g., *A. R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973). In *Hewett-Kier Construction, Inc. v. Lemuel Ramos & Associates, Inc.*, 775 So.2d 373 (Fla. 4th DCA 2001), the court went so far as to extend the design professional's exposure to anyone who has a "special relationship" to the design professional's work. Further, design professionals owe obligations to the general public for latent defects that cause unsafe conditions. See, *Slavin v. Kay*, 108 So.2d 462 (Fla. 1959); *Easterday v. Masielo*, 518 So.2d 260 (Fla. 1988).
6. An agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by a court unless it is clearly erroneous. See, *BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594 (Fla. 1998); See, also, *Florida Interexchange Carriers Association v. Clark*, 678 So.2d 1267 (Fla. 1996); *Florida Cable Television Association v. Deason*, 635 So.2d 14 (Fla. 1994). The court in *BellSouth Telecommunications* noted that agency orders come to the court "clothed with the presumption of validity." *BellSouth Telecommunications*, 708 So.2d at 596. *Seibert*. The question of code application is one of law for the court to decide. *Lindsey v. Bill Arflin Bonding Agency, Inc.*, 645 So.2d 565 (Fla. 1st DCA 1994); *Seibert*.
7. The Florida legislature adopted a residential construction defect act. Under the terms of Florida Statutes Section 558.001-.005, homeowners are now required to provide contractors and other members of the construction team, including design professionals, written notice of any alleged construction defects. The statutory scheme provides the construction team members an opportunity to resolve any claims or to correct construction defects prior to a homeowner seeking relief through the courts. The procedures of the statutes must be followed prior to a homeowner seeking relief through litigation. There is not yet any case law interpreting these statutes, and they have been the subject of some criticism, including a recent *Florida Bar Journal* article. The legislature has already begun to tinker with the statutes, extending some of the statutory deadlines in the 2004 amendments.
8. ADA suits typically seek two things: 1) compliance with the ADA; and 2) money (through a statutory basis to recover attorneys' fees). In *Rodriguez v. Investco, L.L.C.*, however, 305 F.Supp.2d 1278 (M.D. Fla. 2004), the latter of the two targets has drawn recent criticism from U.S.

District Court Judge Gregory Presnell: "The current ADA lawsuit binge is, therefore, essentially driven by economics—that is, the economics of attorney's fees...Plaintiff's testimony left the distinct impression that he is merely a professional pawn in an ongoing scheme to bilk attorney's fees from the Defendant." Judge Presnell noted that plaintiff and plaintiff's counsel did not attempt to procure pre-suit voluntary compliance with the ADA. As Judge Presnell stated in the opinion:

Why would an individual like Plaintiff be in such a rush to file suit when only injunctive relief is available? Wouldn't conciliation and voluntary compliance be a more rational solution? Of course it would, but pre-suit settlements do not vest plaintiff's counsel with an entitlement to attorney's fees.

In Judge Presnell's case, the defendant, Investco, LLC, acquired the property, a hotel known as Sandy Lake Towers. Prior to Investco's acquisition of Sandy Lake Towers through a mortgage foreclosure, the plaintiff, Jorge Luis Rodriguez, stayed in the hotel, cut his visit short allegedly due to encountered barriers, and filed suit against the owner of the hotel at that time, Sergio Naya. Soon after filing suit, Rodriguez substituted the new owner, Investco, in as the defendant. Judge Presnell ruled, however, that Investco was not responsible for violations caused by the prior owner. Thus, since Investco simply purchased the existing facility, Rodriguez failed to establish that Investco designed and constructed Sandy Lake Towers, as required to maintain a claim under the ADA. Moreover, Investco had already begun renovations, which presumably would remedy any existing barriers. Lastly, Judge Presnell found that Rodriguez failed to show a continuing connection to the hotel necessary to establish ongoing discrimination or likely future discrimination.

Similarly, in March of this year, in *Brother v. CPL Investments, Inc.*, 317 F.Supp.2d 1358 (S.D. Fla. 2004), United States District Judge Martinez entered judgment in favor of a hotel owner in an ADA suit. Judge Martinez held that the plaintiffs, who only made a visual inspection of the hotel and could not credibly testify that he still considered staying at the hotel, lacked standing to bring the ADA public accommodation action against the hotel owner. Like Judge Presnell, Judge Martinez noted the plaintiffs' numerous other ADA suits filed over the last year. Furthermore, Judge Martinez cited Judge Presnell's ruling to support his conclusion that the plaintiffs' testimony about plans to stay at the hotel in the future was not credible. These opinions show the courts' increasing reluctance to permit "drive-by" plaintiffs to pursue ADA claims and the legal principles governing the standing necessary to pursue ADA claims. See, *Dana Lamb v. EID Management, LLC*, No. 202-cv-312-FtM-29DNF at 7, footnote 1 (M.D. Fla. July 8, 2003) (emphasis added), citing, *Gladstone Realtors v. Village of Belwood*, 441 U.S. 91, 100 (1979); *Jackson v. Okaloosa County, Fla.*, 21 F. 3d 1531, 1537 (11th Cir. 1994) (plaintiff must allege and prove that they meet the standing requirements).

9. The purpose of Florida's ADA Act is to establish standards for accessibility to places of public accommodation and commercial facilities by individuals with disabilities, and it applies to the design, construction, and alteration of such buildings and facilities. The Florida Act applies to all new or altered buildings and facilities that may be frequented, lived in, or worked in by the public, F.S. 553.504(1); private clubs, F.S. 553.505; and residential buildings, F.S. 553.504(2).

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## GUEST ESSAYS

Mr. Keiner is a specialist in complex commercial, construction, professional liability, environmental, and intellectual property litigation, arbitration, and mediation. Mr. Keiner earned his undergraduate degree from Miami University and his law degree from the University of Michigan. He represents a number of architectural and engineering firms across the country regarding various professional liability disputes. He has given numerous presentations regarding these design professional issues.

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