ABANDONED CABLING AND THE AMERICANS WITH DISABILITIES ACT: A DISCUSSION ON CURRENT TOPICS IN OFFICE & INDUSTRIAL LEASING

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I. ABANDONED CABLING

A. Background: The Abandoned Cabling Issue

Technology might make our lives easier in some ways, but nothing is free, and landlords and tenants are paying the price associated with the unadulterated proliferation of cabling born of the growth in technology.

"Cabling" is a broad term that encompasses many types of low voltage wiring including voice, data, security, fire alarm, and cable television infrastructure.

The practice of most tenants when vacating leased premises is to simply sever the wires connected to their equipment and repurchase wiring at their new location. This is the most cost-effective practice for tenants, since the time involved in untangling a mass of wires and identifying which belong to their equipment is too much to justify in light of the relative low cost of new wires. However, this practice results in a mass of wires left behind each time a tenant moves out. Higher tenant turnover rates and increased technology exacerbate the problem.

Most office buildings conceal wires in one of two places, either ceiling cavity plenums or raised floor plenums. Ceiling cavity plenum is the space between the top of the ceiling and the underside of the floor above or the roof. Raised floor plenum is the space between the raised floor surface and the finished floor.[1] Aesthetically and practically, hiding wires in these spaces seemed to be a great idea for landlords and tenants alike; however, since these wires are out of sight, the problems they can

[1]Capretta, Fred. Abandoned Cabling: Be Aware, Be Safe. BOMA Business. <http://bomacleveland.org.pr_properties.htm.> 14 October 2004.

potentially cause are also out of mind. Therefore, tenants think it is acceptable to leave their old wires behind when they move out.

According to changes to the National Electrical Code ("NEC") in 2002, it is now clear that it is not acceptable to leave abandoned cabling in place. The two options now are to either remove the cabling or tag each loose wire "for future use".

Most estimates of the cost of removing cabling is that it will cost between $2.50 and $4.50 per square foot.[2] Discerning which cables are attached and which are not is no simple task. The ramifications of severing a connected wire and possibly interfering with an existing tenant's business are significant. Furthermore, few cables are adequately labeled, and most are so tangled that it is next to impossible to ascertain the path of each wire. To minimize the inconvenience to existing tenants, most cable removal is performed after hours, incurring heightened labor costs. Moreover, if the EPA does in fact classify lead-containing PVC as a hazardous substance, as discussed below, the cost will increase even more due to compliance with regulations for disposing of the hazardous wires.

Initially, landlords were most significantly affected since as property owners, they are required to ensure that their property complies with fire code; however, as more landlords are transferring the costs of removing cable to their tenants in new lease provisions, tenants are beginning to feel the effect of the removal expenses. Additionally, there is a lot of uncertainty as to exactly who, as between landlord and tenant, is responsible for the removal.

[2] Ibid

B. The 2002 Changes to the National Electrical Code

The last time National Fire Protection Agency ("NFPA") made any major changes to the cabling requirements in the National Electrical Code ("NEC") was in 1975. After more than 25 years of silence, the NFPA dealt a heavy blow, making two significant changes by adding

1) Requirements for the removal of abandoned cabling; and

2) Restrictions regarding use of building components for support of cables (ceiling grid wires and support structures cannot be utilized as cable support)

NFPA promulgates a revised version of the NEC every three years. The NEC is up for revision in the new year (2005), and few doubt that the 2005 revision will further address abandoned cabling issues. Frank Bisbee of BOMA identifies the failure of the 2002 revisions to limit the volume of cable allowed is an imperfection that may be addressed in 2005. As the NEC exists now, conceivably landlords and tenants could fill the plenum space with cables while still being in compliance with the code.[3] Additionally, many view the allowance of tagged abandoned cabling as an unacceptable loophole that should, at the very least, be further restricted in the 2005 NEC. For example, it would be helpful if the Code specified what the labels need to say – what type of cables are they? When were they installed? Where are they connected, if at all?

[3] Bisbee, Frank. Abandoned cabling is a Pandora's Box. Real Estate Weekly. No. 22, Vol. 50; Pg. C7. 14 January 2004.

The NEC defines abandoned cable in Article 800.2 as "Installed communications cable that is not terminated at both ends at a connector or other equipment.[4] Article 770.3 pertains to "Optical Fiber Cables" and states "the accessible portion of abandoned optical fiber cables shall not be permitted to remain".[5] Article 800.52 pertains to "Installation of Communications Wires, Cables, and Equipment," and states, "the accessible portion of abandoned communications cables shall not be permitted to remain."[6]

Note that the Code provides for removal only of "accessible" cabling. As a result, there is a feasible argument that knocking down walls or otherwise significantly destroying the property in order to access the cable is not required by the 2002 Code. On the other hand, it seems logical that most cabling must be accessible since it was most likely installed after initial construction of the building. After all, was it not installed in places that were easily accessible to begin with, and can't we argue that almost anything located in floor or ceiling plenum is accessible? .

