HUD'S MULTIFAMILY HOUSING, FAIR HOUSING ACT ACCESSIBILITY

DESIGN REQUIREMENTS - *HOW FAIR IS IT?*

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Background:

In 1988, Congress passed the Fair Housing Amendments Act; and with it came handicap accessible design and construction requirements for multifamily housing built for first occupancy after March 13, 1991. The Fair Housing Act is now 20 years old, and unfortunately physical inspections are finding that ~ 65% of the multifamily housing stock built after March of 1991 has some degree of violation of the handicap design requirements. This rate of occurrence should come as no great surprise, as HUD commissioned a study in 2003 with similar findings (link: http://www.huduser.org/portal/publications/fairhsg/multifamily.html).

HUD' s *Fair Housing Act Design Manual* contains an introduction which states that the Fair Housing Act is intended to place "*modest accessibility requirements on covered multifamily dwellings .... These modest requirements will be incorporated into the design of new buildings, resulting in features which do not look unusual and will not add significant additional costs*". In theory, compliance with the accessibility requirements of the Act does not add cost at the time of new construction; however, applying the guidance as a retrofit manual to non-compliant existing properties can place a substantial burden on time, resident patience and capital budgets. A concern of ours is that the safe-harbor accessible design standards are ***NEW*** construction codes, and were not written for retrofit or rehabilitation construction.

Current HUD Policy:

The United States Department of Housing and Urban Development (HUD) is the enforcement agency of the Fair Housing Act. HUD Multifamily has conveyed a policy to require that violations of the FHA be repaired as Critical Repairs (prior to closing) and Non-Critical Repairs (within 12-months of closing). In essence, saying to owners and managers of non-compliant multifamily housing that "*Your property is in violation of a federal law, and fix it now!*" This policy is neither practical, nor conducive to business.

The Department needs to acknowledge that the incredibly large repair escrows associated with Fair Housing Act retrofit construction are making borrowers: (a) shop their post-1991 loans elsewhere because other lending agencies do not enforce Fair Housing Act policies as stringently as HUD; or, (b) borrowers with non-compliant 223(A7)'s play the role of the Ostrich, with their head in the sand. There are too many A7's that have not been refinanced because of FHA accessibility violations, where the borrower would rather risk the violations and a higher interest rate, than disclose the condition to HUD and have large repair escrows and tenant disruption. It is our belief that current HUD policy is much too

stringent, resulting in a loss of business, or even worse increasing risk to their existing portfolio by means of becoming a zookeeper for a flock of Ostriches.

Potential Resolve:

In all fairness, the Fair Housing Act directs the Department of Housing and Urban Development (HUD) to attempt to reach an amicable resolution of an action. Consistent with this directive, HUD Multifamily needs to adopt an "amicable" solution to this problem, and applying the existing new construction guidance documents to non-compliant housing is anything but amicable. We have seen recent compliance orders by the DOJ take a more common sense approach to repairs to the Fair Housing Act ; whereby making an attempt to not be too harsh, illogical, or disruptive to the tenant rental income stream. HUD, as the enforcement agency of the FHA, should explore the possibilities of a mechanism to extend punitive reprieve from existing design/construction violations for owners that want to "make good." Creative examples being: (a) use of Voluntary Compliance Agreements (VCA); and/or (b) establishing a "Site Impracticality Test" to as-built vertical construction. Public Housing is very familiar with the 5-year VCA enforcement tool to encourage retrofitting of non-compliant housing (VCAs have been entered into with PHAs across the country to remedy handicap non-compliant conditions under ADA, UFAS and FHA). With regards to a "Site Impracticality Test" for existing non-compliant sites, it only makes sense that it is impractical to apply the new construction manual to existing construction, and a compromise must be reached (e.g. requiring only 20% of covered units to be adaptable, with the remainder under tenant disclosure and reasonable accommodation requirements).

Benefit:

There are many benefits to such mechanisms in the refinance markets, including:

a) borrowers would have a more amicable solution to needed FHA repairs (Initial Deposit to Reserves);

b) less disruption to the tenants and the property income stream;

c) consistent Fair Housing Act interpretations across HUD field offices could be achieved;

d) HUD would reduce Fair Housing Act design risk within their aging 221(d4) portfolio; and

e) HUD could see an increase in business if a loan program were established that provided a time-limited safe harbor for borrowers to get violations of the FHA repaired.

Such creative mechanisms could allow borrowers a method to refinance non-compliant properties, while repairing violations in the timely and legal manner. Everyone wins, including the Department, borrowers, and most importantly those in need of adaptive and accessible housing.