Fair Housing Act Amendments

Celebrating 20th Anniversary in Obscurity

By William S. Thomas

Understanding legislation can save your clients from expensive, and often very public, litigation.

With enactment of the Fair Housing Act (FHA) in 1968, 42 U.S.C. §3601 *et seq.* (2008), the right to fair housing opportunities for all Americans became United States policy. That right expanded to include fair housing opportunities for persons with disabilities through the Fair Housing Act Amendments, passed in 1988. The amendments were a "clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. at 18 (1988). Those amendments enhanced the government's powers of enforcement, allowing the United States to join or initiate litigation in the federal district courts against parties who violate the act.

Enhancing the enforcement provisions was not enough to properly address the unique barriers faced by persons with disabilities, however; Congress added specific requirements to the amendments related to the design and construction of dwellings with disabled persons in mind. The amendments to the FHA, and Federal Fair Housing Accessibility Guidelines that followed, specifically listed prohibited activities and imposed requirements for anyone involved in the "design and construction" of "covered dwellings," defined under the FHA.

Even though the amendments to the FHA celebrate their 20th anniversary in March 2009, design and construction professionals are still coming to grips with the act and the regulations relating to handicap accessibility.

Basic Statutory Requirements

The key provisions relating to the design and construction professions are found in 42 U.S.C. §3604(f)(3)(C), which prohibits discrimination in new housing designed and constructed after March 1991, by requiring that (1) the public and commonly used portions of a dwelling are readily accessible to and usable by disabled persons, (2) units include accessible routes into and through the units, and (3) all internal features are provided with accessibility and adaptive design in mind.

Under the FHA, only a building defined as a "covered multi-family dwelling" must comply with the accessibility requirements. These dwellings are defined as "buildings consisting of four or more units if

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such buildings have one or more elevators, or ground floor units in other buildings consisting of four or more units." 42 U.S.C. §3604(f)(7). The focus of the FHA is on buildings or portions thereof in which one or more families reside. Other non-permanent residences, such as hotels, are covered by the "public accommodations" requirements of the Americans with Disabilities Act. Defense of a claim of discrimination under the FHA cannot be achieved by demonstrating that a local code official or other agency determined that the design and construction met local codes or ordinances. 42 U.S.C. §3604(f)(6)(B).

Design Manual Provides "Safe Harbor"

The U.S. Department of Housing and Urban Development (HUD) originally issued a "Fair Housing Act Design Manual," in 1996, which has been updated a number of times. It is available upon request from HUD. The manual, written primarily to assist designers and builders, is intended to provide clear guidance about ways to design and construct housing that complies with the FHA. It provides comprehensive information about a number of accessibility requirements to incorporate into the design and construction of multifamily housing covered by the FHA and contains details about everything from accessible building entrances and routes to wall reinforcement, locations of light switches and controls, to usable bathroom and kitchen designs. It also supplies HUD's interpretation of the FHA's requirements so that construction professionals will know what actions will provide them with a "safe harbor" should an investigation commence. Following the recommendations of the manual will ensure compliance with the act's accessibility provisions and prevent implication in an enforcement action.

The "Design Requirements of the Guidelines" in the manual offer detailed, illustrated explanations of the specific design and construction requirements of the FHA. The manual also gives greater detail on "covered dwellings"—condominiums, single-story townhomes, college dormitories and even vacation time-shares fall under the auspices of the act. Even several dwellings built within a single structure but separated by a firewall are treated as a single "covered dwelling." Great care should be used in selecting an appropriate structure for new construction, and the manual and act should be carefully reviewed beforehand to verify applicable FHA requirements.

The regulations promulgated under the act also provide further guidance about what exactly constitutes a "covered dwelling," providing specific examples. Specifically, 24 CFR §100.205, provides a number of examples which will give designers and builders insight into the types of buildings that are covered. That section also defines one of the only "exemptions" to the applicability of the act, the "impractical site" exemption.