The Code provides a further exception—some call it a loophole—for cabling that is tagged for future use. NFPA seems to have recognized that abandoned cabling does not necessarily equal unusable cabling.[7] Those responsible for removing cabling should

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[4] Spartin, Debbie B. and Elizabeth Rugaber. New Code on Old Cabling: Something to Untangle. Washington Business Journal. 12 July 2004. http://washington.bizjournals.com/Washington/stories /2004/07/12focus6.htm. 14 October 2004.

[5] Michelson, Marilyn. The Issue of Abandoned Cable—The Current National Electrical Code Mandates Its Removal, or Tagging for Future Use. Boston Chapter of the National Electrical Contractors Association. Spring 2004. <http://www.bostonneca.org/Spring2004.pdf.>. 15 October 2004.

[6] Ibid

[7] Migdal, Nelson and Michael Beckwith. Abandoned Cable Issue Could Trip Up Owners. National Real Estate Investor. 1 December 2003.
< http://nreionline.com/commentary/washington/real_estate_ abandoned_cable_issue/>. 14 October 2004.

beware of using this exception to avoid removing any cabling at all. Should there be a fire or other catastrophe, the unjustified choices not to remove cabling could create liability issues.

That being said, there are prudent reasons to retain cabling for future use. The problem with the NEC provision is that it does not provide a specified standard for tagging cables. All it requires is a tag boldly stating "FOR FUTURE USE" and citing the type of cable and applicable NEC provision. The provision does not require that the label contain information as to the date of installation, where it is connected, where it terminates, or who installed it, all of which is useful information to know if the cabling really is to be put to future use.

Below is an example of a tag that one company uses:

FOR FUTURE USE

IAW: NEC 2002 Code

Article 800. Communications Circuits,

Section 800.2

Article 830. Network-Powered Broadband

Communications Systems,

Section 830.2

Practically speaking, many building owners will not feel the effects of the 2002 NEC unless building inspectors have an additional reason to be inspecting the building. For example, when building inspectors come to approve a remodeling for a new tenant or when there is reason to believe the building may be dangerous to current occupants. At this point, few municipalities have the resources or the interest to take affirmative action to examine all buildings for potential NEC abandoned cabling violations.

C. Applicability in Georgia

While the NEC does not have the effect of law, most jurisdictions in the United States adopt the NEC by reference into local building and fire codes.[8] Effective as of January 1, 2003, the Georgia Department of Community Affairs ("DCA") issued the "Georgia State Amendments to the National Electrical Code (2002 Edition)" (the "Georgia Amendments") which consists of a cover page and two sparse pages of text (See Appendix One). In the Georgia Amendments the DCA states that "The National Electrical Code, 2002 Edition, published by the National Fire Protection Association, when used in conjunction with these Georgia Amendments, shall constitute the official *Georgia Minimum Standard Electrical Code*" (emphasis in original).

[8] Anderson, Richard S. Abandoned Cable: New Solutions to an Old Problem. Cable Installing and Maintenance. September 2004. <http://cim.pennnet.com/Articles/Article_Display.cfm?Section=Articles&Subsection=Display&ARTICLE_ID=21220814.> 14 October 2004.

D. Hazards the NFPA Attempts to Minimize through the 2002 NEC Changes

Amassing wires in plenum spaces creates numerous risks. Structurally, the increasing weight of the wires can become more than the beams and joists were designed handle. Experts from the National Electrical Contractors Association state that, "Cabling not properly supported or supported to supports for other systems adds additional weight to fasteners that have been designed for certain loads. The load of abandoned cabling can cause ceilings to fall and fasteners to pull out."[9]

The NEC cites risks from "Spread of Fire of Products of Combustion" as its primary focus, however. Depending on the type of cable, cabling can add fuel to an existing fire, emit toxic fumes while burning, and produce a smoke that impedes evacuation efforts during a fire. In an attempt to reduce these risks, the NFPA's revisions are designed to reduce the amount of wire present in plenum cavities. From the NFPA's perspective, disconnected wiring not tagged for future use has no business being in the plenum space, so it should be removed to reduce potential fuel for fires and toxic smoke.

Some older buildings may have wires that are not coated with fire retardant jackets, providing ready fuel for a fire. But even wires with fire-retardant jackets deteriorate and split as they age, exposing their insulation and providing fuel for fire.

[9] Abandoned Cable—How Prevalent a Problem Is It? Boston Chapter of the National Electrical Contractors Association. Spring 2004. <http://www.bostonneca.org/Spring2004.pdf.>. 15 October 2004.

Often this insulation spreads flames more quickly than the "five feet in twenty minutes" standard allowed by NFPA.[10]

Smoke produced by building materials must be of a clear or white color so that exit signs are clearly visible to building occupants and firefighters. [11] Some wires, however, give off a black smoke which impedes visibility for those exiting a building during a fire.

