PUBLICATION

Commercial Foreclosures and the Impact of the ADA

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Statutory Overview

When foreclosing on commercial properties, lenders and servicers must assess the liabilities to which they may be exposing themselves under various state and federal laws and regulations. One such liability (that can often be overlooked) are the requirements imposed by the Americans with Disabilities Act ("ADA") which, in certain circumstances, can paint a large target on the backs of "deep pocket" lenders who obtain title to commercial properties via a foreclosure or voluntary transfer. See 42 U.S.C. 12101, et seq.

The ADA makes it discriminatory when a "public accommodation" (i.e. most commercial buildings, all shopping centers, all apartment complexes, etc.) fails to remove or correct architectural, structural, and communication barriers. Barriers preclude normal access to members of the public who need reasonable accommodation, taking into account a physical infirmity which, but for the accommodation which removes the barrier, precludes them access to the public space where such removal is readily achievable. See 42 U.S.C. 12182(b)(2)(A)(iv). The foreclosure does not extinguish violations of the ADA that exist on the property.

Unlike certain other federal laws which impose liability on owners and operators, the ADA does not contain any specific "safe harbors" from compliance for lenders who own property after foreclosure. Therefore, the lender could be faced not only with the expense of bringing the property into compliance, but also the imposition of preliminary and permanent injunctions, imposition of civil penalties, and the award of damages to aggrieved persons.

Examples of "removing barriers" include, but are not limited to, (i) installing ramps, (ii) making curb cuts in sidewalks and entrances, (iii) repositioning shelves, (iv) rearranging furniture, (v) repositioning electrical equipment and telephones, (vi) widening doors, (vii) installing offset hinges to widen doorways and (viii) removing high pile, low density carpeting. See 28 CFR 36.304.

When Applicable?

Notably, the ADA only imposes this duty when the accommodation is "readily achievable." The ADA defines this term to mean "easily accomplishable and able to be carried out without much difficulty or expense." See 42 U.S.C. 12181(9). This is a subjective test, however, and federal agencies are instructed by the ADA to consider, among other factors, the financial resources available to the covered entity and the impact making such accommodations would have on the covered entity and its work force. Id. Enforcement is by institution of litigation. Thus, it may be wise, especially in older housing, apartments, shopping centers and the like, to check for litigation and/or have an ADA assessment conducted by an engineer familiar with the statutory requirements.

Given the above, in a pre-foreclosure scenario where a lender/servicer is owed by a financially distressed owner, a federal agency may make a determination that certain action which would normally be required by the ADA is not "readily achievable." This determination can, and often will, be quickly reassessed when a new owner (i.e., the lender/servicer) takes title/control of the property (or even prior to foreclosure in certain "title" theory jurisdictions).

In Sum: Corrective Action

Consequently, lenders and servicers should take certain steps prior to foreclosure in order to close off this potential avenue of liability as securely as possible, including (i) seeking legal counsel to determine whether a particular property is subject to the ADA regulations, (ii) obtaining an ADA compliance audit of the property so as to properly factor potential construction expenses into foreclosure strategies and bid amounts, and (iii) determining whether ADA litigation is already pending against the property.