Section 100.205(a) provides that covered multifamily dwellings shall be designed and constructed to have at least one building entrance on an accessible route "unless it is impractical to do so because of the terrain or unusual characteristics of the site." The burden of establishing impracticality because of terrain or unusual site characteristics is on the designer or constructor of the facility. The regulations provide a number of examples illustrating what does and does not constitute "site impracticality." In short, a feature of the property that makes it impossible to provide ground floor access because of terrain, proclivity to flood, or other such circumstance, would meet the exemption regulations for "site impracticality." What clearly does not constitute site impracticality is a project configuration that maximizes occupant density while sacrificing accessibility. Further, if the developer decides before grading that the site is impractical, and then grades the site to make accessibility practical, the regulations provide little defense. Clearly, a determination of site impracticality must be made before any construction or grading work begins, otherwise a court is unlikely to apply the exemption.

The guidelines also outline two tests for determining site conditions which make it impractical to provide a building entrance on an accessible route: the individual building and the site analysis tests. The purpose of these tests is to set forth enforceable criteria for determining when terrain makes accessibility impractical, while providing builders and developers with flexibility to select the most appropriate or least burdensome approach for project development. Utilization of either test requires evidence of the slope of the undisturbed site on which the project is to be built. The individual building test requires evidence of the slope on the undisturbed site on a straight line between the planned building entrance and pedestrian and vehicle arrival points. If the slopes of both the undisturbed site and the planned finish grade exceed 10 percent as measured between the planned entrance and all vehicle or pedestrian arrival points within 50 feet of the planned entrance, the test criteria is met, and the site is considered "impractical" for accessibility. 56 Fed. Reg. at 9503.

An entity must be a "wrongful participant" in the design and construction process to be held accountable under the FHA.

The site analysis test requires a calculation of the percentage of the total buildable area of the undisturbed site with a natural grade sloped less than 10 percent. The developer would then have to make accessible a number of ground-floor units equal to the percentage of the total buildable area, excluding floodplains, wetlands or other restricted uses, of the undisturbed site with an existing natural grade of less than 10 percent slope. The guidelines require the analysis to be based on a topographic survey with contours at two-foot intervals, with slope determinations made between each successive interval, certified by a professional licensed engineer, landscape architect, architect or surveyor.

Administrative and Procedural Framework

Many of the claims brought under the FHA originate with an investigation launched by a local advocacy organization whose mission is generally to ensure full housing opportunities for local residents. These advocacy groups will derive much of their

annual funding from government grants and loans to promote fair housing educational programs, seminars and to pay for "testers" sent into the field to investigate whether newly constructed dwellings comply with the letter of the law.

HUD investigates complaints of housing discrimination based on race, color, religion, national origin, sex, disability, or familial status. HUD initially investigates a complaint and tries to resolve the matter with all involved parties prior to litigation. If conciliation fails, HUD will determine whether "reasonable cause" exists to believe that a discriminatory housing practice has taken place. If HUD finds reasonable cause, it issues a charge of discrimination and schedules a hearing before an administrative law judge from its Office of Administrative Law Judges (ALJ). Either party may, at that point, elect to proceed in the United States district courts. In that case, the Department of Justice will pursue the case on behalf of the complainant. The decisions of the ALJ and the federal district courts are subject to review by the U.S. Court of Appeals.

The construction professional may not have the right or ability to insist that the owner engage in a certain course of conduct.

If the matter is pursued in the federal courts, the district court judge shall be empowered to issue injunctive relief with respect to any discriminatory housing practice, and he or she can order any party found in violation of the act to correct any nonconforming construction. 42 U.S.C. §3613(c)(1). In addition, the court can award "compensatory damages," damages for the out of pocket losses of an aggrieved person, damages for emotional distress and humiliation, punitive damages. The court can also impose a "civil penalty," akin to punitive damages, but in the statutorily maximum amount of $55,000 for a first violation. An intervening party, if he or she prevails, can also be awarded attorney's fees under the act. A prevailing defendant may be awarded attorney's fees and expenses under the Equal Access to Justice Act.

