

## WHAT YOU DON'T KNOW WILL HURT YOU.

BY G. ALAN WALLACE

The Department of Justice (DOJ) may be after you. Recently, the DOJ has stepped up enforcement of the Fair Housing Act's (FHA) design and construction requirements. The FHA's design and construction requirements regulate discrimination in housing on the basis of disability. While the DOJ has long enforced the FHA's restrictions against race and age discrimination, it has only recently focused on enforcing the very technical requirements for "accessible" housing for persons with disabilities.

If you are a builder, developer, architect, manager, or owner of multifamily housing—including condominiums and townhomes—then the FHA may make you liable for violations you may not even know exist. The DOJ is now pushing hard to flush these violations out.

The FHA covers multifamily housing designed or constructed for first occupancy after March 13, 1991. Obviously, multifamily housing includes apartment complexes. Not so obviously, it also includes condominiums and townhomes if they have four or more ground-level dwelling units or units serviced by an elevator.

Most people are already familiar with the Americans with Disabilities Act (ADA) and its requirements, but only now are they becoming aware of the FHA and its requirements—oftentimes too late. The ADA applies to places of "public accommodation." The FHA, while it covers public and common use areas in multifamily housing, primarily focuses on individual dwellings.

The ADA's technical requirements appear in ADAAG—the Americans with Disabilities Act Accessibility Guidelines. ADAAG is written like a building code and it

has the force of law. Congress gave the DOJ rulemaking power to promulgate technical enforcement requirements.

The FHA is very different from the ADA. Unlike the ADA, Congress did not grant rulemaking power for the FHA. Instead, it granted Housing and Urban Development (HUD) the authority to provide "technical guidance" on what constitutes "accessibility" and to grant "safe harbor" status for various building codes that often provide very different technical criteria for measuring "accessibility." Moreover, Congress made both the DOJ and HUD responsible for FHA enforcement—sometimes with varying results.

The reason you might be in peril under the FHA and not even know it is that the various FHA "safe harbors" either contradict each other or are not written in the precise "codespeak" of ADAAG. Two of HUD's safe harbors come from HUD itself—the FHA Guidelines and the FHA Design Manual—and neither provide clear guidance for compliance.

Now, here's the Catch 22. Although none of the FHA safe harbors have the force of law and you need not comply with any one to have "accessible" housing, according to the DOJ, if you do not comply with one of the safe harbors, you cannot prove your housing is accessible. Moreover, even if you comply with one safe harbor, the DOJ may still come after you for not complying with another. For instance, thermostats, switches, and environmental controls are defined as "accessible" in one safe harbor if they are 54 inches high. In another they are defined as "accessible" if they are 48 inches high. So, even if you have thermostats at 54 inches under one safe harbor, the DOJ may still come after you for not having them at 48 inches under another.

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This is just the tip of the iceberg. Some safe harbors define an accessible slope at a landing as 2%, while others define it as 1%. So, which is it? And, what's to say that either percentage actually relates to accessibility? Why is a 1% slope accessible in once case, but 2% in another? And, for that matter, why is 2% accessible at all, while 2.1% is, by definition, inaccessible? That's only a difference in elevation of 1/8 of an inch over a foot, after all.

You may think you're safe, but the odds are good you are not. Many designers and architects do not understand all the technical requirements under the FHA's many safe harbors. Even if the designers and architects design it correctly, its difficult to build exactly to specification the real world. In construction, usually thats fine. But, under the FHA, if your contractors lay your concrete off by just an eighth of an inch, you could wind up in court.

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And do not think you are safe just because you have a local permit or even a state certification. The federal government enforces the FHA at the federal level and does not care what state or local government has to say. So, the bottom line is that even if you have been careful, you may find yourself in violation of the FHA's design and construction requirements.

Understand, though, that the FHA does not just have design and construction requirements. It also requires that multifamily housing providers furnish occupants with reasonable accommodations and reasonable modifications. A reasonable accommodation is a change in policies or procedures that will increase accessibility for persons with disabilities. An example of a reasonable accommodation would be to arrange for trash removal or mail pick-up for a mobility-impaired tenant.

A reasonable modification, on the other hand, is a change in the physical structure of multifamily housing that will increase accessibility. An example of a reasonable modification would be installing a wheelchair ramp. While

multifamily housing providers must grant modifications if they are reasonable, they can require occupants to pay for the modifications and to restore the dwelling to its original state after they leave.

For both accommodations and modifications, the provider needs only grant them if they are reasonable, although s/he denies requests as unreasonable at their own peril.

While "reasonable" accommodations and modifications under the FHA are tougher to define than the Act's technical design and construction criteria, they are easier to enforce. While its tough to understand the FHA's technical design and construction criteria and the DOJ looks to enforcing the FHA's safe harbors, its easy to understand what the DOJ looks for in enforcing the non-technical requirements in enforcing the FHA's accommodation and modification requirements.

The DOJ and HUD look for these violations by using "testers" to pose as potential residents. These testers, often paid by the federal government, pose as tenants to get inside units, and to trip up leasing and sales staff who might incorrectly answer accommodation and modification questions. The testers are trained to identify key design and construction violations and discriminatory policies and procedures.