Any kind of burning plastic releases toxic gases[12], and even the newer flame-retardant materials that coat wires will produce toxic gases in a fire.[13] Some insulation materials, such as polyolefins, can produce the same BTU output as gasoline.[14]

Even in the absence of fire, there can be a toxic fume risk because most of the cable in buildings today, known as multipurpose plenum ("CMP"), is covered with fire-resistant polyvinyl chloride ("PVC"). Two components used in making PVC are lead stabilizers and plasticizers, which give the cable flexibility.[15] The lead concentration in 1,000 feet of cable can be anywhere from 130 to 180 times the EPA lead exposure limit.[16] The lead is released when the cabling deteriorates through age, excessive heat, or

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[10] Anderson, Richard S. Abandoned Cable: New Solutions to an Old Problem. Cable Installing and Maintenance. September 2004. <http://cim.pennnet.com/Articles/Article_Display.cfm?Section=Articles&Subsection=Display&ARTICLE_ID=21220814.> 14 October 2004.
[11] Ibid
[12] Cabling: Reducing Fire Risks Target of New Code. Building Operating Management. 3 January 2004. <http://www.facilitiesnet.com/bom/jan03/Jan03communications.html.> 14 October 2004.
[13] Ballast, Donna. Cabling Abatement: We Know Why . . . Here's How. PennWell Corporation. September 2004. < http://cim.pennwellnet.com/Articles/Article_Display.cfm?Section=Articles&Subsection=Display&ARTICLE_ID=212212>.
[14]Henkels & McCoy. NEC 2002 Code Summary. <http://www.henkelsandmccoy.com/LOB/NetworkCablingSolutions/Abandoned%20Cable%20NEC%20Code%20Summary.pdf>.
[15] Cabling: Reducing Fire Risks Target of New Code. Building Operating Management. 3 January 2004. <http://www.facilitiesnet.com/bom/jan03/Jan03communications.html.> 14 October 2004.
[16] Ibid

chaffing during installation and removal. According to Frank Bisbee of BOMA, the EPA is close to classifying CMP as a hazardous substance.[17] This means that the cabling could not be thrown away or recycled in a normal fashion, adding yet another headache for the party responsible for abandoned cable removal.

While manufacturers are responding by producing non-lead-containing PVC, nothing has been done to prohibit cabling containing lead, so the presence of lead in cabling is still significant.

E. So, Who is Responsible?

In light of the gravity of the NEC revisions and the reasons that abandoned cabling must be removed, the next question, and the question most relevant to legal counsel for landlords and tenants, is whether the landlord or tenant is responsible for the removal.

As with most questions of landlord/tenant liability, we look to the lease first. However, most leases in effect today do not include specific provisions addressing the issue of abandoned cabling, so it is necessary to resort to an analysis of other, more general provisions of the lease before answering the question. Even in the absence of an express clause requiring the tenant to bear the costs of removal, there may be other lease clauses that give the landlord leverage to require the tenant to remove abandoned cabling. Look to lease provisions such as:

[17] Ibid

- Those requiring the tenant to surrender possession in the same condition as the premises were delivered, normal wear and tear excepted;
- Those prohibiting the tenant from making alterations to the premises that would cause the premises to be in violation of laws, rules, or regulations;
- Those governing the storage, removal, and clean up of hazardous substances;
- Clauses describing the premises;
- Clauses describing portions of the premises for which the landlord or tenant is responsible for maintenance; or
- Those requiring tenant to remove its trade fixtures;

Assuming that a tenant is required by the terms of the lease to remove its trade fixtures, the landlord will need to present a compelling argument that the cabling is a trade fixture. This may be difficult to do for a lot of different reasons.

First, Georgia law on fixtures has evolved primarily around a tenant's *right* to remove certain items after the expiration of a lease term, or a landlord's *right* to ownership of certain improvements to premises. The questions surrounding the issue of abandoned cabling require a determination as to who, among the landlord and tenant, has the *obligation* to remove the cabling.

Second, whether the cabling is movable, and not affixed to the realty, and therefore presumed to belong to the tenant, is a question of fact that is not so easy to determine (an item is considered a permanent fixture if it is substantially integrated into

the property so that its removal would cause injury to the property). Cabling is usually located within the walls, ceilings, or floors of a building, and therefore necessitates intrusion into those areas to allow removal. The cabling may also be attached to structural components (even though 2002 NEC changes now prohibit attaching to many structural components). However, most standard cabling (such as CAT5 cabling) is also fairly easy to remove once a contractor has access to it.

