

Issue: Is the re-construction of a twenty-four (24) unit two story, privately owned multifamily residential building which was destroyed by a fire in May of 2017 and is to be permitted and constructed by a private owner without government funding and containing no public/common areas, required to include vertical accessibility pursuant to Florida Statute 553.503, Federal Housing Act (“FHA”) or the Americans with Disabilities Act (“ADA”)? If so, is a waiver permissible?

Brief Answer: The proposed re-construction of the multifamily residential building is only two stories and does not include an elevator. Under the ADA, the proposed subject development is exempt as it is less than three stories. Under the Fair Housing Act, the proposed subject development is not considered a “*covered* multifamily dwelling” as it does not include an elevator and therefore, not regulated by the FHA. Under the Florida Fair Housing Act (Florida Statutes), the proposed subject development is also not considered a “*covered* multifamily dwelling” and therefore, not required to have an elevator or lift. Finally, under the Florida Accessibility Code for Building Construction, the proposed subject development, being less than three (3) stories, is exempt from the requirement of a vertical lift.

Summary of Facts: Bengal Properties, Inc., is the owner of a multifamily residential complex located at 11110 N. 56th, Temple Terrace, Florida. The complex was originally built in 1971 and included 144 apartment units. In May of 2017 one building, which was two stories containing twenty-four (24) apartment units and no elevator or lift, was destroyed by fire and subsequently razed. The owner is seeking to rebuild the two story, twenty-four (24) unit building and seeks clarification of code requirements regarding vertical accessibility and waiver of the any requirement of a vertical lift.

Applicable Codes:

Federal Housing Act - (Title VIII of the Civil Rights Act) codified at 42 U.S.C. § 3602 and 3604; 2017

Florida Accessibility Code for Building Construction, Chapter 201.1.1, Accessibility; Chapter 233.1 Residential Facilities and Chapter 206.2.3;

Code of Federal Regulations Title 28 – Judicial Administration, Chapter 1 – Department of Justice (28 CFR 36.401(d)(2) – New Construction);

Florida Statutes, 399.035, 553.509(1) and 760.22

Americans with Disabilities Act: Title III Regulations.

Discussion: Bengal Properties intends re-construct the two story, twenty-four unit multifamily residential dwelling without an elevator. The re-construction is being performed without any federal funding. The building will have no public space and is intended solely for the use of residents and their guest. The project is **not** subject to Section 504 of the Rehabilitation Act (programs receiving federal financial assistance) and is not subject to Title II of the Americans with Disabilities Act (State and Local Government Services). Below is an analysis of the potentially applicable standards affecting the subject development.

Fair Housing Act

The Fair Housing Act (FHA), applies only to new construction of “**covered** multifamily dwellings”. Under the FHA a “**covered** multifamily dwelling” is one that has either: (A) buildings consisting of 4 or more units **if** such buildings have one or more elevators; and (B) ground floor units in other buildings consisting of 4 or more units. See 42 U.S.C. § 3064(7)(A) and (B). The Act does not set forth specific technical design criteria that have to be followed in order to comply with the design and construction requirements. The Fair Housing Act ‘s design and construction requirements do not cover multistory units, unless the building has an elevator. It does provide, however, that compliance with the appropriate requirements of the American National Standards Institute (ANSI) for buildings and facilities providing accessibility and usability for physically handicapped people, commonly known as ANSI A117.1, satisfies the Act’s technical requirements. At the time the law was passed, the 1986 ANSI A117.1 standard was the edition in effect; therefore, the U.S. Department of Housing and Urban Development’s (HUD’s) regulations implementing the Act specified this edition of the ANSI standard for this purpose.

The Fair Housing Act does not dictate whether or not an elevator is required, but rather it is the Florida Accessibility Code for Building Construction (FACBC) that sets the standard related to vertical accessibility. (See discussion below).

ADA Standards

The Americans with Disabilities Act (ADA) Standards do not require an accessible route to each and every level. In Title III ADA Code of Federal Regulation 28 Part 36.401 New Construction provides:

(d) Elevator exemption. (1) For purposes of this paragraph (d) --

(i) Professional office of a health care provider means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The facility housing the "professional office of a health care provider" only includes floor levels housing at least one health care provider, or any floor level designed or intended for use by at least one health care provider.

(ii) Shopping center or shopping mall means --

(A) A building housing five or more sales or rental establishments; or

(B) A series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. For purposes of this section, places of public accommodation of the types listed in paragraph (5) of the definition of "place of public accommodation" in section Sec.36.104 are considered sales or rental establishments. The facility housing a "shopping center or shopping mall" only includes floor levels housing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

(2) This section does not require the installation of an elevator in a facility that is less than three stories or has less than 3000 square feet per story, except with respect to any facility that houses one or more of the following:

(i) A shopping center or shopping mall, or a professional office of a health care provider.