So, why the sudden focus on accessibility instead of race and age? Simply put, race and age are low-hanging fruit. They are easy to enforce because race and age are apparent at a glance, while disability discrimination relies on obscure technical criteria. Now that the DOJ has cracked down on race and age discrimination in housing, it has turned to cracking down on the tougher-to-understand, and therefore harder-to-enforce, disability discrimination.

In fact, according to HUD's 2006 annual fair housing report to Congress, disability discrimination exceeded race discrimination for the first time in 2005. HUD reported an 8% rise in these complaints, and the numbers will only rise as fair housing centers and private plaintiffs learn to follow the federal government's lead.

This is a lot to take in. The confusion concerning the FHA leaves architects, developers, management firms, investors, owners (past as well as present) subject to potentially massive liability. While this is a lot to take in,

you would be well served to do so, and to seek guidance on the FHA's requirements for design and construction, reasonable accommodation, and reasonable modification. In this case, what you don't know will hurt you.



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### ATTORNEY ACTIVITIES OF NOTE

■ The Energy Bar Association's State Commission Practice and Regulation Committee will host a telephone conference meeting on September 22, 2006 at 12:00 noon. The topic of the call will be "Transmission Projects From a State Perspective and National Corridors." The Moderator for the telephone conference will be attorney *Robert B. Nelson*.

■ Gaming Analyst *Robert R. Russell*, will serve as a judge for the 2006 Gaming & Technology Awards held in connection with the casino gaming industry's largest trade show and conference, Global Gaming Expo, scheduled for November 13-18, 2006 in Las Vegas. The Global Gaming Expo attracted 20,000 attendees and 800 exhibitors in 2005. Interested companies submit their innovative gaming products to the Global Gaming Business Magazine and the five industry leaders serving as judges, review them at the annual Global Gaming Expo in November. Awards are presented to the top three products.

■ On August 8, 2006, *Iris K. Linder* had the opportunity to watch firm client Aurora Oil & Gas ring the bell at the American Stock Exchange. On May 24, 2006, Amex listed the common stock of Aurora Oil & Gas Corporation under the ticker symbol AOG. The company is involved in the exploration and development of unconventional gas reservoirs such as black shales, coal seams and tight sands with assets and acreage in the Michigan and Illinois basins. The picture above features AOG's President and CEO, William Deneau with Ms. Linder.



■ Attorneys *Nicki L. Proulx*, *Mike S. Ashton* and *Graham K. Crabtree* were successful in convincing the Michigan Court of Appeals to reverse a judgment that had been entered against a firm client on a breach of contract matter. The plaintiff had sued the client claiming that it breached the terms of a purchase agreement, and therefore had asked the trial court to rescind the subsequent land contract. At trial, the lower court found in favor of the plaintiff and ordered that the land contract be rescinded, which would have required the client to refund the approximately \$20,000 that the plaintiff had already paid under the contract. However, the Court of Appeals agreed with the firm's attorneys' argument that the plaintiff waited too long to file suit, so their claim was barred by the statute of limitations. Therefore, the Court of Appeals ordered that the trial court reverse its judgment and instead enter a judgment in favor of the firm's client.

■ Firm client Biophotonic Solutions, Inc., and its CEO and Project Director Dr. Marcos Dantus were successful in their bid with MSU to receive one of the first-round grants for applied research from Michigan's innovative 21st Century Jobs Fund. On September 6, 2006, Governor Jennifer Granholm announced the grant along with 60 other awardees selected, following a demanding competition among over 800 applicants, conducted by the Michigan Strategic Investment and Commercialization Board to allocate more than \$100 million in funding. Attorney *Jonathan Raven* assisted Biophotonic Solutions in preparing and delivering its presentation before the scientific evaluation panel, comprised of experts from around the country.

"We were privileged to assist BSI in its effort to secure funding by demonstrating the commercial potential of its breakthrough technology, which will be applied in a collaborative effort to create technology jobs through diversification of Michigan's economy" said Mr. Raven.

The 21st Century Jobs Fund is a \$2 billion, ten-year initiative proposed by Governor Granholm, approved by the Michigan Legislature, and administered by the Michigan Economic Development Corporation (MEDC) to accelerate the diversification of Michigan's economy. The commercialization component of the initiative devotes approximately \$800 million for competitive-edge technologies in the targeted sectors of life sciences, alternative energy, advanced automotive materials and manufacturing, and homeland security/defense.

**GOLDEN NUGGET**

Myth: If I don't have a will, the State of Michigan will take all of my assets.

Fact: Without a will, your property will be distributed to your next of kin pursuant to a priority list contained Michigan's probate code. The priority list often does not match a person's desire for distribution of his or her property. However, if you die without a will, the State of Michigan will NOT take your assets UNLESS you have no surviving family, or they cannot be located.

Interested in more information about Estate Planning and Probate issues? Sign up for Ryan Wilson's free monthly *Golden Bullets*. It is available in print and email format. For a subscription call Mr. Wilson at 517/377-0897 or email him at [rwilson@fraserlawfirm.com](mailto:rwilson@fraserlawfirm.com).

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