Third, and perhaps most important, is the question of whether the cabling is a trade fixture. This question is more important than the first since in the case of trade fixtures, an item may be substantially integrated into the premises, and therefore not easily movable, but nonetheless removable by a tenant. A trade fixture is defined as an article of personal property placed by a tenant on the leased property for the purpose of furthering his use of the leased property for the trade or business for which it was leased.[18] Since tenants are allowed in Georgia to lawfully remove their trade fixtures[19], and by definition trade fixtures are installed for the tenant's specific use of the property, and leases usually require that a tenant remove its trade fixtures upon expiration of the lease term, then a landlord who is attempting to force a tenant to remove cabling has a much stronger argument when the factors lead to a conclusion that the cabling is in fact a trade fixture.

If a trade fixture is one that is placed on the premises for the purpose of furthering the use of the leased property for the trade or business for which it was leased, then certainly it seems like a reasonable argument that cabling makes almost any

[18] J.K.S.P. Restaurant, Inc. V. Nassau County, 513 N.Y.S.2d 716 (1987); R & D Amusement Corp. v. Christianson, 392 N.W.2d 385 (N.D. 1986)
[19] O.C.G.A. § 44-7-12; Wright v. DuBignon, 114 Ga. 765 (1902); Armour & Co. v. Block, 147 Ga. 639 (1918)

property more useful to a tenant. After all, what business is not dependent upon computers to operate? On the other hand, since cabling is so commonplace, a tenant may argue that the cabling is not an item specific to the tenant's use of the premises, and is therefore more akin to items such as carpet, which a tenant obviously would not have an obligation to remove.

The more complex the cabling and the equipment which it services, the more likely the cabling is to be considered a trade fixture. For example, take a telecommunications company which operates a switching station from a warehouse. A switching station requires substantially more (in quantity and quality) cabling than would a distribution center operating from that same property. A future tenant might not consider the advanced cabling installed in the property to be the type of cabling that would enhance that tenant's business. Therefore, a tenant will most likely have a harder time convincing the court that the more complex system is not a trade fixture which the tenant is required to remove.

Fourth, it is not always easy to determine who installed the cabling. Such a determination is important because by definition, a trade fixture must be installed by the tenant. Historically, in order for a tenant to have the right (and therefore, arguably, an obligation) to remove a fixture, not only must the fixture fall within the definition of a "trade fixture", but the tenant or the tenant's predecessor in interest must have also installed the fixture[20].

[20] Pope v. Gerrard, 39 Ga. 471 (1869)

F. How Should I Advise a Landlord Going Forward?

Smart landlords since the 2002 NEC have included provisions transferring the cost of removal to the tenant, who is generally responsible for the leftover cables. It is important to state in the lease that the removal is to be done by a qualified cabling contractor, perhaps even negotiating who the contractor will be. In this way, "the building owner retains more control over the potential liability of abandoned cable."[21]

A typical clause specific to cabling drafted from the landlord's perspective might read:

> 1.1. Cabling. Tenant shall not install or cause to be installed any cabling or wiring (collectively, "Cabling") without the prior written consent of Landlord as provided in Paragraph 0.0. Any installation of Cabling shall be performed pursuant to Paragraph 0.0, shall meet the requirements of the National Electrical Code (as may be amended from time to time), and shall comply with all Applicable Laws. On or prior to the expiration or earlier termination of this Lease, Tenant, at Tenant's sole cost and expense, shall remove all Cabling so installed unless Landlord, in its reasonable discretion, elects in writing to waive this requirement. Any Cabling removed by Tenant shall be disposed of by Tenant, at Tenant's sole cost and expense, in accordance with all Applicable Laws.

If the landlord has a reasonable idea of the amount of cable the tenant will leave behind, he or she can take complete control to ensure the cable is removed properly by charging the tenant a removal fee and then personally hiring and overseeing a contractor.

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[21] Anderson, Richard S. Abandoned Cable: New Solutions to an Old Problem. Cable Installing and Maintenance. September 2004. <http://cim.pennnet.com/Articles/Article_Display.cfm?Section=Articles&Subsection=Display&ARTICLE_ID=21220814.> 14 October 2004.

If landlords have the opportunity to negotiate lease terms specifically addressing cabling, it is powerful for the landlord to treat the failure to remove cabling as a trigger in a holdover clause, such as:

> 1.2. Failure to Vacate. If Tenant fails to vacate the Premises when required and holds over without Landlord's prior written consent, Landlord may elect either (i) to treat Tenant as a tenant from month to month, subject to all provisions of this Lease except the provision for Lease Term and at a rental rate equal to one hundred twenty five percent (125%) of the Base Rent payable by Tenant immediately preceding the scheduled expiration of the Lease Term plus Additional Rent, or (ii) to treat Tenant as a tenant at sufferance, eject Tenant from the Premises and recover damages caused by wrongful holdover including, without limitation, as set forth in Paragraph 1.1. Failure of Tenant to remove furniture, furnishings, cabling or other telecommunications equipment, or trade fixtures which Tenant is required to remove under this Lease shall constitute a failure to vacate to which this Paragraph shall apply if such property not removed substantially interferes with occupancy of the Premises by another tenant or with occupancy by Landlord for any purpose including preparation for a new tenant. If a month-to-month tenancy results from a holdover by Tenant under this Paragraph 1.2, the tenancy shall be terminable upon thirty (30) days written notice from Landlord. Tenant waives any notice that would otherwise be provided by law with respect to a month-to-month tenancy.

