

Vulnerability to Design Defects Aren't Limited to the Disabled

[or]

Design Defects Leave Developers and Architects Vulnerable, Too

(For the first time, I have two proposed titles ...please pick whichever you prefer.)

Bad comics sometimes begin their monologue by stating “Stop me if you’ve heard this before...” I’m not much of a humorist, and you might be tempted to assume the following scenario is more an urban legend than a factual situation, but bear with me as I tell it. The punch line isn’t something you’re going to want to miss.

In 1993, DevCo constructs a condominium development overlooking a golf course in the Bluegrass State. One hundred units are to be built for The Links Homes and in the design phase, the architect decides to compliment the overall look of these residences by incorporating the gently rolling hillsides into the blueprints. Homes are constructed on low swales and each is accessible only via a handful of seemingly rustic wooden steps (but which are actually high-impact plastics sculpted to look like railroad trestles). The project is completed on time and the developer starts to sell the homes to investors and to those who are interested in living in the community and joining the golf club.

WHEEL, a non-profit company that has a charter from the Department of Housing and Urban Development to educate and investigate complaints of housing discrimination, learns about the pending sale of units at The Links Homes and the stepped entrances. WHEEL decides to investigate, despite not having received any complaints from disabled individuals and despite having other projects occupying its attention and resources. AID, another organization that acts as an advocate for disabled individuals, provides people to act as testers for WHEEL, which dispatches those testers. The testers report back that the steps make it impossible for them to even enter the units. WHEEL files suit against DevCo and the architect for Fair Housing violations.

Sadly, this isn’t a tale I assembled from attorney-reported anecdotes and horror stories. Instead, “The Links Homes” is actually Village of Olde St. Andrews, a multifamily housing community located in Louisville, Kentucky. In an unreported decision by the Sixth Circuit, a three-judge panel held in Fair Housing Council et al. v. Village of Olde St. Andrews et al., No. 05-5862 (6th Cir. 2006) that the statute of limitations on a claim regarding Fair Housing Act violations tolls two years after the sale of the last unit in a development or even the last unit of a series of developments sharing common design and construction. The panel also held, albeit reluctantly, that testing organizations have standing to sue developers even if the testers initiated the investigation without external complaint. The developer petitioned for Supreme Court review and the National Multi-Housing Council joined as *amicus curia*, but the Justices denied *certiorari* in an order issued January 7, 2008, which left the Sixth Circuit’s opinion untouched (WKB Associates v. Fair Housing Council et al. (07-421)).

The Sixth Circuit’s holding is crucial for understanding the handling of Fair Housing Act litigation in the federal courts. An investigative body, such as the Fair Housing Council in the above-referenced litigation, need only divert resources to combat alleged discrimination in order to be afforded standing to bring a suit. The question the Supreme Court left to the individual

Circuits is the extent of pre-litigation damages that grant standing. The Sixth Circuit and other self-described “lenient” courts allow “injury related to litigation” standing when resources are diverted at any level, whether initiated from a complaint the organization is investigating or in acting independently.

The Ninth Circuit (which includes Arizona) is one of the “restrictive” courts: self-manufactured costs (i.e., initiating the investigation itself) do not afford investigative and training bodies standing as a damaged party. Please be aware that this has no bearing on an agency investigating complaints of discrimination, nor does it affect that same agency which expends funds in broad educational initiatives.

More importantly, the Court held that the statute of limitations under the Fair Housing Act for design defects is not tied to the date of either design approval or of construction completion, but rather a date of sale – though the exact date of the start of the two-year period is dependent upon a case-by-case analysis. The Court also limited its analysis to the sale of condominium units and specifically excluded the rental of multifamily dwellings from its holding. Given the tenor of the rest of the opinion, and with litigation we have seen before, a defect such as the stepped entryways in the not-so-hypothetical example would be continuous until the date the defect was corrected.

The practical result of Village of Olde St. Andrews is that design defects must be identified and corrected in the design phase, because construction according to approved blueprints does not guarantee protection from later litigation. The Fair Housing Act and the Arizona Fair Housing Act have design guidelines that must be met, and violations of those guidelines are committed only at grave risk. Proactive review with the proverbial fine-toothed comb – despite its abstract nature – will serve you better than post-construction discovery of disability discrimination issues. Aesthetics must take second chair to accommodation.