**ADA Legal Webinar Series is a collaborative between the Great Lakes ADA Center and the Southwest ADA Center**

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# Complex Issues in Fair Housing and Individuals with Disabilities

*Diego Demaya, J.D.*

*Southwest ADA Center*

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# General FHA Provisions

- Unlawful to refuse to make reasonable accommodations in rules, policies, practices, and services to allow residents with disabilities equal opportunity to use and enjoy a dwelling and amenities;
- Unlawful to refuse to permit residents with disabilities to make reasonable modifications to a dwelling or public and common use area at tenant expense;
- Retaliation strictly prohibited; e.g., coercion, threats of eviction, warnings to stop complaining, removal of accessible parking, etc. 42 U.S.C. § 3617 (2000); 24 C.F.R. § 100.400(b).

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# Type of Housing Covered

- Multifamily apartments, high rise housing, condos, rental and privately owned single family homes under HOAs, college student dorms;
- Covers Private Housing and Housing Managed by Public Entities (ADA Title II / Section 504).

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# The Americans with Disabilities Act Applies to Leasing Office Only

- Title III of the ADA applies to the leasing office because it is a Public Accommodation;
- Must have accessible parking and accessible entrance to offices;
- Must have accessible public bathrooms if offered;
- Must provide assistance to fill out application and read content of lease and help with signing if requested by applicant/tenant.

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# New Construction FHA Accessible Design Coverage

- All units in buildings containing four or more dwelling units if such buildings have one or more elevators;
- All ground floor dwelling units in other buildings containing four or more units;
- A single dwelling over a shopping center if a housing permit was granted to build-renovate into a dwelling after June 15, 1990.

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# A Building is Not Subject to FHA Design Requirements If:

- It was occupied on or **before March 13, 1991**, or
- The last building permit or renewal thereof was issued by a state, county, or local government on or before June 15, 1990, or
- There are less than 4 dwelling units in the building.

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# After March 1991 Newly Built Multifamily Communities Must Comply with Accessibility Standards

Builders must adhere to one of several alternate Multifamily Accessibility Design standards (Safe Harbors) to ensure:

- Accessible building entrance on an accessible route;
- Accessible and usable public and common use areas;
- Usable doors;
- Accessible route into and through the covered dwelling;

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## After March 1991 Newly Built Multifamily Communities Must Comply with Accessibility Standards (Cont'd)

Builders must adhere to one of several alternate Multifamily Accessibility Design standards (Safe Harbors) to ensure:

- Light switches, electrical outlets, thermostats and other environmental controls in accessible locations;
- Reinforced walls for grab bars;
- Usable kitchens and bathrooms

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## Fair Housing Act Design and Construction Requirements Final Rule – March 8, 2021

- HUD amended HUD's FHA design and construction regulations by incorporating by reference the 2009 edition of International Code Council (ICC) Accessible and Usable Building and Facilities (ICC A117.1–2009) standard, as a safe harbor.
- HUD determined that compliance with ICC A117.1–2009 satisfies the design and construction requirements of the FHA and its amendments;
- This rule also designates the 2009, 2012, 2015 and 2018 editions of the International Building Code (IBC) model codes as FHA safe harbors;
- EFFECTIVE DATE: March 8, 2021, See: 24 CFR Part 100 78957 - 63 FR-2020b12-08.pdf

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## FHA SOL – Filing A Complaint

- Only the original owner or builder is liable for new construction and accessible design deficiencies pursuant to one of the safe harbors;
- FHA provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A) .