While an administrative complaint can be filed with HUD, a private complainant may pursue a concurrent remedy with a private cause of action under 42 U.S.C. §3613. Suit can also be brought directly by the U.S. Attorney General if the case involves a "pattern or practice" of violating the FHA, under §3614(a), or if the alleged denial of rights "raises an issue of general public importance." HUD may also refer matters to the Attorney General to pursue. The Attorney General's Office prosecutes fair housing matters through its special "Housing and Civil Enforcement Section." In cases brought by the Attorney General, any aggrieved party may also intervene as a claimant and receive any available relief.

A "pattern or practice" of violating the FHA has been defined as something more than an isolated, sporadic incident; it constitutes a repeated, routine, or activity of a generalized nature. A single incident of discrimination, standing alone, should not justify a finding of pattern or practice under the Fair Housing Act. *U.S. v. Northside Realty Associates, Inc.*, 474 F.2d 1164, 1169 (5th Cir. 1973).

Cases Are Few, but with Wide Application

A number of decisions have been reached in fair housing cases by the ALJ of HUD, but very few have addressed newly constructed covered dwellings. Most of the ALJ decisions have dealt with owner failures to make reasonable accommodations to an existing dwelling not covered under the new "design and construct" provisions. These decisions are all available online at HUD's website: http://www.hud.gov/offices/fheo/index.cfm.

While the FHA states that "discrimination" includes "a failure to design and construct" certain multifamily housing that is accessible to and adaptable for persons with disabilities, neither the FHA itself, nor the related guidelines, define or limit who may be held liable for violating the design and construction provisions of the FHA, and the act does not define the phrase "design and construct," leaving it to the courts to decide.

The most-cited case regarding this issue states, "When a group of entities enters into the design and construction of a covered dwelling, all participants in the process as a whole are bound to follow the [FHA]… In essence, any entity who contributes to a violation of the [FHA] would be liable." *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998). Courts have held that owners, builders, developers, contractors, architects, engineers, and all others involved in the design or construction process can be held liable for FHA violations. *See*, *e.g.*, *Memphis Ctr. For Indep. Living v. R. & M. Grant Co.*, 2004 U.S. Dist. LEXIS 30880 (W.D. Tenn. 2004) (sustaining claim on summary judgment against engineer); *Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Associates*, 133 F. Supp. 2d 203, 205 (E.D.N.Y. 2001) (sustaining claim against designer-builder of prefabricated units used in project); *Montana Fair Housing, Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1059–60 (D. Mont. 1999) (granting summary judgment against builder).

However, the *Baltimore Neighborhoods* court explained that it "does not suggest that all participants are jointly and severally liable for the wrongful actions of others regardless of their participation in the wrongdoing, but rather, those who are wrongful participants are subject to liability for violating the [Act]." *Id.* The *Baltimore Neighborhoods* court rejected the plaintiff's reading of the phrase, which proposed that "all entities involved in the design and/or construction of covered dwellings in violation of the [Act] should be liable as joint tortfeasors." *Id.* at 662. The court reasoned that the plaintiff's interpretation "would expand the field of possible defendants to anyone who was involved in either designing or constructing covered dwellings." *Id.* at 664.

There is some logical limitation to the scope of liability under the act in the cases. Relevant case law provides that an entity must be a "wrongful participant" in the design and construction process to be held accountable under the FHA. *Baltimore Neighborhoods*, 3 F. Supp. 2d at 665. The *Baltimore Neighborhoods* court noted that, if an architect draws plans with noncomplying entrances, but the builder corrects the entrance when it is constructed, the builder

is not liable. *Id.* The converse must therefore be true: if a designer prepares plans that comply with the act, but the builder does not follow the plans, the designer should not be liable. Similarly, there can be no liability without both nonconforming design and nonconforming construction: "a nonconforming design that was never constructed would produce no injury, while a nonconforming construction implies a nonconforming design." *Doering v. Pontarelli Builders, Inc.*, 2001 U.S. Dist. LEXIS 18856 at *10–11 (N.D. Ill. 2001).