G. How Should I Advise a Tenant Going Forward?

Lease provisions transferring the cost of abandoned cabling to the tenant upon vacating the premises may be unfair, particularly if there is cabling leftover from a prior tenant. If the lease specifies that the landlord will have a professional remove the cable, the professional will likely not be able to distinguish between the cables belonging to the vacating tenant and those belonging to prior tenants. Likely the professional will do his or her job and remove all non-compliant cables, and the tenant may be unjustifiably charged for cabling leftover from prior leases.

Tenants will want to obtain information about the current state of the plenum spaces before agreeing to be responsible for cable cleanup costs. A professional inspection, properly documented, could go a long way in preventing a tenant from being unjustly charged for removal of cabling abandoned by prior tenants.

Ideally, the tenant should negotiate for an express representation in the lease that the premises are in compliance with all applicable laws, rules, and regulations, as well as an indemnification that will require the landlord to make alterations in the event the premises are found to be out of compliance through no fault of tenant. Since the 2002 NEC amendments have been adopted into the law of most states, such a representation would protect the tenant from landlord requiring tenant to remove cabling in order to bring premises into compliance.

It is wise for tenants, when moving out of a space, to have the landlord sign off on removal of certain items from the premises and waive the right to demand that the tenant remove any additional items in the future. This forces the parties to inspect the premises, decide what the responsibility of the tenant is at that point, and gives both parties certainty in moving forward.

Another solution may be to avoid the abandoned cabling issue altogether or at least minimize the costs by investing in wireless equipment where possible. The added cost of wireless, if any, may be justified when weighed against the substantial costs of dealing with wires upon vacating leased premises. If the tenant intends to use wireless technology, it needs to make sure that the lease makes that intention clear, and should

also state that the tenant will not be responsible for removing any cabling from the premises.

H. Tax Considerations

With the steep removal costs, the party responsible for removing loose cabling will want to ease the financial burden in any way possible. Unfortunately, a tax deduction for abandoned cabling is not necessarily a slam dunk. Whether the expense of removing abandoned cabling may be deducted for tax purposes has not yet been determined.

Repairs and other maintenance expenses are generally deductible as ordinary and necessary business expenses pursuant to Reg. 1-162-1(a) of the Tax Code. However, a deduction for any sum expended to materially improve or prolong the life of building is not permitted; the expense must instead be capitalized. Additionally, if otherwise deductible repairs are conducted as part of a significant overall renovation, the expenses may also need to be capitalized. Removing abandoned cabling does not fall neatly into either of these two categories.

According to Mike Rosenberg, "it is quite possible to reach the conclusion that the cost to remove loose wires pursuant to code can be claimed as an ordinary and necessary business expense."[22] Rosenberg cites the criteria the Sixth Circuit Court of Appeals established in United Dairy Farmers v. United States, 267 F.3d 510 (2001) for environment clean up expenses to be deductible:

[22] Rosenberg, Mike. New Cable Code's Implications for Property Owners. Real Estate Weekly. No. 46, Vol. 50, p. S14. June 23, 2004.

1. A taxpayer must have contaminated the property through the ordinary cost of doing business;
2. The taxpayer must have cleaned the contamination to restore its pre-contamination state; and
3. The cleanup must not have allowed the taxpayer to put the property to a new use.[23]

I. Ramifications of Non-Compliance

The ramifications of ignoring the NEC cabling requirements are potentially serious—including fines that vary by jurisdiction, liability in case of a lawsuit, and loss of insurance coverage. Additionally, even if there are no direct legal ramifications of non-compliance with the NEC, marketability of the building will decrease if the building is out of compliance.

In some states, landlords are unable to obtain permits to make alterations to their premises if they are not in compliance with the NEC.

J. Conclusion

The ramifications of the 2002 NEC revisions will take time to sink in – time for leases to expire and the issue to arise, time for new tenants to discover that old tenants left a mess behind, time for landlords to discovery that they are stuck with generations worth of abandoned cables, time for the NEC to clarify code provisions, and time for courts to interpret the existing provisions. Regardless of the eventual effects, it is clear

[23] Ibid

that abandoned cabling is an issue that cannot be ignored absent substantial costs to landlords and tenants.