## New Construction Continuing Violation vs. Continuing Ill Effect of Former Non-compliance

- "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." An] FHA non-compliant building which contains inaccessible features… is more akin to a continuing effect rather than a continuing violation under the FHA;
- Supreme Court made distinction between a continuing violation and continual effects holding that "current effects alone cannot breathe life into prior, unchanged discrimination… [As] we held… such effects in themselves have 'no present legal consequences.'";
- Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct [long before plaintiffs brought suit]. See, Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008)

## Subsequent Owners Are Not Liable for New Construction Design Deficiencies - 11th Circuit Decision

- Harding v. Orlando Apartments (2014): 11th circuit Court of Appeals - issue of whether the current owner of a community who had no role in the design and construction of that property could be liable under the FHA for design and construction deficiencies that occurred under a previous owner;
- Apartment complex was built and was initially owned by Orlando Apartments, LLC. The next year Orlando LLC sold the apartment complex to an unrelated company.
- Plaintiffs filed complaint against both Orlando LLC and subsequent owner, contending that the apartment complex violated design and construction requirements of the FHA. Plaintiff sought to hold the subsequent owner liable on the theory that it "continued to allow the [design-and-construction violations] to exist."

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## 11th Circuit Decision Holding

- Based on FHA plain language, court concluded that design-and-construction requirements of the FHA do not provide a basis for a claim against a subsequent owner that had no involvement in the design or construction of the facility.
- in pertinent part the FHA reads, "in connection with the design and construction" of a covered dwelling concluding that language limited the clause to the design and construction of the property to the original builder or owner "connected" to the new construction.

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## New Construction Liability Takeaways

- HUD issued a letter as well as formal guidance noting that, subject to a few exceptions, subsequent owners are not appropriate defendants for FHA claims based on the design and construction guidelines;
- Caution: this decision does not exempt owners from the FHA reasonable accommodation or modification provisions;
- All owners and/or management must still review and consider reasonable accommodation or modification request -- even if the request pertains to a new construction accessibility defect.

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## FHA Rights to Accessibility in existing Housing

- Reasonable Accommodation: at landlord expense; e.g., waving pet deposits for Service or Assistance Animal, designating and restriping accessible parking, assisting with completion of application form or signing lease, etc.
- Reasonable Structural Modification: at tenant expense; e.g., front door ramp or removal of step threshold in front doorway, bathroom grab bars, making kitchen accessible, lowering vanity in bathroom, etc.

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# Definition of Reasonable Structural Modification

- Reasonable Structural Modification: a structural change made to existing premises for a tenant with a disability to afford full enjoyment of premises;
- Includes modifications to interiors and exteriors of dwellings and to common use areas usually at tenant expense;
- It is unlawful to refuse a reasonable modification when necessary to afford tenants with disabilities full use and enjoyment of the dwelling and common use areas. 42 U.S.C. § 3604(f)(3)(A).

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# Examples of Permissible Structural Modifications

- Widening doorways or removing internal doors for wheelchair access;
- Grab bars in bathrooms and/or other rooms;
- Lowering kitchen cabinets or bathroom vanities;
- Access ramp for Entrance or Common Use Area;
- Courts typically require tenants to cover reasonable cost of structural changes.

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# Illustration – Beware of *Verbal* Assurances

- Tenant with elderly parent with mobility disability leases apartment on verbal assurance from apartment manager that front entrance will have a ramp installed by move-in time. Tenant signs lease. When move-in time comes, the ramp is not installed and tenant is told that ramp will be installed at tenant expense. Tenant decides to not move in because apartment is inaccessible to parent using a wheelchair.

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# Landlords & Leasing Agents Do Not Explain FHA Rights Despite Required HUD FHA Poster

- FHA statute and regulation says tenant is responsible for cost of structural modifications before lease signing and during tenancy;
- Structural modifications must be at reasonable and/or market cost and tenant may review bids if landlord uses a contractor;
- Modifications that improve use or habitability are "property improvements" and landlord cannot assess fees to retrofit unit to original state unless modifications interfere with non-disabled tenant habitability.

