

11. **LIABILITY INSURANCE.** OSF shall procure, and during the term of this Lease shall continue in force, the following policies of insurance at OSF's cost: Public liability and property damage in a responsible company with limits of not less than \$250,000.00 for injury to one person, \$500,000.00 for injury to two or more persons in one occurrence, and \$100,000.00 each occurrence for damage to property. City may require OSF to increase these limits in the event of any change in the provisions of ORS 30.270, or in the event these limits are found to be not totally applicable to a city. Such insurance shall cover all risks arising directly or indirectly out of OSF's activities on or as a result of the condition of the Property and shall protect the City and OSF against all claims of third persons. Certificates evidencing such insurance and bearing endorsements requiring thirty (30) days written notice to the City prior to any change or cancellation shall be furnished to the City. It is agreed that the City shall not be liable to any third persons as a result of the use of the Property by OSF, its employees or agents,

15. **COMPLIANCE WITH ADA.** Except for the Parking Facility Property, OSF shall be solely responsible for any improvements, alterations or repairs to the Property required by the Americans with Disabilities Act (ADA), whether or not the ADA imposes such requirements on the City as owner of the Property. OSF shall provide all services, programs or activities conducted by it on the Property in compliance with the ADA, whether or not such compliance is imposed by the ADA upon the City. OSF shall defend and indemnify and hold entirely free and harmless City from and against all ADA-related claims, judgments, damages, penalties, fines, costs, liabilities, or losses which arise during or after the lease term and which are imposed on, or paid by or asserted against City by reason improvements, alterations or repairs to the Property or services, programs or activities conducted on the Property by OSF.

FROM: Primerus Law Institute - North America

Developer Claims for Indemnification of ADA Violations are Barred by FHA

Written By: Shaw M. Blatt, Esq.

Freund, Freeze & Arnold

Dayton/Cincinnati, Ohio

In recent years, we have seen an increase in Fair Housing Act suits against developers and general contractors involved in the construction of apartments/condominiums and other multi-family housing. These claims are brought by public interest groups, on behalf of disabled persons, who inspect newly-constructed multiple family housing looking for violations of the Americans With Disabilities Act ("ADA"). These suits target any ADA violations that can be found in a thorough inspection, including proper slope of wheelchair ramps, heights of countertops and electric outlets, restroom accessibility, and other ADA requirements. The suits, of course, seek not only repair and correction of the physical structures, as well as damages, but also attorney fees and costs incurred in litigating the claim. These claims can quickly become expensive for the client.

Typically, suits asserting FHA/ADA claims will target the developer/owner and general contractor of the project. Under the FHA, all entities involved in the construction of the project can potentially be held liable for the FHA/ADA violation, right down to the sub-subcontractor, who is responsible for installing a wheelchair ramp. To those filing the FHA lawsuit, the burden of pleading in so many parties and the lack of knowledge of which entities actually did the work usually results in only the developer/owner and general contractor being named as defendants. It is then left to the developer and general contractor to respond to the claims and to investigate the lower tier subcontractors to determine which entities were involved in the actual work.

What inevitably results is a third-party complaint against all subcontractors who did the work that resulted in the FHA/ADA violation. The general contractor likely hired design experts as well as construction consultants to ensure compliance with all applicable federal laws and regulations, including the Americans with Disabilities Act. The claims against those third party subcontractors will include indemnity and contribution claims, professional negligence/ construction defect claims, as well as contract and warranty claims. The developer/general contractor will claim that, if it is found liable for violations of the ADA and FHA, then all those subcontractors that did the actual work, or oversaw compliance, will be liable to him for the total amount awarded to the plaintiff.

Commercial developers/general contractors will invariably include indemnification language in their contracts to ensure that the subcontractor holds it harmless for any violations of law or damages that arise out of the sub's work, including the agreement that the sub will reimburse the developer for all attorney fees and costs involved in enforcing the agreement.

