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Risk Management Tools for the Design Professional

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Design and Accessibility Requirements under the Fair Housing Act

By David T. Patterson and Frederick T. Bills

Violations of the design and accessibility standards of the Americans with Disabilities Act (“ADA”) and the Fair Housing Act (“FHA”) present some of the largest liability risks, in terms of claim value, to design professionals across the country. Generally, the federal statutes require certain residential and commercial structures be readily accessible to, and usable by, individuals with disabilities. And, while accessibility and usability are components considered over the course of design and the standard of care, the statutes pose significant risk to designers. Exacerbating that risk, the FHA financially incentivizes enforcement by private entities by providing recovery of attorneys’ fees and costs to the prevailing party. This article focuses on the design and accessibility requirements of the FHA so designers can better understand their risk under the statute and where to turn for guidance in the event of a claim.

What Does the FHA Require?

The FHA is a federal civil rights statute designed to protect individuals from discrimination in the housing market. 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). 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). 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. U.S. v. Edward Rose & Sons, 384 F.3d 258 (6th Cir. 2004).

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The Safe Harbors

In order to assist designers navigating the FHA accessibility requirements, the United States Department of Housing and Urban Development ("HUD") has developed "safe harbors" which establish design and construction standards deemed to comply with the seven technical accessibility requirements of the FHA. Presently, there are fifteen different standards HUD recognizes as safe harbors. Compliance with a safe harbor is not mandatory and they do not set minimum accessibility requirements. See Barker v. Niles Bolton Associates, Inc., 316 Fed. Appx. 933 (11th Cir. 2009). As such, a covered dwelling that deviates from a safe harbor is not necessarily deemed inaccessible. U.S. v. Noble Homes, Inc., 2016 U.S. Dist. LEXIS 37857 (N.D. Ohio 2016). Designers and developers may choose to design covered dwellings to a different standard than those pronounced in the safe harbors but must demonstrate that it 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). It should be noted, however, that reliance upon anything other than an objective standard of accessibility threatens exposure.

Who is liable?

The accessibility language is interpreted broadly, and all participants in the process of design and construction are subject to its requirements. See United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129 (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 (D. Md. 1998). So, who is a wrongful participant? The Court in Baltimore Neighborhoods gave the following example:

[F]or example, if an architect draws up plans with noncomplying entrance ways, and a builder follows the plan resulting in a covered dwelling with an inaccessible entranceway, both entities would be liable as both were wrongful participants. On the other hand, if the builder corrects the entranceway, building it in compliance with FHAA regulations, then the builder is not liable because the builder was not a wrongful participant.

Id. at fn 2. By extension, then, an architect who designs an accessible covered dwelling should not be considered a wrongful participant, even where the as-built conditions result in inaccessible features, if the architect is not involved in the construction process.

A prima facie case for an accessibility violation is established by showing a violation of a safe harbor. United States v. Tanski, 2007 U.S. Dist. LEXIS 23606 (N.D.N.Y. 2007). A defendant may then rebut the presumption 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). While courts have not been clear on what constitutes a comparable objective measure of accessibility, some circuit courts have refused to accept a defendant's attempt to demonstrate accessibility by showing, "[w]hether one disabled person may be able to maneuver through the complex and units(.)" United States v. Quality Built Constr., Inc., 2003 U.S. Dist. LEXIS 24969 (E.D. N.C. 2003). A single instance of inaccessible design and construction by a wrongful participant can establish liability.

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One important consideration, under any liability analysis, is that 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. In other words, if a developer is named as a defendant for inaccessible design and construction, and attempts to bring in the design team by way of third-party complaint or a state-based claim of indemnification, the design team should be successful in a motion to dismiss early in the pleading phase of the process.

Conclusion

Unfortunately, there are several conflicts across the circuit courts on several of the legal standards and defenses which may apply in accessibility claims. Our experience in these cases involves complaints filed by fair housing advocacy groups against developers and designers, and the trend is likely to continue as new construction of covered multi-family dwellings expand across the country. Litigation can be drawn out and expensive due to the lengthy discovery process, the use of experts, and damages that may include injunctive relief to retrofit properties, attorneys' fees, compensatory damages, and punitive damages. Understanding and complying with accessibility requirements should be a primary concern of designers from the initial phase of a project. This article covers only a glimpse of the requirements under the statute, and it is critical that designers consult with their carriers and counsel if put on notice of claims for inaccessible design and construction.

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[1] The 15 safe harbor standards can be found at https://www.hud.gov/program_offices/fair_housing_equal_opp/faq_accessibility_first