

# ACCESS ALERT

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## FHA Litigation Update

Last week the US Department of Justice (US DoJ) filed a lawsuit against the owners, developers, builders and engineers of two Savannah, Georgia, condominium complexes. The lawsuit alleges that they violated the Fair Housing Act (FHA) because it did not include required accessible features for persons with disabilities. The suit seeks a court order requiring the defendants to modify the complexes and pay monetary damages to compensate victims and a civil penalty to be paid to the government.

Fighting illegal housing discrimination is a top priority of the Justice Department. It has filed 111 suits alleging housing discrimination based on disability since 2001. In addition, many other developers have been sued in federal court in private actions.

KMA provides services nationally to help multi-family developers avoid costly schedule delays, change orders, and litigation.

Attached is a [link](#) ([http://www.multihousingnews.com/multihousing/content\\_display/features/e3i7e39d77f0e7863858cdea9224faa3013](http://www.multihousingnews.com/multihousing/content_display/features/e3i7e39d77f0e7863858cdea9224faa3013)) to an article authored by KMA Principal David Kessler that is in the September 24 issue of **Multi-Housing News** addressing several common design and construction mistakes.

*[Kessler McGuinness & Associates, LLC](#) , is a nationally known firm that specializes in accessibility compliance planning through access audits, access master plans, architectural plan review, accessible design review protocols, training and resource development. We also serve as expert witnesses for plaintiffs and defendants. Clients include airports, commercial property owners, educational institutions, government agencies, architects, and attorneys.*

*Please call, 617-641-2802, if you have any questions or would like to discuss one of your projects.*

## **Exclusive Web Feature:**

### **Ensuring Accessibility: Multifamily Housing Developers Learn from FHA Litigation**

**Sept 24, 2007**

By David Kessler, Kessler McGuinness and Associates, LLC

Three years ago the multifamily housing industry collided with the Fair Housing Act (FHA) with several lawsuits alleging that some of the country's largest developers had discriminated against people with disabilities in the design and development of thousands of residential units in hundreds of facilities across the country. One settlement requires over \$20,000,000 of barrier removal and \$400,000 in damages and legal fees.

The list of defendants reads like a who's who of multifamily housing—Archstone-Smith, AvalonBay Trust, Bozzuto & Associates. The lawsuits allege "continuous and systematic civil rights violations against persons with disabilities" in the design and construction of dwelling units in multifamily projects across the country. Typical barriers cited include excessive slopes of exterior walkways and curb ramps; common use areas such as pools, locker rooms, and community kitchens that lack accessible elements; and bathrooms and kitchens in dwelling units without adequate clear maneuvering space.

A *Wall Street Journal* article reported that the plaintiffs had filed the lawsuits because "the number-one crisis for people with disabilities is obtaining accessible housing." In its 2006 annual report, HUD reported that there were more discrimination complaints under the FHA than ever before and the greatest number were based on disability.

Scrutiny of FHA compliance in multifamily housing is likely to continue for two reasons. First, their frustration with finding accessible housing remains high; and second, at least one major developer has responded to the litigation by agreeing to make their developments accessible rather than fighting compliance in court.

#### **Fair Housing Act Requirements**

Failure to design and construct multifamily dwellings with certain accessible and adaptable features became an act of discrimination in 1988 when the federal Fair Housing Act was amended to include people with disabilities as a protected class. The design standards, however, defining compliance with the FHA's non-discrimination provisions are confusing. The FHA does not reference a single accessible design standard.

At first, the FHA recognized two "safe harbors" for satisfying its accessible construction requirements—either ANSI A117.1 or a state code into which the requirements of the FHA Amendments had been incorporated. Subsequently, HUD issued the *Fair Housing Accessibility Guidelines*, followed by the *FHA Design Manual*, to help interpret the guidelines. To date, the FHA Accessibility Guidelines along with seven other design standards are recognized by HUD as compliance "safe harbors" (see sidebar below for all eight safe harbors).