Claims for Indemnification of Damages for FHA Violations are Barred by Doctrine of Federal Obstacle Preemption

The developer reasonably believes, pursuant to his contract, that he has insulated himself from any potential liability. That belief is false security when it comes to claims arising under the Fair Housing Act. Federal courts interpreting the Fair Housing Act hold that claims for indemnification, whether contractual or at common law, are preempted by the FHA and cannot be used to transfer FHA liability to third parties, including the subcontractors that actually did the work. *United States v. Quality Built Construction, Inc.*, 309 F. Supp.2d 767 (E.D. N.C. 2003). Accord, *United States v. Gambone Bros. Dev. Co.*, 2008 WL 4410093 (E.D. Pa. Sept. 25, 2008); *United States v. Shanrie Co., Inc.*, 610 F Supp.2d 958 (S.D. Ill., Feb. 23, 2009); *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Co.*, 2007 WL 633951 (S.D. N.Y., Feb. 26, 2007); *Sentell v. RPM Mgmt. Co.*, U.S. Dist. Lexis 75126 (E.D. Ark 2009); *Mathis v. United Homes, LLC.*, 607 F. Supp.2d 411, 421-23 (E.D. N.Y. 2009); *Miami Valley Fair Housing Center v. Steiner & Assoc.*, 2010 U.S. Dist. Lexis 63915 (S.D. Ohio 2010).

* At least one appellate court has ruled on the issue and held that no third-party claim for indemnity can be made to transfer liability for FHA and ADA violations. See, *Equal Rights Center v. Archstone-Smith Trust*, 602 F.3d 597, cert denied, 131 S. Ct. 504 (4th Cir. 2010).

The prohibition against such claims is based on the concept of federal obstacle preemption, i.e., the notion that enforcing a right of indemnification and contribution would conflict with, or act as an obstacle to, the achievement and execution of the purpose and objective of the Fair Housing Act. *Id.* at 601. A state law claim will be preempted where it interferes with the methods the federal statute was intended to use to accomplish its purpose. *Id.* The courts that have considered the issue have looked to the language of the Fair Housing Act and the ADA and have examined the purposes behind those Acts. These courts have noted that Congress did not create any right of contribution or indemnity under the FHA and that the absence of such a remedy presumes that Congress intended that defendants in such cases are to have a non-indemnifiable, non-delegable duty to comply with the Act. *United States v. Gambone Brothers Dev. Co.*, 37 NDLR 254 (E.D. Pa. 2008).

The ADA was drafted to benefit a specific class (disabled persons), and because the ADA did not create any special provision to benefit violators, those found liable should not be able to avoid sanctions by transferring their liability to third parties. The nature of the ADA and FHA is regulatory, designed to prevent discrimination against those with a disability and to ensure fair housing throughout the United States.

Archstone-Smith Trust, 602 F.3d at 602. Those federal statutes do not set forth any provision allowing for indemnification of one found in violation of the regulations. Because they are not members of the special class for which the ADA was created, general contractors and developers cannot do what federal law prohibits by seeking to transfer their liability to the subcontractors that performed the actual work. *United States v. Quality Built Construction*, 309 F. Supp. 2d 767 (E.D.N.C. 2003).

Allowing an entity to transfer its liability under the FHA to third parties interferes with and stands as an obstacle to the purpose of the FHA and ADA by disincentivizing developers from ensuring compliance. *Archstone*, 602 F.3d at 602. As stated by the court in *Archstone*:

If a developer of apartment housing, who concededly has a non-delegable duty to comply with the ADA and FHA, can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing. Such a result is antithetical to the purposes of the FHA and ADA.

Archstone, 602 F.3d at 602.

It should be noted that indemnification and contribution claims are only barred because one entity is seeking to transfer its liability for the FHA to another. All parties who perform work on a particular project could potentially be directly liable to the plaintiff if violations occurred and their conduct and work was the cause of those violations

Preemption Applies to "De Facto" Indemnity Claims

The prohibition against indemnity claims applies regardless of how the claim is pled. If the claim is pled as one for negligence or breach of contract, but is actually seeking to transfer liability for FHA violations, it is barred as well. A contractor cannot attempt to do through state law claims what Congress has prohibited under federal law. Thus, all claims of "breach of contract," "negligence," "architect/engineer malpractice," or "unworkmanlike performance" that amount to "de facto" claims for indemnity are barred. Anytime a party is attempting to transfer liability it may have under the FHA or ADA to a third party, that claim will be barred.

Generally, claims against the lower tier subcontractors will be asserted for the first time as a third party complaint under Fed. R. Civ. P. 14. Third party claims, by their nature, are strictly claims for indemnification, either partial or full. Under Federal Civil Rule 14, the only claim that can be asserted is a derivative claim, i.e., seeking to transfer liability to a third party. No independent claims unrelated to transferring liability for the claims in the original complaint can exist in a third-party complaint. *American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800 (6th Cir. 2007). Thus, where the original complaint solely sets forth ADA/FHA violations, third party claims should be preempted as a matter of law.

