ADA Design Responsibility

by Quenda Behler Story

The requirement to make buildings accessible to all is probably the biggest legislatively-imposed change on the construction industry during the last three decades. These laws have been a tremendous help to disabled people, but from a builder's standpoint, there are some legal problems that haven't been worked out yet.

Two federal congressional acts require buildings to be made accessible to everyone, including disabled people. The first is the Americans With Disabilities Act (ADA), which applies to commercial buildings and public accommodations, such as restaurants or malls. New buildings must comply with ADA standards for accessibility, and when existing buildings are remodeled, the ADA requires that those buildings be moved closer to compliance.

The second building accessibility law is the Fair Housing Act (FHA), which sets accessibility standards for multiple housing units, such as apartment buildings, senior citizen homes, or dormitories. The FHA works in much the same way as the ADA: New buildings must fully conform; buildings that are being remodeled must be made more handicapped-accessible.

Who's Liable?

To guarantee that buildings comply, both acts put a legal hammer into the hands of the people who benefit from building accessibility. The laws allow a lawsuit to be brought by anyone who is harmed because a building isn't handicapped-accessible and is supposed to be.

The problem is that the legal language appears to make it possible to sue practically everybody who ever lifted a brick on a job site: the property owner, the architect, the contractor, maybe even the subcontractors.

But accessibility isn't a construction problem — it's a design problem. Ordinarily, responsibility for design flaws rests on the people who are in charge of design. If someone wants to sue because of a design flaw, the architect is the designated defendant, so to speak.

The language of the accessibility laws, however, appears to change the standard rule. Under the standard rule, the contractor and subs become liable only if they violated their duty to warn. In other words, if the contractor or a sub, while building or looking at the plans, becomes aware of a problem with the plans, then he or she must warn the architect and the property owner. Otherwise, the contractor's and the subcontractor's sole duty is to build according to the blueprints.

For example, if the contractor realizes that the stairs in the blueprints will not meet local code requirements, the contractor has a legal duty to say so. If nobody will listen, that's their problem, not his.

Misery loves company. But the language in the accessibility acts appears to do something different with the liability for design mistakes. It appears to distribute liability freely among everyone involved in construction. As an East Coast court said, when holding a contractor liable for accessibility mistakes in the blueprints that were supplied to him: "...all participants in the process...are bound to follow the Fair Housing Act...."

This type of ruling scatters the liability for design mistakes that violate the accessibility laws onto everyone who was involved in the construction process, even though some of those people had no input into the building's design at all. This has the potential to place a heavy burden on small contractors and subcontractors who often have very little actual design control, and who, unlike architects, don't typically carry errors and omissions insurance on building design.

"Weasel" Language

Unfortunately, I have no foolproof answers. The only thing I can suggest is that, until the courts or Congress brings some sort of closure to this issue, you should carefully study the plans of any building that falls under either of these acts. If you suspect that there is an accessibility problem, warn everybody in the chain of command above you in writing. That includes the property owner and the architect (and the general contractor if you're a subcontractor).

Write your warning in "weasel" language. Don't say that you *know* there's a problem with the ADA or FHA. Don't admit anything. Instead, remind everyone that you're not the architect or the building designer, but that in your opinion there "may be" a problem here that they should review. Then say what you think the problem "may be."

If you know for a fact that there's a design problem with the accessibility laws, and you can't get the architect or property owner to listen to you, you ought to rethink your involvement in the project. It might turn out to be more trouble than it's worth. At the very least, you could be drawn into a nasty legal battle, which will consume time and money even if you win. In the worst case scenario, you could wind up paying for someone else's design errors.

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