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# Takeaway on Needed Reasonable Structural Modifications

- **Prior to lease signing**: a verbal promise by manager to install door ramp is not actionable unless stated in writing;
- Tenant should negotiate needed modifications prior to lease signing;
- Negotiated modifications must be clearly stated in lease addendum prior to lease signing;
- If requested modification at landlord expense is not stipulated in addendum, then oral promise is unreliable, and tenant will likely be stuck with either an inaccessible unit or a modification cost after lease is signed.

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# Definition of Reasonable Accommodation

- Reasonable accommodation: a change, exception, or adjustment to a rule, policy, practice, or service, necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling and common use areas;
- Must be facilitated at Landlord Expense – Unless Accommodation causes Undue financial-administrative Burden affecting ENTIRE corporation. 42 U.S.c. § 3604(f)(3)(B); 24 C.F.R. § 100.204(a). 4.
- Covers applicants and tenants with disabilities, family members with disabilities, and guests with disabilities associated with tenants and applicants. 24 CFR §§ 100.202; 100.204; 24 C.F.R. §§ 8.11, 8.20, 8.21, 8.24, 8.33.

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## HUD $80,000 Multi-Claim Settlement with Pennsylvania Apartment Complex

- Two residents asserted that management failed to approve their reasonable accommodation requests for a reserved parking space, did not permit them to transfer to a first floor home, and that management retaliated against the residents for exercising their rights under the Fair Housing Act;
- Respondents also promised to develop an equal housing opportunity policy, a reasonable accommodation policy, and to have their representatives with direct leasing responsibilities at the property and/or authority to grant or deny reasonable accommodation requests attend fair housing training. See HUD May 2020 settlement here: https://www.hud.gov/sites/dfiles/FHEO/documents/20vHUB-Final%20Conciliation%20Agreement.pdf



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## Who Pays for Reasonable Accommodations

- Courts rule that housing providers must cover expense of Reasonable Accommodations -- so long as doing so does not pose undue financial and administrative burden on business operation;
- The financial resources of the provider, the cost of the accommodation, the benefits to the tenant, and the availability of other, less expensive alternative accommodations must be considered;
- See United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416 (9th Cir. 1994). Held: history of the FHAA clearly establishes that Congress anticipated that landlords would have to shoulder certain costs… [in making reasonable accommodations], so long as they are not unduly burdensome; e.g., the cost of modifications to common use areas—widening laundry room entrance, designating accessible parking spaces, providing access to a mailbox station, or making an apartment entrance accessible—are costs to be borne by the landlord or housing provider as property improvements.



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## Must Existing Facilities be Made Accessible?

- FHA does not require renovations to existing buildings;
- FHA design requirements only apply to new construction of covered multifamily dwellings built for first occupancy **after March 13, 1991**;
- First occupancy is defined as "a building that has never before been used for any purpose."

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## What About Renovations, Alterations, or Additions?

- If an alteration, renovation or addition results in a building permit to be issued by a state, county, or local government after June 15, 1990, then that alteration, renovation or addition will likely result in a covered new construction;
- Periodic maintenance is neither considered new construction nor requires a building permit.

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# Additions May Trigger FHA Coverage

- Fair Housing Design Manual states on page 11, "When an addition is built as an extension to an existing building, the addition of four or more units is regarded as a new building and must meet the design requirements of the Guidelines.
- If any new public and common use spaces are added, they are required to be accessible."
- Even if the criteria is "four or more units," adding just apartment will likely require a building permit thereby covered by FHA;
- If any public or common use space is added, accessibility is required.

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# 7th Circuit Appeals Court Holds Landlord May Be Liable for Deliberate Indifference to Tenant-on-Tenant Discrimination

- Issue: whether a landlord may be liable under the FHA for failing to address tenant-on-tenant discrimination;
- Held: the FHA creates liability where a landlord has actual notice of harassment based on protected status and chooses not to take reasonable steps within their power to stop the harassment.

