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Summer 2024

ARCHITECTS & ENGINEERS NEWSLETTER

ISSUES CONFRONTING ENGINEERING FIRMS THAT ACT AS MUNICIPAL ENGINEERS

Overview

ACEC Ohio, for whom Weston Hurd serves as General Counsel, asked for input as to issues that confront engineering firms who served as municipal engineers. The following is our evaluation as to ethical concerns, but each firm when confronted with an ethical issue, needs to address same with its own counsel for advice.

The duties of a municipal engineer vary by size and nature of the municipalities but generally consist of attending meetings of public bodies, providing advice on engineering matters, reviewing plans and subdivision maps, design, and construction of infrastructure as well as maintenance of same. Many of the smaller communities do not have and cannot afford full-time municipal engineers or supporting staff for a full-time office. In such instances, smaller communities will retain the services of a consulting firm in private practice and appoint a principal of the firm as the municipal engineer. The municipality gets the advantage of a multidiscipline engineering firm and is able to control costs for engineering services.

Title 7 of the Ohio Revised Code (ORC) governs municipal corporations. ORC §705.78 and ORC §705.82 enable a mayor of a municipality to appoint a Director of Public Services who is responsible for "care, management, construction, and improvement" of utilities, public ways, grounds, buildings, highways, waterways, plans, maps, and other associated activities. Municipalities have the power through legislation to hire a City Engineer. ORC §735.32 provides that the municipal engineer's general duties are to supervise the improvement and repair of streets, lanes, avenues, bridges, sewers, culverts, lighting of public spaces, and perform other duties as the mayor or chief executive officer requires. ORC §735.33 provides the engineer shall have assistants as directed by legislative authority. Finally, ORC §733.80 states that a municipal engineer shall perform duties as the legislative authority requires by ordinance and receive compensation by fees or salary, or both, as the ordinance specifies.

Municipalities are governed by the Qualifications Based Selection (QBS) process set forth in ORC §153.65 through ORC §153.71 when selecting an engineering firm providing professional design services for public improvements. ORC §153.67 requires a public authority to announce all contracts for design services. ORC §153.67(B) provides that the announcement contain a "general description of the project" and a "statement of the specific professional design services…required." At this point in the process, there is lack of a definitive scope of work for services to be provided thus the qualifications, competence, and availability of the most qualified engineering firm are considered first, and fees are negotiated after the most qualified firm has been selected.

Although it is clear public authorities such as municipalities are required to follow the QBS process for selecting a municipal engineer, it is still a bit of a square peg in a round hole. ORC §153.67 and ORC §153.69 reference the qualifications for the "project" which is an undefined term. Given that during the selection process, "project" is not a definitive scope of work, the varying responsibilities of a municipal engineer are the "project."

Scenarios

1. City/County Engineer review of submittals from third-party design consultant.

The municipality ordinance sets forth a scope to provide basic engineering services and a contract is entered into with XYZ Engineering Inc. through the QBS system. The ordinance provides for the following engineering services:

- technical support on engineering related issues
- coordinate with state and federal agencies on engineering issues
- attend council meetings
- long-term planning
- budget preparation
- preparation of scopes for design consultants
- consultant selection
- review and update city ordinances
- review design consultant plans

The municipality advertises for design services for a new municipal project. ABC Engineering Firm is selected through the QBS process. The Municipal Engineer reviews the ABC plans for the project for compliance with municipal ordinances and expectations.

COMMENT:

Because the City/County Engineer is acting in limited capacity and is not reviewing submissions from his/her own firm there are no potential conflicts or ethics issues.

2. City/County Engineer review of engineering submittals from same engineering firm City Engineer is employed.

The municipality ordinance sets forth the same scope as above but XYZ Engineering Inc. (contracted to serve as City/County Engineer) submits through QBS proposal to serve as design consultants for a new municipal project.

COMMENT:

Chapter 102 of the ORC sets forth ethics for "Public Officers." ORC §102.01(C) defines a public official or employee as "any person who is elected or appointed to an office." ORC §102.4 precludes any person elected or appointed to an office of a county, township, municipal corporation or any other government entity shall receive compensation other than from the agency for which he serves.

The Ohio Ethics Commission issued Informal Opinion 1996 – INF – 0624 in which an engineering firm was contracted to serve as the Village Engineer for a monthly retainer but was allowed to provide additional services for special projects at a negotiated rate. The Commission in a long opinion determined that the term "public official" applied to the engineering firm since it was "appointed" to serve as the Village Engineer. The term "appointed" is a reference to the contract between the Village and the engineering firm.

The Ohio Ethics Commission ruled ORC §102.4 precluded XYZ Engineering firm from serving both as Village Engineer and outside design consultant. The concern was the need for the Village Engineer to act independently in its review of outside consultant submittals to avoid compromise. The Village would have to hire an independent engineering firm to review XYZ Engineering design submittals.