II. AMERICANS WITH DISABILITIES ACT

A. Background: The Revised ADAAG

Nearly fifteen years ago, in July 1990, the Americans with Disabilities Act ("ADA") was passed with little partisan dispute. Some say the ADA was a long-overdue civil rights development, recognizing and advancing the rights of persons with disabilities to equal opportunity and access in a world built around the able-bodied. Others claim that the ADA makes little economic sense because it imposes compliance costs on businesses and governmental entities that are not in proportion to the benefits actually conveyed. Additionally, some claim that "individuals, businesses, and governmental bodies must make expensive accommodations to ensure full integration even when less costly, more convenient alternatives, which are preferred by disabled individuals, are available."[24] The ADA is unique among civil rights legislation in that compliance requires more than a de minimus cost.[25] Compliance with gender and racial civil rights legislation, for example, generally costs little to nothing except changes in behavior.

PROS	CONS
"Mainstreams" persons with disabilities into society as fully as is technologically possible	Leaves entities little room to choose the most economically practical accessibility solution for their particular enterprise

[24] O'Quinn, Robert P. The Americans with Disabilities Act: Time for Amendments. (August 9, 1991). http://www.cato.org/pub_display.php?pub_id=1018.
[25] Ibid.

Reduces at least outward manifestations of discrimination against those with disabilities	Imposes substantial compliance costs on businesses, unlike other civil rights legislation
Increases awareness of the challenges that persons with disabilities face	Results in increased consumer costs because of the compliance costs to businesses and other entities

A July 2003 Harris Poll reports that the American public overwhelmingly supports the ADA—79% of those surveyed believe that employers with more than fifteen employees should make reasonable accommodations for employees with disabilities, and 88% believe that public facilities should not discriminate against persons with disabilities by maintaining inaccessible facilities.[26] However, these percentages are down from an identical poll conducted in 1991, shortly after the ADA was originally enacted.[27]

Regardless of sentiments about the ADA, those who must implement the changes face significant challenge and adjustment. Businesspersons, whether owners or tenants of commercial property, may groan to learn that revised accessibility guidelines are on the table, due to become law within the next few years. Not all of the revisions portend additional cost and effort, however. Among the purported goals of the revisions are to make the format of the guidelines more user-friendly and to harmonize the guidelines with both model building codes and industry standards.[28] Furthermore, the goal of this article is to highlight the most significant changes and offer suggestions for landlords and tenants wishing to take action in anticipation of the revisions to the ADA.

On July 23, 2004, after ten years of effort, the Access Board published its revised ADA accessibility guidelines (hereinafter "the revised ADAAG"). The Access Board is a federal agency charged with developing and maintaining accessibility guidelines as well as offering assistance and training in complying with the ADA accessibility component.

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[26] Taylor, Humphrey. Thirteenth Anniversary of the Americans with Disabilities Act. (2003). Harris Poll # 41, July 26, 2003. http://www.harrisinteractive.com/harris_poll/index.asp?PID=390.
[27] Id.
[28] A Guide to the New ADA-ABA Accessibility Guidelines. http://www.access-board.gov/ada-aba/summary.htm (July 2004).

The Access Board's revised guidelines do not become enforceable law until the Department of Justice ("DOJ") formally adopts them, a process which may take years.[29] Even upon adoption, the DOJ is proposing a period between six and eighteen months before the new standards are effective.[30] This means that provisions will most likely not be effective until 2007 at the earliest.

Notwithstanding the fact that the legally effective date of the revised ADAAG may be several years in the future, both landlords and tenants would be wise to begin considering the effects of the revised ADAAG as they negotiate leases, plan new construction, renovate, and make other alterations. Leases negotiated today will typically have three to ten year terms and thus span the implementation of the revised ADAAG. Forward-thinking landlords and tenants should begin implementing the standards of the revised ADAAG so as to better accommodate employees and patrons with disabilities and to save money in the long-run.

While some aspects of the ADA are subject to change as the DOJ receives feedback from the public, the actual design standards of the revised ADAAG are not among those aspects. The DOJ proposes to enact the design standards of the revised ADAAG as is; the aspects still in the more flexible "proposal" stage include application of the ADAAG, its effective date, and its enforcement.

The ADA is organized into five sections. **Title I** of the ADA addresses non-discriminatory behavior in employment settings and applies to all employers with more than fifteen employees. Title I prohibits employers from discriminating against qualified job applicants and workers who are or who become disabled and covers all aspects of

[29] Currently, the DOJ is in the "Advanced Notice of Proposed Rulemaking" ("ANPRM") stage. The DOJ recently extended the ANPRM's comment period from its original deadline (Janary 28, 2005) to May 31, 2005. After the ANPRM, the DOJ will issue a notice of proposed rulemaking and a proposed rule, each of which will invite further comments, before it actually issues a final rule.