These decisions create obvious problems for general contractors and developers. Almost all construction projects involve vertical indemnity



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June 12, 2017

Dr. Philip Lang
758 "B" Street
Ashland, OR 97520

Re: OSF Plaza Renovation

Dear Dr. Lang:

On June 12, 2017, I observed the existing condition of the renovated OSF Plaza area near the Angus Bowmer Theatre, Elizabethan Stage, Gift Shop, Administrative Office and Plaza Area in front of the Thomas Theatre and Box Office and Parking Garage. The Plaza Area between the Angus Bowmer Theatre and Pioneer Street has been renovated, but is not quite complete or ready for use. I did NOT review the Construction Drawings for these improvements and therefore cannot compare the completed work to the approved documents. I will just compare this area to my previous observations. In order to compare the proposed improvements to my observations of the site I will use my October 26, 2015 letter numbering as a guide.

I submit the following observations with how I see each item addressed compared to my site observation on July 19, 2012 in bold italics, as numbered from my April 24, 2015 letter:

1. The slope on the Chautauqua Park ramp access from Main Street (Photos 1140, 1141, 1142, 1145) measured 18.4% at the bottom and 18.9% at the top. This has a grooved concrete surface and there is a 36" high handrail on one side. This is NOT the accessible route to the theatre plaza, but it is a main point of connection for pedestrians. ***(This area has not changed and was NOT part of the renovation.)***
2. The ramp to the custodial office (Photo 1144) has a slope 23.6%, with 33" high handrail on one side and the ramp is 36" wide. ***(This area has not change and was NOT a part of the renovation.)***
3. The brick landing at the top of the Chautauqua Park ramp (Photos 1143, 1146) leads to the custodial office ramp and stairs leading to the plaza. The stairs have a maximum riser height of 7" and a minimum tread length of 11" and has three, 36" high handrails. ***(The proposed plans show this landing and the stairs leading to the Plaza and the Courtyard to be removed and replaced. The proposed grading plan will create a landing area with slopes of 2% or less. The proposed renovation does NOT make this area ADA accessible.)***
4. The brick area and ramp leading from the stairs to the plaza (Photos 1147, 1148) has a maximum slope of 11.2% near the bottom and 3.8% near the top with 34" high handrails on both sides. ***(This area has been renovated with a ramp and stairs, Photos 8388, 8389 and appears to meet ADA requirements.)***
5. There are two ramps from the plaza to the Gift Shop (Photos 1149, 1150). The right ramp has an 8% slope and less than 2% cross-slope with a 35" high handrail on one side. The left ramp has an 11% slope and a 4.7% cross-slope with a 36" high handrail on one side. This ramp is only

- 33" wide and has a vertical lip of nearly 1" at the top. The vertical 1" lip has been removed and the ramp is now flush with the landing. *(This area has been renovated with a new entrance, Photo 8390 and appears to meet ADA requirements.)*
6. The ramp to the Administration Office (Photos 1151-1157) is "L" shaped with a 43"x43" landing at the corner. This upper end of the ramp has a slope of 0.3% and less than a 2% cross-slope with a 34"-36" high handrail on one side. The lower ramp has a slope of 15.5% near the top and 14.6% near the bottom with a 36" high handrail on one side. *(This area has been renovated with a new ramp, Photo 8390, 8394 and appears to meet ADA requirements.)*
 7. The stairs from the plaza to the Administration Office (Photo 1158) have 7" maximum riser height and 11" minimum tread width and has 34"-36" high handrails on both sides. *(This area has been renovated with new stairs, Photo 8392 and appears to meet ADA requirements.)*
 8. The Plaza area near the Angus Bowmer Theatre (Photos 1159-1163) has a 36" high handrail along one side. The lower portion of the plaza ramp slope is 13.8%. The center portion is 11.7% with a 4.1% cross-slope and the upper portion is 7.6% with a 4.8% cross-slope. *(This area has been renovated with a new ramp just from the Angus Bowmer accessible entrance to the Elizabethan Stage and new stairs, Photo 8387. The ramp and stairs appear to meet ADA requirements; however there is NO ACCESSIBLE ROUTE from the Elizabethan Stage to the Gift Shop or Administrative offices without going through the Angus Bowmer Theatre.)*
 9. Both entrances into the Elizabethan Stage (Photos 1164, 1165) are less than 5% slope. *(This area has been renovated with new pavers and appears to meet ADA requirements.)*
 10. The ramp along the left side of the Elizabethan Stage (Photo 1166) has a slope of 11.7% with less than a 2% cross-slope and has no handrails. *(This area has been renovated with a new stairway and ramp parallel to Pioneer Street and appears to meet ADA requirements.)*
 11. The ramp to the south accessible restroom inside the Elizabethan Stage (Photos 1167-1169) has a slope of 8.7% with less than a 2% cross-slope. There is 3/8" to 3/4" vertical lip where the brick pavers meet the concrete landing. There are 36" high handrails on both sides of this ramp. The location of this restroom is NOT well marked. **(This ramp has not changed but there is a no longer a lip between the pavers and the concrete entrance. New signs, Photos 8385, 8386 have been added, but no new signs show you where the restroom is from the Service Counter area.)** The ramp to the north accessible restroom is 7.2% with no lip and 36" handrails on both sides. It also is NOT well marked. *(This area has been renovated with a new ramp and wheelchair lift and appears to meet ADA requirements.)*
 12. The Plaza between the Elizabethan Stage and the center of the Plaza is shown in Photos 1170 and 1172. These slopes are in excess of 5% and there are no handrails. *(This area has been renovated with new pavers and is much improved, however in some areas; the cross-slope exceeds 2% and does NOT meet ADA requirements for an accessible route.)*
 13. The Plaza between Pioneer Street and the center of the Plaza is shown in Photos 1171 and 1173. The slope parallel to Pioneer Street is 11.9% and there are no handrails. The brick pavers are also uneven in this area as visible in Photo 1173. *(This area has been renovated with new pavers but the slope is unchanged.)*
 14. The Plaza area near the old Box Office location (Photos 1174-1178) has not changed from my previous report with slopes as high as 19.4%. There is a 36" high handrail from Pioneer Street sidewalk to the old Box Office location. *(This area has been renovated with new pavers and new grades, Photo 8393 and is much improved, however in some areas; the cross-slope exceeds 2% and does NOT meet ADA requirements for an accessible route.)*
 15. The crosswalk at Pioneer Street (Photos 1179-1181) is concrete with an 11.9% slope. *(This area has NOT changed.)*