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## Wetzel V. Glen St. Andrew Living Community, LLC.
The Facts - 1

- Marsha Wetzel moved into Glen Saint Andrew Living Community after Judy Kahn, her partner of 30 years, died. Her tenancy at Saint Andrew was governed by a lease that guaranteed three meals served in a central location, access to a community room, and use of laundry facilities. The agreement also conditioned her tenancy on refraining from “activity that management deems unreasonably interferes with the peaceful use and enjoyment of the community by other tenants” or “a direct threat to the health and safety of other individuals.”
- Wetzel alleges that she spoke openly to tenants and staff about her sexual orientation. She “was talking to the ladies and getting to know people, and they were talking about their children” when she volunteered that she raised a son with Judy Kahn. “They were shocked that I had a partner who was a woman. According to the complaint, Wetzel’s fellow tenants responded with verbal and physical abuse; e.g., one resident “told Wetzel that he reveled in the memory of the Orlando massacre[,]” and another told her that “homosexuals will burn in hell.” One resident “rammed his walker into Wetzel’s scooter forcefully enough to knock her off a ramp,” and another “bashed her wheelchair into a dining table flipping the table on top of Wetzel;” she was also struck from behind hard enough to throw her from her scooter, causing a “bump on her head and a black eye.”

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## Wetzel V. Glen St. Andrew, Living Community, LLC., The Facts - 2

- Wetzel reported the abuse to Saint Andrew’s staff, who “told Wetzel not to worry about the harassment, dismissed the conduct as accidental, denied Wetzel’s accounts, and branded her a liar.” Wetzel also alleged that Saint Andrew took steps to retaliate against her by “relegate[ing] [her] to a less desirable dining room location . . . bar[ing] her from the lobby except to get coffee and halt[ing] her cleaning services, thus depriving her of access to areas specifically protected in the Agreement.” Saint Andrew also purportedly accused her of smoking in her room and withheld the customary rent reminder in an apparent effort to manufacture a justification for her eviction.
- Ultimately, Wetzel filed a lawsuit against Glen Saint Andrew and several individual defendants, claiming that they violated the FHA by failing to “ensure a non-discriminatory living environment and retaliate[ing] against her for complaining about sex-based harassment.”

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## Reasoning of Holding

- Recognizing that the text of the FHA does not contain a test for landlord liability, the Seventh Circuit looked to Title VII governing employment discrimination, and Title IX governing discrimination in education.
- Under Title VII, an employer may be liable when its own negligence is the cause of prohibited harassment. Similarly, courts interpreting Title IX have held that school districts may be liable for student-on-student harassment when the district remains idle even though it has actual knowledge of the harassment. The Seventh Circuit, therefore, reasoned that, because Title VII and IX are functionally equivalent to the FHA, the FHA must likewise allow liability for deliberate indifference to harassment… the Supreme Court's interpretation of analogous anti-discrimination statutes satisfies us that her claim against St. Andrew is covered by the Act."

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## Unanswered Questions that Could Limit Reach of this Decision

- First: while court held that landlords are liable for deliberate indifference to tenant-on-tenant discrimination when they have actual notice, the court said nothing about constructive notice.
- However, HUD regulations hold landlords responsible for deliberate indifference when they "knew or should have known of the discrimination" See 24 C.F.R. § 100.7(a)(1)(iii) (emphasis added).
- Second: the Wetzel case involves an assisted living facility that provides various services to tenants and where staff has heightened level of responsibility over tenant welfare. This made it easier for the court to draw a comparison to Title IX, applicable to education institutions.
- It is unclear how a court would apply this analysis to other types of facilities – even though apartment communities do indeed provide amenities for tenant use.

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## Does the FHA Cover Apartment Elevators?

- FHA says it is unlawful to refuse to make reasonable accommodations in rules, policies, practices, and services to allow residents with disabilities equal opportunity to use and enjoy a dwelling, common use area, and all amenities;
- Elevator is a common use area, service, amenity, and/or part of required vertical access toward habitability of dwelling covered by lease;
- An elevator in disrepair for an unreasonable length of time amounts to a denial of equal use and enjoyment if tenant is physically unable to use stairs due to disability.