[30] ANPRM, Nondiscrimination on the Basis of Disability in State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities. To be codified at 28 C.F.R. pts. 35 and 36. September 30,2004.

employment, including "recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment."[31]

Title II sets forth accessibility standards for state and local government entities and prohibits state and local governments from discriminating against disabled persons in their programs and activities. Title II applies to public education, public transportation, courts, and town meetings, among other state and local government services and entities. The public transportation provisions of Title II apply to any city transit system, such as bus and subway, as well as to Amtrak. Unless it creates an undue hardship, public transportation authorities must provide paratransit services in areas that they operate a fixed route bus or rail system. "Paratransit is a service by which individuals who are unable to use the regular transit system independently (because of a physical or metal impairment) and are picked up and dropped off at their destinations." [32]

Accessibility requirements for private entities of public accommodation are set forth in **Title III**. "Public accommodations are private entities that own, lease, lease to, or operate facilities."[33] They "must comply with the nondiscrimination policies prohibiting exclusion, segregation, and unequal treatment," as well as specific architectural accessibility guidelines. Transportation services by private entities are also regulated by Title III.

Title IV makes available telecommunications devices and services for the hearing and speech impaired. These regulations spell out certain mandatory minimum standards telephone companies must maintain to be in compliance with the ADA. Telephone companies must provide transportation rely services (TRS) twenty-four hours a day, seven days per week.[34]

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[31] A Guide to Disabilities Rights Law. (May 2002). <http://www.usdoj.gov/crt/ada/cguide.pdf#search='ADA%20Title%20I%20landlords'>.
[32] Ibid.
[33] Ibid.
[34] Ibid.

Title V includes some miscellaneous provisions that relate to the construction and application of the ADA, including alternative dispute resolution.

The focus of our discussion is Title III,[35] which incorporates the current ADAAG in its Appendix A and, of course, will incorporate the revised ADAAG upon adoption. Title III regulations indicate three areas of accessibility compliance: new construction, alterations, and barrier removal.

B. New Construction

The most stringent application of the ADAAG is logically with new construction, the setting where compliance is presumably the most feasible and least costly. The current regulations provide that new buildings must be "readily accessible to and usable by individuals with disabilities" by the date of first occupancy.[36] The only exception to compliance in new construction is "structural impracticability," and even if structural impracticability is demonstrated, compliance "to the extent not structurally impracticable" is still required.[37]

Plaintiffs have been creative in trying to categorize more buildings as "new construction," but the courts have held this language to unambiguously mean a newly constructed unit. "The date the public entity first leased, purchased, occupied, or otherwise began using the facility is irrelevant."[38]

The DOJ is contemplating an additional "triggering event" for new construction compliance. In addition to "first occupancy," the DOJ proposes "first use" as an alternative triggering event for some facilities.[39] The DOJ expresses concern that the current triggering event may be inappropriate and difficult to apply in some building

[35] 42 U.S.C. § 12181, *et seq*.; *see* 28 C.F.R. pt. 36 (regulations implementing Title III).
[36] 28 C.F.R. § 36.401 (2004).
[37] Ibid.
[38] Anderson v. Department of Pub. Welfare, 1 F. Supp. 2d 456, 465 (D. Pa., 1998).
[39] ANPRM....

situations, "particularly...those that do not require building permits or that do not receive certificates of occupancy."[40]

C. Alterations

Renovations and other alterations of facilities are most likely to trigger compliance affecting the landlord/tenant relationship. Common practice is to renovate the leased space to suit a tenant's needs, and such alterations trigger compliance with the ADAAG to the "maximum extent feasible" as regards the altered portions of the facility.[41] This "maximum extent feasible" standard is not a particularly flexible one: it must be literally impossible for the facility to comply with the ADAAG. Cost and difficulty are not factors weighed in this consideration. Under the maximum extent feasible standard, "undue burden is not a justification for failing to comply with the obligation of accessibility."[42]

According to the regulations, noncompliance is allowed only when compliance is "technically infeasible," which is defined as having

> little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.[43]

Again, even in situations in which full compliance would be "technically infeasible," the responsible party must do all that *is* feasible, to the maximum extent.

The definition of "alteration" does not include "normal maintenance, re-roofing, painting or wallpapering, asbestos removal, or changes to mechanical or electrical

[40] ANPRM
[41] 28 C.F.R. § 36.402
[42] Deck v. City of Toledo, 29 F. Supp. 2d 431, 433 (D. Ohio, 1998).
[43] 28 C.F.R. Pt. 36 § 4.1.6(j) (1998).

systems."[44] Only more significant changes such as "remodeling, renovation, reconstruction, . . . changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions" qualify as alterations.[45]

The DOJ states that it presumes that the new and changed requirements in the revised ADAAG will have "negligible cost" in alterations, as with new construction.[46] Therefore, the DOJ proposes to require full compliance with revised ADAAG whenever a planned alteration takes place.