16. The Thomas Theatre brick paver plaza (Photos 1182, 1183) has a slope of 3%. *(This area has NOT changed.)*
17. The ramp from the Thomas Theatre plaza to the new Box Office concrete landing (Photos 1184, 1185) has a slope of 9.5% with NO handrails. *(This area has NOT been renovated; however, an accessible Box Office entrance has been created closer to the main entrance to this Theatre and appears to meet ADA requirements.)*
18. The main Plaza area directly facing the stage in the center of the Plaza (Photos 1186-1188) has a slope of 9.3%. *(This area has been renovated with new pavers and new grades, Photo 8393 and is much improved, however in some areas; the cross-slope exceeds 2% and does NOT meet ADA requirements for an accessible route.)*
19. The Point of Sale and Service Counters at the Elizabethan Theatre are NOT ACCESSIBLE. Section 1109.11.3 and 1109.11.4 of the 2010 OSSC requires an accessible counter. This same condition may occur in other facilities, which we did not have access to at the time of my visit. *(These Counters have NOT been changed or modified.)*
20. The intersection of Hargadine Street, Fork Street and South Pioneer Street is relatively flat and could be a possible location for an "Accessible Site Arrival Point". This location is close to the Elizabethan Theatre and should be considered for this purpose. *(This comment has NOT been addressed or changed.)*

I submit the following observations with how I see each item addressed in the proposed renovation plans in bold italics, as numbered from my September 5, 2014 letter:

1. There was a "Green Show" information table set up in front of the old box office location. This is at the bottom of a very steep grade, as noted in number 14 of my previous letters. *(This area has been renovated with new pavers and grades.)*
2. The Tudor Guild building just north of the Allen Elizabethan Theatre on the plaza sells food and souvenirs. The single counter is too tall and is NOT ADA accessible. OSSC Section 1109.11.3 and 1109.11.4 requires Point of Sale and Food Service Counters to be accessible. *(This building has been removed and the area renovated with landscaping and pavers.)*
3. The Tudor Guild Gift Shop does have two ramps from the plaza area to the building, as noted in number 5 of my previous letters. There is also a ramp on the inside of the building to service the upper floor area. This ramp appears to meet ADA requirements. *(See Number 5 above.)*
4. The main entrance area into the Angus Bowmer Theatre has quite a slope to it, likely over 5%, but there are no handrails. Portions of this short ramp may even be over 8%. On the left side of this main entrance are two box office windows, neither or ADA accessible and there is no level landing area to stand in front of these windows. *(This area has been renovated, Photo 8391 and there are no longer Box Office windows. This entrance now appears to meet ADA standards, although there is NO ACCESSIBLE ROUTE to get to the entrance from Pioneer Street because some areas have more than 2% cross-slope.)*
5. The main lobby of the theatre does have two heights of service counters, but the lower service counter is still higher than 34" and therefore does NOT meet ADA requirements. *(I could NOT verify if this item has changed or not but was NOT a planned part of the renovation.)*
6. There is NO directional signage for ADA facilities visible in the lobby area or near the main entrance. Staff members have to tell people to use the ADA accessible entrance from the plaza area that is near the Tudor Guild building. The location of accessible facilities is shown on map in the Playbill and on other literature, but there are NO directional signs visible. *(I could NOT verify if this item has changed or not but was NOT a planned part of the renovation.)*

