A quick primer on the

Fair Housing Act and accessibility

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The Fair Housing Act requires all multifamily construction built since 1991 to meet a certain level of accessibility for people with disabilities, including features of accessibility included in all ground floor units (or all units if the building has an elevator). If that statement takes you by surprise, you're not alone. Even now, nearly fifteen years after the effective date of the Fair Housing Act's accessibility provisions, many developers, owners, and managers of newer multifamily housing are still confused about what exactly is required for compliance with the law. And that confusion is compounded by the same lack of knowledge and understanding on the part of many architects, engineers, and other design team members.

While HUD has taken numerous steps intended to spread the word about multifamily accessibility, the reality is that headline-grabbing lawsuits are often the most effective eye-openers. In 2005, a private group known as the Equal Rights Committee (ERC) filed a lawsuit in federal court in Maryland, charging that over 100 properties owned or managed by a large, national REIT all over the country were designed and constructed in violation of the Fair Housing Act's accessibility requirements. This lawsuit, filed against Archstone-Smith, was settled shortly after filing. It is significant primarily because it is the first example of a large scale legal action by a private group covering properties in a wide geographic area. Prior to the ERC's action, most of the legal actions in this field were brought by private groups to HUD's administrative process, or filed by the Department of Justice under its original jurisdiction for an alleged "pattern or practice" of discrimination, against properties in the same local area.

The ERC settlement resulted in a payment of $1.4 million to ERC for costs, damages for its "diversion of resources," and attorney's fees. The settlement also differed from many previous actions with regard to any retrofits to the properties at issue. In most of these cases, the alleged violations of the Fair Housing Act's accessibility requirements are identified prior to any settlement. In the ERC matter, rather than identifying all potential violations prior to settlement, the parties agreed to identify and modify noncomplying features over the course of a specified period of time. The costs of ultimate modifications to be made to the properties at issue, therefore, are still not calculated.

The ERC has since filed two other similar complaints against large multifamily developers with a presence in the metropolitan Washington, DC area, where ERC is located. Those cases are still pending in litigation processes. But the settlement of the Archstone complaint has clearly brought attention to the need for better awareness and education on the accessibility issue, and has many in the business of design and construction of multifamily housing taking a

new look at their procedures for compliance.

So what can someone about to develop multifamily housing, or about to purchase a multifamily property built since 1991, do to ensure compliance with the Fair Housing Act's accessibility provisions? First, know the basics. The Fair Housing Act has seven requirements of accessibility: 1. an accessible entrance on an accessible route; 2. accessible common use areas; 3. usable doors; and for all "covered units," meaning those on the ground floor or any units if the building has an elevator, 1. an accessible route into and through the unit; 2. light switches, thermostats, electrical outlets, and other environmental controls in accessible locations; 3. reinforcements in all bathrooms for the later installation of grab bars; and 4. kitchens and bathrooms with sufficient maneuvering space to be "usable" by people in wheelchairs.

Second, be sure the design team is very familiar with the Fair Housing Act requirements, as opposed to other accessibility laws. Keep in mind that the law at issue here is not the Americans with Disabilities Act; don't be lulled into complacency by a design team that constantly refers to the "ADA." While the ADA and the Fair Housing Act may have some elements in common, they have different requirements, different scope of coverage, and different enforcement mechanisms. Relying on ADA requirements and scoping in the case of multifamily residential construction will not result in Fair Housing Act compliance.

Third, insist that all parties involved with the design and construction of any new multifamily property have adequate errors and omissions insurance policies. Owners and developers of multifamily properties are the first line of assault in accessibility enforcement actions, and can be held liable even if they relied on a professional design team, but they rarely have insurance coverage for these claims. The owner and developer needs to be able to look to the insurance carriers for the architects and engineers involved, particularly to cover the often significant costs of retrofit.

Fourth, engage in peer review. Those constructing new multifamily developments covered by the Fair Housing Act's accessibility requirements can benefit tremendously by a plan review by a third party with knowledge of and experience working with the Fair Housing Act's provisions. Keep in mind that no governmental agency will "pre-approve" plans for Fair Housing Act compliance.

Similarly, while construction is ongoing, owners and developers should be sure to have the professional design team inspect the ongoing work. Without question, accessibility concerns are significantly less difficult (both financially and structurally) to address prior to or during construction than after the building is complete and the residents have moved in.

Finally, many multifamily properties are built to be sold, or may be sold years after they are first occupied. While no reported judicial decisions have affirmed the theory, both HUD and the Justice Department appear to agree that a subsequent owner who had no involvement in the property's original design and construction will likely not have direct liability for Fair Housing Act violations arising from that original construction. Even so, a subsequent owner will certainly be requested to participate in any enforcement action against the original design team, and to provide access to the property for often costly and complicated retrofits. Anyone contemplating purchase of a multifamily property built in 1991 or later should be sure to include an assessment of Fair Housing Act accessibility compliance as part of due diligence.

Barring any radical change in the Fair Housing Act itself, we can expect that education and awareness of the law's requirements will continue to arise from lawsuits filed by governmental enforcement agencies and private fair housing groups. The publicity achieved by the ERC over the 2005 Archstone settlement probably did more to increase the industry's familiarity with the Fair Housing Act's requirements than any educational seminar previously offered in the Washington DC area. Accessibility is a worthy goal with benefits for all; it is also a serious business when developing, designing and constructing new multifamily housing. **MP**

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