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Legally Speaking: Accessible Design and Construction



By Amy Glassman / Issue: September 2023

There are many considerations that go into the design of housing. While accessible design is only one such consideration, it is important for developers and investors to ensure that their architects, engineers and builders follow applicable accessible guidelines for all housing and associated non-dwelling spaces. This ensures that persons with disabilities will have equal access to housing and prevents legal and financial issues that are costly to address.

What Are the Accessible Rules?

The main legal obligations for accessible design and construction differ based on the funding used to construct and operate a housing development. For accessible design, all applicable standards must be followed, even when multiple standards are applicable to the same building. In the event of multiple accessibility standards applicable to an element, the most stringent standard should be followed to ensure compliance with all applicable standards. Below are brief descriptions of the standards applicable to most multifamily housing, particularly affordable multifamily housing.

Local/State Accessibility Requirements

All buildings must be designed in accordance with applicable local and state fair housing requirements, including but not limited to building codes. Some laws will require that a certain percentage of units in a building be designed for persons with disabilities. State or local building codes also typically include accessible design requirements. Note that some state housing finance agencies or other entities may require developers to follow Section 504 requirements even if not otherwise applicable.

Fair Housing Act

The Fair Housing Act and its regulations generally require that all multifamily housing consisting of four or more units and constructed for initial occupancy after March 13, 1991 complies with one of 15 safe harbors that have been adopted by the U.S. Department of Housing and Urban Development. One key difference between the Fair Housing Act standards and other standards, like Section 504, is that the Fair Housing Act standards apply to all units and public and common areas in an elevator building – not just units set aside for persons with disabilities. In buildings with no elevators, the standards apply to all ground-floor units and public and common areas. The standards often focus on ensuring that all units and common areas can be visited by a person with a mobility disability.

Developers, architects, construction managers, builders and any other parties involved in design and construction of a building for initial occupancy can be sued or held liable for compliance issues. A new owner can also be named in suits and can further be held responsible for rehabilitation of accessible features that are noncompliant with the applicable Fair Housing Act standards. Among other remedies, a lawsuit generally seeks the retrofitting of the property so that units and public and common areas comply with the accessible design requirements. A plaintiff or the federal government will also often seek monetary damages and the government may further seek civil money penalties.

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Americans with Disabilities Act

The Americans with Disabilities Act (ADA) applies to all multifamily housing and places of public accommodation. Title II applies to developments by state and local governments. Title III applies to private entities, including nonprofits. The standards applicable to accessible design differ based on the date on which a property was newly constructed or altered, but generally, all housing and associated facilities constructed or altered on or after March 15, 2012 must follow the 2010 ADA Standards. Unlike the Fair Housing Act, which generally exempts buildings constructed prior to March 13, 1991 from compliance with its accessible design standards, the ADA is a continuing obligation. Accordingly, buildings designed well prior to the effective date of the ADA must comply with applicable ADA standards as they are modified.

Section 504 of the Rehabilitation Act

Section 504 is applicable when federal funds are used for a project. In multifamily development, the most common funds that trigger Section 504 requirements are HUD funds, such as Section 8 project-based voucher subsidies, public housing funds, HOME or Community Development Block Grants (CDBG). Some state housing finance agencies and other non-federal agencies also may require compliance with Section 504 even if HUD funds are not being used. Section 504 generally provides that five percent of a development's units be constructed for persons with a mobility disability and two percent of units be constructed for persons with a hearing or visual disability. Developing an accessible "unit" also includes ensuring that there is an accessible route from the outside of a building to and from the unit and that common areas are also accessible and on an accessible route.

Section 504 is a continuing obligation irrespective of when a property was constructed. As such, both new construction and alterations should comply with the applicable Section 504 design standards. HUD distinguishes between "substantial alterations," during which the full five percent mobility accessible and two percent hearing/visually accessible units should be developed, and other alterations, in which only the area being altered must comply with Section 504 design standards. HUD by regulation designated the Uniform Federal Accessibility Standards (UFAS) as the Section 504 design standard, but also subsequently published what HUD calls its "deeming notice," which allows a property to follow the 2010 ADA Standards with certain exceptions in which UFAS must be followed, as identified in the notice. In theory, following the 2010 ADA Standards may be more effective since that means the property will also comply with the ADA, however, developers should be attuned to the deeming notice's exceptions to ensure a development is fully compliant with Section 504. And remember that compliance with either Section 504 standard or the ADA is in addition to compliance with other applicable accessibility requirements.

Architectural Barriers Act

Like Section 504, the Architectural Barriers Act (ABA) applies to federally funded housing. HUD's applicable compliance standard for the ABA is UFAS.

Compliance Tips

Legal challenges and investigations related to accessible design are expensive, both in terms of time and money. I generally recommend that clients be acutely aware of the accessibility standards applicable to their developments and alterations from the start. While I must provide the disclaimer that this column should not be considered legal advice, generally, ways to facilitate compliance include:

- Make sure architects and engineers working on a project are familiar with the applicable accessibility standards. Sometimes architects will indicate familiarity with the ADA—often shorthand for accessibility in general—but what they really know is the state standards or ADA, and not the Section 504 standards.
- Make sure the architect's drawings include the numerical measurements and other indications regarding the applicable accessibility standards for each element of development, so builders have clear guidelines to follow.
- If there are concerns about whether drawings meet all applicable accessibility standards and will be clear to a builder, consider hiring an accessibility expert to review them. There are experts who specialize in these reviews and conduct accessibility inspections during construction and after construction completion.
- Ensure contracts with all parties involved in the design and construction of a development require compliance with the applicable accessibility standards.

- There are no construction tolerances when it comes to the Department of Justice or HUD inspecting a completed building. Make sure all parties involved in design and construction of a development understand this. While standards may provide measurement ranges or maximums or minimums, even a quarter of an inch in excess of those ranges, maximums or minimums is typically found to be non-compliant by DOJ or HUD.
- Consider having an accessibility expert conduct inspections of the accessibility compliance during construction. Make sure that the inspector is familiar with how DOJ or HUD measures to determine compliance. No construction tolerances should be allowed. It is much cheaper to fix issues during construction rather than after completion.
- Complaints and investigations regarding accessible design and construction may originate from DOJ, HUD, fair housing testers, applicants or tenants, among others.

Often, noncompliant exteriors will pique the interest of testers or others to investigate further. Accordingly, while building interiors should be compliant, as a best practice, make sure that exteriors—including parking spaces, lot striping, curb cuts and accessible routes to the building—remain compliant over time.

Retrofitting is exceedingly expensive. So, too, is litigation. Paying damages to plaintiffs or penalties to the government can also add up. Getting the design right the first time can save all parties involved many headaches down the road.



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