OAC 4733-35-05(C) precludes an engineer from receiving compensation from more than one party for services on the same project unless the circumstances are fully disclosed.

Assuming full disclosure there would not be an issue. The municipality would have full knowledge since it has a consulting agreement with XYZ to act as municipal engineer and the same firm is responding to the request for services. However, as stated above, an independent engineering firm would need to review XZY Engineering design submittals.

3. City/County Engineer who provides engineering services for developers whose submissions are to be reviewed by City/County Engineer.

The municipality ordinance sets forth the same scope as above but XYZ Engineering (contracted to serve as City/County Engineer) provides engineering services to a developer. The developer submits to the municipality for approval plans that include services performed by XYZ Engineering.

COMMENT:

The Ohio Ethics Commission ruled in its Opinion Number 82-001 that ORC §102.03 and §102.04 precluded the City Engineer from reviewing submittals that were submitted by developer containing engineering services from XYZ.

The Commission determined that by reviewing engineering work of other members of the firm, the City Engineer would be using his position to secure something of value (client fees) that would ordinarily not accrue to a city engineer. Because of the potential to benefit financially, the independent judgement necessary for the City Engineer could be compromised.

4. City/County is interested in hiring an engineering firm to provide not only engineering services set forth in Scenario 1, but also design services for municipal projects. Through QBS system, XYZ Engineering Firm is selected to perform all of said services including design service for yet to be developed projects.

COMMENT:

The QBS system would have to be followed meaning the municipality has to announce the availability of the contract for design and construction administration and invite interested engineering firms to submit a statement of qualifications and be selected through the QBS system. This also means that XYZ should it want to submit a proposal would be subject to Ohio Ethics Rulings and the Ohio Administrative Code referred to above.

There are exceptions to the QBS system that could allow for the municipal engineer to provide design services. Under ORC §153.71 (B)(1) if the professional design fee for the project is estimated to be $25,000 or less, the municipality may select a design professional or firm determined to be the most qualified to provide the design services. In other words, the municipality could determine the firm functioning as the municipal engineer could be selected assuming most qualified.

Further, ORC §153.71(B)(2) provides if the professional design fee for a project is estimated to be more than $25,000 but less than $50,000 and the municipality maintains a file with current qualifications (submitted within the previous year), the municipality may select the design professional determined to be most qualified from the qualifications on file. The municipal engineer, assuming has a current file on record, could be selected to provide those design services assuming most qualified.

For projects in which the estimated fees for professional design services are in excess of $50,000, it would be required to go through the QBS system to avoid any challenge. Assuming the municipal engineer wants to provide those design services, the situation would be the same as Scenario 2 above.

DESIGN AND ACCESSIBILITY REQUIREMENTS UNDER THE FAIR HOUSING ACT

Violations of the design and accessibility standards of the Americans with Disabilities Act ("ADA") and the Fair Housing Act ("FHA") present some of the largest liability risks, in terms of claim value, to design professionals across the country. Generally, the federal statutes require certain residential and commercial structures be readily accessible to, and usable by, individuals with disabilities. And, while accessibility and usability are components of consideration over the course of design and the standard of care, the statutes pose significant risk to designers because they create technical requirements that are difficult to ascertain. Exacerbating that risk, the FHA financially incentivizes enforcement by private entities, in addition to federal authorities like the Department of Justice, by providing recovery of attorneys' fees and costs to the prevailing party. This article focuses on the design and accessibility requirements of the FHA and more recent legal developments so design professionals can better understand their risk under the statute and where to turn for guidance.

What Does the FHA Require?

The FHA is a federal civil rights statute designed to protect individuals from discrimination in the housing market. The statute makes it illegal to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap. 42 U.S.C. §3604(f)(1). Discrimination includes the failure to design and construct dwellings with the following features:

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

I. an accessible route into and through the dwelling;

II. light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

III. reinforcements in bathroom walls to allow later installation of grab bars; and

IV. usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. §3604(f)(3). All seven of the accessibility requirements must be achieved; it is no defense for a developer or designer to demonstrate that a project complies with some or most of the statutory requirements. *U.S. v. Edward Rose & Sons*, 384 F.3d 258 (6th Cir. 2004). The accessibility requirements apply to multi-family residential buildings containing four or more units and built for first occupancy after March 13, 1991. All ground floor units and common use areas must comply with the requirements in buildings which are not serviced by an elevator, whereas all common use areas and units must comply in buildings serviced by an elevator. 42 U.S.C. §3604(f)(7).

The Safe Harbors

In order to assist design professionals navigating the FHA accessibility requirements, the United States Department of Housing and Urban Development ("HUD") has developed "safe harbors" which establish design and construction standards deemed to comply with the seven technical accessibility requirements of the FHA.