Further, the range of liable parties has not been expanded to implicate everyone remotely connected to a property. The Supreme Court has made clear that a violation of the FHA constitutes a tort and thus is governed by tort principles. *See Meyer v. Holley*, 537 U.S. 280, 285–91 (2003). Under ordinary tort principles, liability vests when a person engages in tortious conduct and that conduct is a "substantial factor" in causing harm to another. It may not necessarily be true that nonconforming design leads to nonconforming construction, because the builder may depart from the design, or may not consult the designer. When defending a case, insisting that the government prove "as built" conditions is one way to force the issue and to possibly defeat a claim that the design was in fact used when it was not.

Court cases interpreting other accessibility laws have found only those parties actively or substantially involved in design or construction to be liable for a violation. One court interpreted a provision in the Americans with Disabilities Act to mean that only parties with a "significant degree of control over the final design and construction of a facility" could be held liable for a violation. *United States v. Days Inns of America, Inc.*, 151 F.3d 822, 826 (8th Cir. 1998). The court found that the defendant, although somewhat involved in the design and construction process, did not exert enough control over the final product to be held liable because the defendant was only "tangentially or remotely connected" with the design and construction. *Id.*

Practical Considerations

The application of the act, its amendments and regulations has broad reach, and enforcement can be particularly punitive. Practitioners should be mindful of a number of practical considerations when working with clients involved in the design or construction fields.

For those attorneys who review contract language between participants in the construction process on projects involving "covered dwellings," early education of clients is imperative. Oftentimes one party or another to a construction contract will want to include language relating to compliance with laws and regulations, which may read like this:

> [Design Professional/Contractor] shall comply with all applicable Federal, State, and Local Laws, rules, codes, ordinances, regulations and orders in effect as of the date of execution of this Agreement applicable to the [Work/plans/specifications/other design documents] provided for this Project and will not violate any other law, rule, code, ordinance, regulation or order applicable to the services which it renders pursuant to this Agreement.

In addition, many indemnity provisions will make one party obliged to defend and indemnify another if any claim arises out of violation of law in the design or construction. This language should be carefully reviewed and appropriately tailored to include provisions that require the owner to defend and indemnify the construction professional if the owner fails to follow the plans as they relate to accessibility issues. Point out that the construction professional may not have the right or ability to insist that the owner engage in a certain course of conduct. If the owner decides, for whatever reason, not to incorporate accessibility elements, the owner should agree to release and indemnify all other parties to the project for this choice. This may still not arrest a claim by the Department of Justice, which may assert as the basis of an enforcement action that the construction professional should have walked away from the project once he or she knew the housing would be nonconforming.

Participants in the planning, development, design, and construction of multifamily housing developments should be aware of the requirements of the FHA before selecting a site and site layout. Since one of the only defenses to such a claim, site impracticality, requires extensive testing and evaluation before any construction work is performed, a party involved in the process should properly document files to show that these tests were done and include the results. Also, if a party is merely involved in review of concepts, as opposed to actual "design" work, he or she should properly designate "concept drawings" as such, to avoid appearing to be a willing participant in a design process that later led to the construction of an inaccessible building. Further, even though a design professional might think he or she is legally untouchable because he or she only provided incidental site design services, zoning assistance, or other related tasks, the scope of the statute cares only whether a party was involved in the "design or construction." No matter how minor the party's design or construction role, he or she is potentially liable for any infractions.

Should a matter lead to litigation and eventually proceed to trial, great care should be used in the defense. Many times a traditional "joint defense" type arrangement amongst the defendants will be unavailable because one or more parties will have clearly violated the law. This tends to lead to an instant adversarial relationship, likely brought on by denials of claims for indemnity, as well as participant's hard feelings throughout the process. Early conciliation and resolution is recommended, otherwise, the case could turn into an expensive quagmire, given the likely number of depositions, experts and financial risk involved should the case go to trial. There will inevitably be dispositive motion practice, and the parties risk the court or ALJ imposing a remedial plan that is accelerated, unworkable and terribly costly.

By spreading the word on the Fair Housing Act, we do our clients the good service of saving them from potentially very public and expensive litigation resulting from a claimed violation. We also do our part in aid of the enforcement of a law with an ambitious purpose, yet anemic publicity. FD