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## 2010 ADA Standards and State Law Required Maintenance of Elevators

- Advisory 407.1 General: The ADA and other Federal civil rights laws require that accessible features be maintained in working order so that they are accessible to and usable by those people they are intended to benefit.
- Building owners should note that the ASME Safety Code for Elevators and Escalators (typically adopted as State law) requires routine maintenance and inspections.
- Isolated or temporary interruptions in service due to maintenance or repairs may be unavoidable; however, failure to take prompt action to effect repairs could constitute a violation of Federal laws and these requirements.

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# FHA and Electric Vehicle Charging Stations (EVCS) 1

- If landlord agrees to install an EVC station for use of all tenants, FHA applies insofar as consideration of a requested individual reasonable accommodation is concerned;
- Tenant with disability is responsible for asking landlord to install a planned EVCS in an accessible car parking location;
- Absent a tenant disability-related accommodation request, landlord will have no FHA obligation insofar as accessible location of a EVCS;
- Landlord and installer of a EVCS would be liable for adherence to any applicable State law or model code adopted as enforceable law.

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# FHA and Electric Vehicle Charging Stations (EVCS) 2

- I am unaware of any tenant rights to use or have an EVCS as a common use amenity in a multifamily housing environment unless otherwise provided by a Federal, State, or local law;
- Unlikely that any law would obligate private landlords to install EVC stations;
- Single tenant use of electric power for EVC from his/her own rental dwelling may exceed power consumption specifications – so caveat emptor!

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# All About FHA Accessible Parking

- FHA New Construction: a minimum of two percent of the number of parking spaces serving covered dwelling units must be made accessible and they must be located on an accessible route; if different types of parking are offered, such as surface parking, garage, or covered spaces, a sufficient number of each type must be made accessible;
- FHA reasonable accommodation provision addresses accessible parking issues such as overcrowding by tenants with disabilities and unauthorized use;
- Regardless of New Construction Standards, DOJ-HUD require landlords to stripe and designate an additional parking space for the use of each individual tenant making a request.

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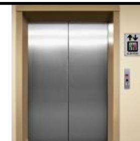
# Landlord Maintenance of Common Use Areas and Amenities



- Remember that all tenants are subject to a lease agreement ("contract") that promises what will be provided and maintained by the landlord for the rent paid;
- Tenants have a right to enforce any part of a lease otherwise breached by a landlord; e.g., elevator in disrepair for an unreasonable length of time, removal of an accessible car space, failure to address plumbing problems, or failure to maintain usable any common use element or amenity that is part of the overall equal use and enjoyment requirement;
- Sadly, most tenants fail to read their lease in detail, both, prior to signing and after signing.

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## Assistance Animal Reasonable Accommodation

- Tenants with disabilities must request modification of the "no pets" policy as an FHA reasonable accommodation for Service Animal (dogs only) Assistance Animal - dog, cat, bird, snake, etc)
- In situations where ADA and FHA apply, housing providers must meet the broader FHA standard in deciding whether to grant reasonable accommodation. FHEO Notice - FHEO-2013-01.



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## Where to File a Fair Housing Act Complaint

- HUD FHEO in the Fair Housing Assistance Program investigate approximately 10,000 housing discrimination complaints annually;
- People who believe they are victims of housing discrimination should contact HUD at
- 1 (800) 669-9777 (voice)
- (800) 927-9275 (TTY).
- Additional information is available at www.hud.gov/fairhousing.



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# Questions?

# Contact Your Regional ADA Center

CALL TOLL FREE – (800) 949-4232
To contact Diego-
WEB: www.SouthwestADA.org
Local Phone: (713) 520-0232
Diego Demaya – (713) 797-7114
E-Mail: diego.demaya@memorialhermann.org

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