1. HUD Fair Housing Accessibility Guidelines published on March 6, 1991 and the Supplemental Notice to Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines, published on June 28, 1994.
2. American National Standards Institute ("ANSI") ANSI A117.1 (1986), used with the Fair Housing Act, HUD regulations, and the Guidelines.
3. Council of American Building Officials ("CABO") CABO/ANSI A117.1 (1992), used with the Fair Housing Act, HUD regulations, and the Guidelines.
4. International Code Council ("ICC") ICC/ANSI A117.1 (1998), used with the Fair Housing Act, HUD regulations, and the Guidelines.
5. ICC/ANSI A117.1 (2003) used with Fair Housing Act, HUD regulations, and the Guidelines.
6. The Fair Housing Act Design Manual (1998).
7. Code Requirements for Housing Accessibility 2000 (ICC/CRHA).
8. International Building Code ("IBC") 2000 as amended by 2001 Supplement to the International Codes.
9. IBC 2003, with one condition; effective February 28, 2005 HUD determined that the IBC 2003 is a safe harbor, conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "ICC interprets Section 1104.1, and specifically, the exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7."
10. IBC 2006.
11. ICC A117.1 (2009) used with the Fair Housing Act, HUD regulations, and the Guidelines
12. IBC 2009.
13. IBC 2012.
14. IBC 2015.
15. IBC 2018.

Compliance with a safe harbor is not mandatory and they do not set minimum accessibility requirements. See *Barker v. Niles Bolton Associates, Inc.*, 316 Fed. Appx. 933 (11th Cir. 2009) and *U.S. v. Edward Rose & Sons*, 246 F. Supp. 2d 744 (E.D. Mich., 2003). As such, a covered dwelling that deviates from a safe harbor is not necessarily deemed inaccessible. *U.S. v. Noble Homes, Inc.*, 2016 U.S. Dist. LEXIS 37857 (N.D. Ohio 2016). Designers and developers may choose to design covered dwellings to a different standard than those pronounced in the safe harbors, but must demonstrate that it meets an objective "comparable standard" of accessibility. *Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co.*, 2004 U.S. Dist. LEXIS 30880 (W.D. Tenn. 2004). But reliance upon anything less than an objective standard of accessibility threatens liability exposure.

Who is Liable?

The accessibility language is interpreted broadly, and all participants in the process of design and construction of a covered dwelling are subject to the requirements of the FHA. See *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1149 (D. Idaho 2003). Under the statute, a plaintiff must demonstrate by a preponderance of the evidence that a party to the design and construction of a covered dwelling was a "wrongful participant" in the process which resulted in the creation of inaccessible features. *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661 (D. Md. 1998). So, what is a wrongful participant? The Court in *Baltimore Neighborhoods* gave the following example:

> [F]or example, if an architect draws up plans with noncomplying entrance ways, and a builder follows the plan resulting in a covered dwelling with an inaccessible entranceway, both entities would be liable as both were wrongful participants. On the other hand, if the builder corrects the entranceway, building it in compliance with FHAA regulations, then the builder is not liable because the builder was not a wrongful participant.

Id. at fn 2. By extension, then, an architect who designs an accessible covered dwelling is not a wrongful participant, even where the as-built conditions of the property result in inaccessible features if the architect is not involved in the construction process, and should face no liability.

A prima facie case for an accessibility violation is established by showing a violation of a safe harbor. *United States v. Tanski*, 2007 U.S. Dist. LEXIS 23606 (N.D.N.Y. 2007). A defendant may then rebut the presumption harbor by demonstrating compliance with a comparable objective measure of accessibility. *Nelson v. U.S. Dept. of Housing and Urban Dev.*, 320 Fed. Appx. 635 (9th Cir. 2009). While courts have not been clear on what constitutes a comparable objective measure of accessibility, some Circuit Courts have refused to accept a defendant's attempt to demonstrate accessibility by showing, "[w]hether one disabled person may be able to maneuver through the complex and units does not indicate compliance with the Act." *United States v. Quality Built Constr., Inc.*, 2003 U.S. Dist. LEXIS 24969 (E.D. N.C. 2003). A single instance of inaccessible design and construction by a wrongful participant can establish liability.

One important consideration, under any liability analysis, is that defendants to design and construction accessibility litigation are prohibited from seeking indemnity or contribution from other defendants or third-parties under the obstacle preemption doctrine. See *Miami Valley Fair Hous. Ctr., Inc. v. Steiner & Assocs.*, 2010 U.S. Dist. LEXIS 63915 (S.D. Ohio 2010); "[T]he federal courts that have considered the question…are in universal agreement that there is no express or implied right to indemnity under the FHA…" *United States v. Murphy Development, LLC*, 2009 U.S. Dist. LEXIS 100149 (M.D. Tenn. 2009). Courts have determined that the obligation to design and construct accessible and usable covered multi-family dwellings is a non-delegable duty, and therefore participants in the design and construction process may not seek recovery from each other for damages that are established. In other words, if a developer is named as a defendant for inaccessible design and construction, and attempts to bring in the design team by way of third-party complaint or a state-based claim of indemnification, the design team should be successful in a motion to dismiss early in the pleading phase of the process.