(ii) A terminal, depot, or other station used for specified public transportation, or an airport passenger terminal. In such a facility, any area housing passenger services, including boarding and debarking, loading and unloading, baggage claim, dining facilities, and other common areas open to the public, must be on an accessible route from an accessible entrance.

(3) The elevator exemption set forth in this paragraph (d) does not obviate or limit, in any way the obligation to comply with the other accessibility requirements established in paragraph (a) of this section. For example, in a facility that houses a shopping center or shopping mall, or a professional office of a health care provider, the floors that are above or below an accessible ground floor and that do not house sales or rental establishments or a professional office of a health care provider, must meet the requirements of this section but for the elevator.

Florida Accessibility Code for Building Construction

The Florida Accessibility Code for Building Construction (FACBC) requires the owner of any building, structure or facility governed by the Florida Statutes to provide vertical accessibility to all levels above and below the occupiable grade level, regardless of whether the standards require an elevator to be installed. Similar to the federal ADA standards and related regulations provided in 28 C.F.R part 36, the FACBC, Chapter 206.2.3 (Multi-Story Buildings and Facilities), while requiring “at least one accessible route [to] connect each story...in a multi-story building...”, provides for exceptions. The FACBC Exception 1 states that in private buildings of less than three (3) stories, an accessible route *shall not* be required to connect the stories provided the building is not a shopping center, shopping mall, the professional office of a health care provider, a terminal, depot or other station use for specified public transportation, an airport terminal, or another type of facility as determined by the Attorney General.

Advisory 206.2.3 (Multi-Story Buildings and Facilities Exceptions) of the FACBC states that exceptions 1 – 7 are preempted by Florida vertical accessibility requirements of s.553.509, F.S., as incorporated in section 201.1.1. However, the Florida requirements may be waived down to the ADA Standards requirements.

Florida Statutes

The Florida Fair Housing Act (Florida Statute 760.20) requires that covered residential buildings which are intended for first occupancy after March 13, 1991 be designed and constructed in a manner that is accessible to persons with disabilities. Specifically, Florida Statute 760.23(10) requires:

“Covered multifamily dwellings as defined herein which are intended for first occupancy after March 13, 1991, shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site as determined by commission rule. Such buildings shall also be designed and constructed in such a manner that:

(a) The public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons.

(b) All doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by a person in a wheelchair.

(c) All premises within such dwellings contain the following features of adaptive design:

1. An accessible route into and through the dwelling.

2. Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations.

3. Reinforcements in bathroom walls to allow later installation of grab bars.

4. Usable kitchens and bathrooms such that a person in a wheelchair can maneuver about the space.

(d) Compliance with the appropriate requirements of the American National Standards Institute for buildings and facilities providing accessibility and usability for physically handicapped people, commonly cited as ANSI A117.1-1986, suffices to satisfy the requirements of paragraph (c).”

However, the Florida Fair Housing Act, similar to the FHA, does not apply to facilities like that proposed by Bengal Properties, i.e. one without an elevator. See Florida Statute 760.22(2) which defines a “***covered multifamily dwelling***” as “***(a) a building which consists of four or more units and has an elevator; or (b) the ground floor units of a building which consists of four or more units and does not have an elevator***”.

The Florida Americans with Disabilities Accessibility Implementation Act (Florida Statute 553.501) is intended to incorporate into the law of this state the accessibility requirements of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. ss. 12101 et seq., and to obtain and maintain United States Department of Justice certification of the Florida Accessibility Code for Building Construction as equivalent to federal standards for accessibility of buildings, structures, and facilities. All state laws, rules, standards, and codes governing facilities covered

by the Americans with Disabilities Act Standards for Accessible Design shall be maintained to assure certification of the state's construction standards and codes.

In applying the intent of Florida Statute 553.501 to incorporate the ADA laws and comply with the DOJ's certification of the FACBA, one must consider the fact that a non-elevator, multifamily dwelling is not "covered" by the ADA or Florida Statutes, and that the FACBA does not require an elevator in buildings of three (3) stories or less. Under both the ADA and FACBA an accessible route to each and every level is not required. Moreover, where the ADA Standards do not require an accessible route to each and every level, the Florida requirement may be waived down to the requirement of the ADA Standards (see Advisory 201.1 Scope of the FACBC).

Conclusion

The proposed subject development does not meet the criteria which would require vertical access under the FHA, FACBC, C.F.R. or Florida Statutes. The proposed subject development has been designed as a two story walk up without an elevator. As such it does not qualify as a "***covered*** multifamily dwelling[s]". In addition, if for some reason it is determined that the proposed subject development meets the aforementioned criteria in Florida, Florida law provides for a waiver of the accessibility requirements down to the requirements of the ADA. And the ADA specifically excludes the requirement of an elevator in a facility of less than three stories.