In an industry that has every-day experience complying with building codes, dealing with a civil rights law with multiple possible compliance standards has

presented some pitfalls, including:

**Two ground floors:** In buildings without elevators all ground floor units must be compliant. In 2/3 or 3/4 splits, there are typically two ground floors. All single story units on both ground floors must be accessible—even when there is no vehicular access to the “terrace” level. The one exception to this requirement is if any of the entrances meet the site “impracticability” test.

**Not everything is “adaptable.”** Adaptability does not apply to all of the FHA requirements. *The FHA Guidelines* require some features of covered units to be accessible (i.e. the corridor side of the unit entrance door) and allow others to be adaptable (i.e. removable cabinets under sinks). For example, bathrooms with in-swinging doors must have a minimum of 30-in. by 48-in. out of the swing of the door. This clear space allowing a person using a wheelchair or scooter to enter and close the door cannot be provided by reversing the swing at a later date when needed. It must be provided at the time of first occupancy.

**Finished surfaces at removable cabinets:** Cabinets are allowed under certain sinks and cooktops if the cabinet is “easily removable.” Often overlooked is the requirement that where cabinets are removable, the floor, wall and cabinet faces of the knee space be finished during initial construction so no other work is necessary when the base cabinet is removed. The small additional expense to continue flooring, baseboard, cabinet finish, and paint is considered an acceptable cost at the time of construction, as opposed to the difficulty of matching materials at a later date—often under different ownership—when the unit is adapted.

**Detectable warnings:** Because the leasing or sales offices of multifamily developments are “places of public accommodation” under the ADA, these facilities, including associated parking and walkways, must meet the *ADA Accessibility Guidelines* (ADAAG), as well as the *FHA Accessibility Guidelines*. Although the ADAAG requirement for detectable warnings was suspended, it has been renewed since July or 2006. Since that time, all curb ramps in accessible paths of travel to public accommodations (i.e. leasing and sales offices) are required to have detectable warning.

**Centered clear space:** The 30-in by 48-in. clear space required at appliances and fixtures such as ranges, sinks, refrigerators, and bathtubs must be centered. The centered clear space must be parallel to ranges. At all other fixtures and appliances it can be either a parallel or front approach.

There are several steps developers can take to help prevent common errors in FHA compliance:

**Safe Harbor:** Decide which “safe harbor” will be used for your project at the beginning of the design process. If the local building code is not a safe harbor then it is critical to analyze where they differ. One element that is increasingly becoming an area of conflict is the maximum balcony door threshold allowed by the FHA vs. the requirement for greater water and wind protection instituted in some local codes since Katrina.

**Plan for construction tolerances:** Where required maneuvering space is designed to absolute minimum dimensions there is no room for construction tolerances. For example, the application of tile as a wall finish could decrease the clear floor space below the minimum required.

**Show actual appliance installation.** KMA often reviews plans showing U-shaped kitchens with the required 60-in. turning diameter and the refrigerator is shown flush against the wall. If the installed position of the refrigerator is any distance off the wall it will protrude into the required clear turning space. Therefore, take into consideration the actual installation requirements for the specified refrigerator model.

**Perform FHA compliance plan review:** Plan reviews specific to FHA compliance, whether performed in-house or by a consultant, can catch the mistakes that often occur when designers are juggling multiple program demands. Reviews early in design development are most helpful in identifying the broader scoping issues while reviews of 90 percent DD or a CD set are best for catching non-compliant details.

**Spell out FHA compliance in construction contracts.** Even when designed correctly, projects may not be built to the discerning standards of accessible design. For example, walkways may have cross-slopes of 3 percent, when the maximum allowed under ADAAG and FHA is 2 percent. Some developers actually give their contractor a “SmartLevel” and ask them to certify compliance with slope and cross-slope requirements at all walkways and accessible parking spaces.

Making FHA compliance a prominent goal of the development team and a clear measurement of a project’s success can ensure that multi-family developers avoid the errors that lead to lawsuits and the subsequent expense of providing a remedy after the fact.

***David Kessler is a Principal of Kessler McGuinness and Associates, LLC, nationally recognized experts in accessibility planning and universal design.***