Conclusion

Unfortunately, there are several conflicts across the Circuit Courts of Appeal regarding several of the standards and defenses which may apply in accessible design and construction claims. Our experience in these cases has dealt with complaints filed directly by non-profit fair housing advocacy groups against developers and architects, and the trend is likely to continue as new construction of covered multi-family dwellings expand across the country. Litigation under the FHA can be drawn out and expensive due to the lengthy discovery process, the use of experts, and damages which may include injunctive relief orders to retrofit properties, attorneys' fees, compensatory damages, and punitive damages. Understanding and complying with its requirements should be a primary consideration of designers from the initial phases of a project. This article covers only a glimpse of the requirements under the statute, and it is critical that designers consult with their carriers and counsel if put on notice of claims for inaccessible design and construction.

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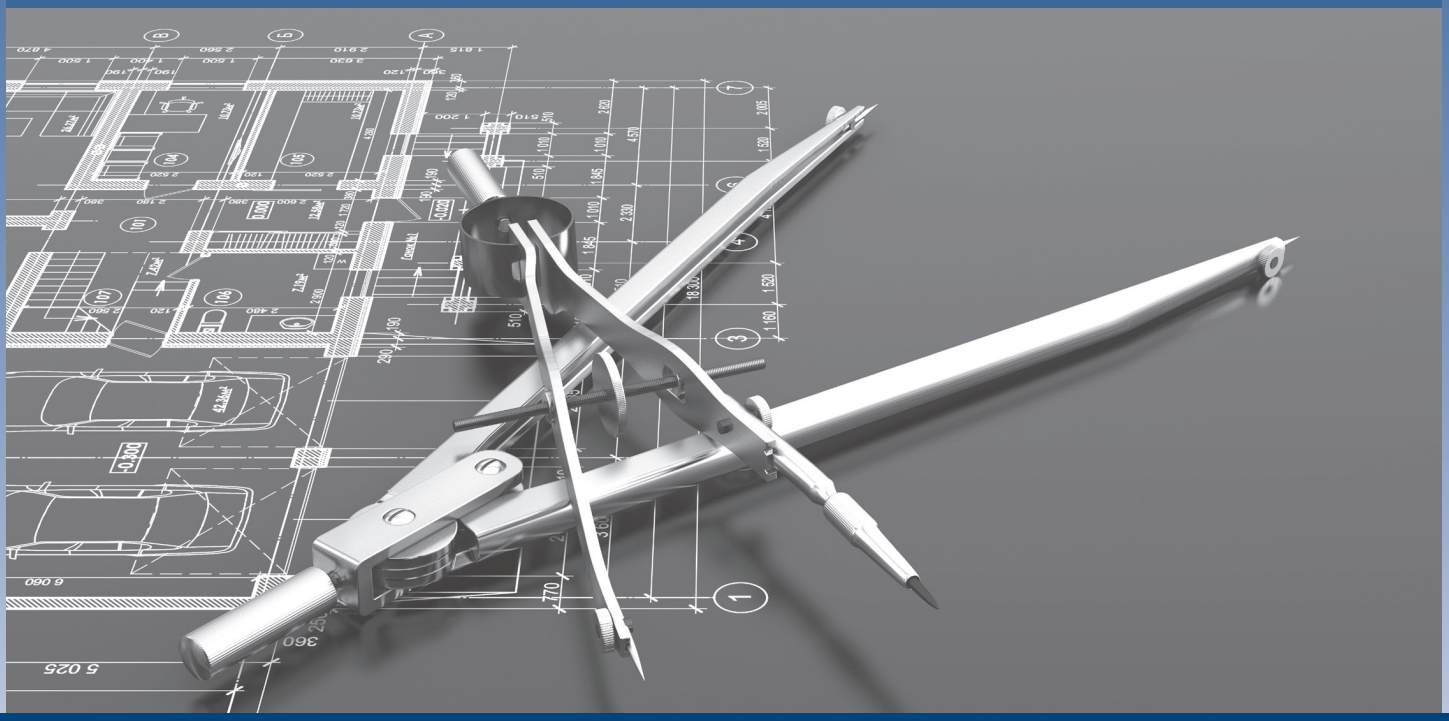

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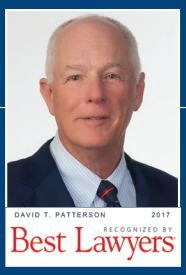

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