7. The downstairs restroom facilities are NOT ADA accessible. *(The proposed plans do NOT address this item. The proposed elevator does NOT serve the basement area, including the men's restrooms. This is beyond the Limits of Construction. I could NOT verify any changes to this area.)*
8. There is access to one (1) unisex ADA accessible restroom with a privacy lock near the one accessible entrance to the building. There is also a drinking fountain in the accessible corridor as well as two other drinking fountains in the main lobby. I did not go into restroom and cannot verify if it truly meets ADA requirements or not, but it is marked as being accessible. *(The proposed plans removes and relocates one (1) unisex ADA accessible restroom and does NOT show the drinking fountain being removed or replaced. I could NOT verify any changes to this area.)*
9. There are two (2) spaces for wheelchairs just inside the theatre at the end of the accessible entrance from the plaza. There is NO companion seating area as these two spaces are enclosed by railing on three sides. According to OSSC Section 1108.2.2.1 there should be 7 wheelchair spaces in an assembly area holding 600 people. This facility has 2 spaces. There is NO elevator in this building. *(The proposed plans do NOT address the number of wheelchair spaces. An elevator is proposed in this new plan that will go from the lobby, to the ADA accessible restroom and egress floor and to the second floor. I am not sure if there are any ADA facilities on the second floor and seating inside the theatre is beyond the Limits of Construction. I could NOT verify any changes to this area.)*
10. The only route from the theatre to the main lobby area, where food service is provided requires leaving the building through the accessible entrance and going down the plaza through the main lobby entrance. *(The proposed elevator will provide access from the Theatre seating area to the lobby, as well as an upper floor, but NOT the basement. I could NOT verify any changes to this area.)*
11. Listening Devices are available in the lobby; however, the signage is very poor. *(The proposed plans do NOT address this item. I could NOT verify any changes to this area.)*
12. I also looked at the intersection of Pioneer and Hargadine streets and there is a nice flat area that could be re-designed to provide at least a two-car drop-off area. It would require loosing some trees and landscaping, but it could be done. *(The proposed plans do NOT address this item and this is beyond the Limits of Construction. This item has NOT been addressed. There is still NO ARRIVAL POINT for this complex!)*

The proposed renovation plans do NOT address any items in my September 5, 2014 letter for the Thomas Theatre. *(This is beyond the Limits of Construction. I could NOT verify any changes to this area.)*

At your request, I also looked at the provided Handicap Parking spaces in the Parking Structure adjacent to the Thomas Theatre. These spaces and the access out of the building and to the OSF facilities do NOT meet minimum ADA requirements. The slopes in the parking and aisle spaces exceed 2% in both directions, the doors exiting the structure to the sidewalk do NOT provide a minimum 32" wide clear space when opened and the sidewalks have more than 2% cross-slope in areas.

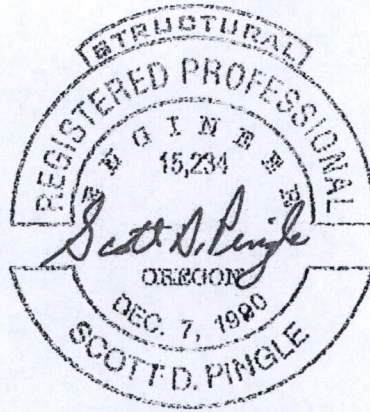
The following summarizes my opinion of the recent renovations to the OSF facilities. This renovation has improved the accessibility and safety in numerous ways, even though some of the renovations may NOT meet ADA accessibility standards. Some very important ADA requirements were NOT addressed in the renovation, such as an ARRIVAL POINT and ACCESSIBLE ROUTES between all facilities.

If you have any questions or need further assistance or consultation, please give me a call.

Sincerely;

Scott D. Pingle

Scott D. Pingle, P.E., S.E.
12103Let6



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