

## REQUIREMENTS OF THE FAIR HOUSING ACT IN MULTIFAMILY CONSTRUCTION

By R. Carson Fisk (as seen in *Texas Construction* December 2005)

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The Fair Housing Act prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities based on race, color, religion, sex, familial status and national origin. However, it is the provisions regarding discrimination based on a handicap that can directly affect those involved in the construction process. Generally, the FHA applies to any building or structure that is occupied as, designed as or intended for occupancy as a multifamily residence. The FHA also applies to vacant land sold or leased for such construction.

The FHA contains many accessibility and design requirements. They include: public use and common use portions that are readily accessible to and usable by handicapped persons; doors designed to be sufficiently wide to allow passage by handicapped persons in wheelchairs; an accessible route provided into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; reinforcements in the bathroom walls to allow later installation of grab bars; and usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Failure to comply with these requirements constitutes discrimination under the FHA and subjects the violating parties to civil penalties in an amount not exceeding \$55,000 for the first violation and in an amount not exceeding \$110,000 for any subsequent violation. Monetary damages may be awarded to aggrieved persons and the court may award injunctive relief on a temporary or permanent basis.

While recent increases in enforcement and education efforts concerning the FHA have resulted in a greater awareness of the act, those formerly and currently involved in the construction of multifamily buildings should understand that the FHA applies to any structures built in or after 1991. Enforcement efforts may be brought by the Department of Housing and Urban Development, private parties or the Department of Justice. When the Attorney General has reasonable cause to believe that a pattern or practice of discrimination is being engaged in or that any group has been discriminated against to a degree that raises an issue of general public importance, the Attorney General may commence a civil action.

HUD adopted the Fair Housing Accessibility Guidelines to provide builders and developers with technical guidance on how to comply with the specific accessibility requirements of the FHA. However, the DOJ has characterized compliance with these guidelines as mandatory. Design professionals and builders should be well versed as to guidelines and acceptable alternatives. For example, compliance with the American National Standard for buildings and facilities providing accessibility and usability for

physically handicapped people, commonly cited as "ANSI A117.1," satisfies the requirements of the FHA.

The costs of retrofitting a multifamily building to fully comply with the FHA are often prohibitive. When the DOJ brings an action against an owner or developer, the contractors, subcontractors and design professionals will almost certainly be brought into the lawsuit. A resolution of the claims will generally involve monetary payment and may include additional requirements. For example, the DOJ has entered into consent decrees requiring parties to agree that all future construction projects will fully comply with the FHA. The DOJ may even require the parties to provide a fund for aggrieved individuals and former tenants and may require notice that the fund is available.

Due to issues surrounding exposure to damages, often the main concern for defendants in an FHA action is minimizing damages. However, contesting the claims may be a viable option for certain parties and under certain facts. One practical consideration is the manner in which the violations are classified. Various industry and consumer groups as well as the DOJ publish information concerning enforcement actions. From a public relations perspective, taking a position that seeks to justify or waive "discriminatory" practices may be detrimental, or destructive, to a construction business.

Case law on such discriminatory practices is sparse because of the recent enforcement of the FHA accessibility and design requirements. This provides some latitude in formulating creative defenses and arguments on behalf of all parties involved.