Fair Housing Act Amendments at 20 + 1 – Time to Reexamine?

Last year marked the 20th anniversary of the Fair Housing Act Amendments (FHAA) that applied the anti-discrimination protections of the original Fair Housing Act to people with disabilities. That Act forbade discriminatory practices in the sale or rental of housing, financing of housing, brokerage services or in other residential real estate transactions. By including people with disabilities, the FHAA outlawed the refusal of landlords and housing developers to "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy the dwelling."[1] It also required privately financed multifamily dwellings of four or more units to meet certain design and construction specifications so that they are usable by individuals with disabilities. These design standards became incorporated into the Fair Housing Act Accessibility Guidelines (FHAAG) and apply to newly constructed apartments or condominiums built after March 31, 1991.

For people with disabilities seeking a place to live in market-rate apartments or condominiums, the FHAA has meant that they should be able to find one that, in the words of the law, affords them "full enjoyment of the premises."[2] However, within that statement, lie many of the weaknesses of this disability rights statute.

Eve L. Hill, a disability rights lawyer and Senior Vice President for the Burton Blatt Institute, notes that the FHAAG are limited in that they provide for adaptability of dwelling units, not full accessibility. Although the law requires landlords and building managers to allow residents with disabilities to make necessary changes to a unit at their own expense, alterations can be expensive. She also cites the failure of the law to apply to renovations done on older buildings, which are often the source of affordable housing. She has seen developers gut an entire building but leave the outside frame in place and thus exempt themselves from the fair housing accessibility requirements. Among the biggest problems with the FHAAG is their inconsistency with the more stringent accessibility rules that apply to federally financed housing. Section 504 of the Rehabilitation Act applies a higher level of accessibility to federally-funded properties but requires the accessibility standards in only 5% of any project's units. The FHAAG apply to all units in privately funded elevator buildings or ground floor units of garden apartments or condos. These differing standards frequently cause confusion for builders attempting to comply with the law, advocates trying to enforce the law, and communities seeking to approve developments according to the law.

Officials at the Department of Housing and Urban Development (HUD) nevertheless contend that the FHAA has been effective in advancing accessible housing for people with disabilities through enforcement actions taken against

[1] 42 U.S.C. § 3604 (f)(3)(B)
[2] 42 U.S.C. § 3604 (f)(3)(A)

violators of the Act. Bryan Greene, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, points out that the building industry initially resisted putting the FHAA accessibility guidelines into building codes. However, when HUD, the Department of Justice and private citizens brought fair housing lawsuits against developers, this led to voluntary efforts to marry building codes with the requirements of the FHAAG. As a result, the fair housing accessibility guidelines ultimately became incorporated into 10 building code safe harbors. If used correctly by builders, these safe harbors ensure proper construction of FHAA compliant units and provide protection from HUD enforcement actions.

Greene is also pleased with the progress of HUD's efforts to promote compliance with the FHAAG through technical assistance. Since 2003, the agency has spent $9 million educating builders, developers, advocates, and the general public about the Act and guidelines through the Fair Housing Accessibility First initiative – an internet-based resource that can be found at www.fairhousingfirst.org. The site contains links to information about the FHAA, the exact specifications of the FHAA guidelines, common violations and steps to take for filing complaints. Over the last six years, the initiative has fielded over 17,000 inquiries to its call center, over 183,000 hits on the website and has offered 131 trainings to over 9000 people around the country.

Unlike other people with disabilities, PVA members have some advantages in overcoming the deficiencies of the FHAA through their access to VA grants for home modifications. These funds can be helpful in making any necessary changes to units covered by the FHAA. However, particularly with the grants for non-service-connected veterans, that money may not be adequate to cover the costs of extensive changes to a unit. Apart from accessibility issues, PVA members regularly report problems in obtaining accessible parking spaces near their condo or apartment or in gaining permission to have a ramp installed on a property. This occurs because building agents and managers are unfamiliar with the other provisions of the FHAA calling for changes to rules and policies as reasonable accommodations.

However, serious problems continue to arise when buildings are constructed without the most basic accessibility elements required by the law. Indeed, several PVA chapters have reported that developers in their states fail to follow the FHAA guidelines due to ineffective code enforcement or lack of a building code altogether. These mistakes are difficult, if not impossible, to rectify after a building is completed and are usually addressed only after lengthy litigation. Typically, a developer found in violation of the law will be required to pay civil monetary penalties to aggrieved parties and make whatever corrections to the properties are possible. Under these circumstances, it is critical for advocates to monitor housing developments under construction in their communities to ensure that properties are built properly and that architects, builders and developers are aware of and following the FHAAG.

Just recently, PVA was selected as the means to disburse the remainder of a settlement fund arising from a 2001 Fair Housing court case in Michigan. The lawsuit was brought against a developer and architect for failure to design and build in accordance with the FHAAG several apartment complexes in seven states. Under the terms of the court order, the plaintiff developer conveyed the funds to PVA to be used in making physical improvements to enhance accessibility in the homes of veterans with disabilities residing in Indiana, Nebraska, Michigan, Ohio, Illinois, Virginia and Wisconsin. Distribution of the funds is being managed by PVA's Veterans' Benefits Department.

Taking enforcement action against builders who fail to abide by the FHAAG became more urgent as the result of a recent 9th Circuit Court ruling affecting the timing of fair housing complaints. In *Garcia v. Brockway*, that court held that design and construction claims under the FHAA must be brought within three years of a building's completion. Other appellate courts have held that complaints may be brought at any time because non-compliant buildings represent ongoing violations of the law until remedied. *Garcia* has been appealed to the Supreme Court. In the meantime, advocates in states in the 9th Circuit must be especially vigilant in identifying fair housing construction violations within three year's of a structure's completion.

There have been no major changes to the FHAA since its enactment in 1988 and no bills have been introduced in the 111th Congress affecting the Act. The accessibility guidelines have been updated periodically through HUD's development of safe harbors and by the building code industry's incorporation of the FHAAG into subsequent editions of the International Building Code. Although Congress has held oversight hearings on fair housing initiatives and enforcement, modernizing the accessibility guidelines and/or the Fair Housing Amendments Act does not appear to be on the radar screen of the authorizing committees. According to one Congressional source, this may be due in part to the fact that Congress is not hearing public demand for changes to the Act or the guidelines.

With the growing popularity of universal design and an increasing aging population, it may be time for the FHAA and its guidelines to be thoroughly reviewed for their effectiveness in advancing accessible housing and updated where necessary. At the very least, consideration should be given to changing the FHAA to require that accessibility elements be included in major alterations of multifamily properties. It may also make sense for Congress to resolve the dilemma posed by the *Garcia* decision so that legal action may be taken at any time a violation of the fair housing accessibility guidelines is discovered.

For more information about the Fair Housing Act Amendments and other disability rights laws visit the Disability Rights link on PVA's website www.pva.org.