Macy's was required to comply with the ADAAG "to the maximum extent feasible" when they engaged in a $130 million renovation of portions of one of their California stores. The portions to be renovated were completely gutted, leaving only an exterior shell. The Court held that all areas to be renovated must be fully compliant with the ADAAG, including restrooms, countertops, entrances, and fitting rooms.[47]

The City of Sandusky, Ohio was held to have violated the ADA by not bringing their sidewalks into compliance "to the maximum extent feasible" when altering them. The City argued that making curb cuts and ramps smooth and flush with the street was "infeasible" because ice would build up on the flush surface more easily than if there were a slight ridge. The City points out that the ADA regulations fail to take into consideration the severe winter weather conditions in Ohio. Dismissing this argument, the court held that "the ADA regulations...do not permit such policy decisions by the public entity."[48]

The current regulations require additional compliance when an alteration affects either an area of "primary function" or the "path of travel" to that area of primary

[44] 28 C.F.R. § 36.402(a)(1) (2004).
[45] Ibid.
[46] ANPRM...
[47] Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065 (D. Cal., 1999).
[48] Ability Ctr. Of Greater Toledo v. City of Sandusky, 133 F. Supp. 2d 589, 592 (D. Ohio, 2001).

function. When altering an area of primary function, the "path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area," not just the altered portion itself, must be accessible to the maximum extent feasible.[49]

Fortunately, cost is a consideration in this analysis—a business has a defense if "the cost and scope of such alterations [for ADA compliance] is disproportionate to the cost of the overall alteration." [50] A disproportionate cost is defined as if the cost of ADA compliance is more than 20% of the cost of the total alteration project.[51] In *Speciner v. NationsBank,* plaintiffs claimed that the following work done to the lobby of the bank constituted "alterations" to an area of primary function: installations of new teller computers, a new teller counter, and modular office furniture and equipment, as well as removal and replacement of two partition walls. The Court did not reach the question of whether the actions were in fact "alterations" in an area of primary function thus triggering the additional compliance requirements. Instead they noted that to bring the area into compliance would cost more than 20% of the $294,000 cost of the work done and thus be disproportionate under the regulations.[52]

The revised ADAAG clarifies that a facility may certainly have more than one area of primary function, apparently a point of contention under the current regulations. Areas of primary function include the following: "the lobby of a bank, the dining area of a cafeteria, the meeting rooms of a conference center, [and] offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out."[53]

[49] 28 C.F.R. § 36.403(a) (2004).
[50] Ibid.
[51] 28 C.F.R. § 36.403(f)(1) (2004).
[52] Speciner v. NationsBank, 215 F. Supp. 2d 622, 633-34 (D. Md. 2002).
[53] 28 C.F.R. § 36.403(b) (2004).

D. Readily Achievable Barrier Removal

Under the current regulations, "barrier removal" accommodations, in accordance with the current ADAAG, must be made to the extent they are "readily achievable."[54] The readily achievable standard takes cost, difficulty, and size of the business into consideration.[55] Barrier removal includes such steps as installing ramps and making curb cuts for those in wheelchairs, repositioning telephones for easy reach, installing handles in toilet stalls, and installing flashing alarm lights for the hearing impaired.[56]

In its proposal to adopt the revised ADAAG, the DOJ expresses concern about the financial burden of barrier removal once the revised ADAAG is effective. Businesses have just recently complied with the original ADAAG; the expense of making perhaps minor adjustments to make spaces even *more* compliant may be an undue burden and a waste of resources. The DOJ "seeks to strike an appropriate balance to ensure that people with disabilities are able to achieve access to buildings and facilities without imposing unnecessary financial burdens . . . under the readily achievable barrier removal requirement." [57] The "happy medium" options the DOJ proposes include 1) a safe harbor provision that rewards businesses already in compliance with the original ADAAG; 2) an alternative set of reduced requirements for certain new or changed requirements; 3) identifying particular elements in the revised ADAAG that will not be required for barrier removal (i.e., not requiring buildings to meet the revised handrails-on-stairs guidelines if they have an existing elevator access); or 4) some combination of the first three options.[58]

The upshot? The DOJ is undecided and open to comments as to how much businesses will be required to modify existing buildings that are already in compliance with the current ADAAG. In fact, throughout the Advanced Notice of Proposed Rulemaking, the DOJ has scattered fifty-four questions to which it invites comment.

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[54] 28 C.F.R. §§ 36.104, 36.304 (2004).
[55] Ibid.
[56] 28 C.F.R. § 36.304 (2004).
[57] ANPRM...
[58] ANPRM....

Individuals and entities that would like to influence this rulemaking are encouraged to respond to one or multiple questions with their perspectives and arguments for a particular outcome. The due date for these comments has been extended to May 31, 2005.

E. Allocation of Responsibility in the Landlord-Tenant Relationship

So who is responsible for Title III ADA compliance in leased spaces—the property owner or the tenant? The short answer is that both are responsible, as the current regulations indicate:

> *Landlord and tenant responsibilities.* Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.[59]

While the parties may allocate responsibility as they see fit, that allocation applies only as between the landlord and tenant: ADA enforcement action by third parties may be taken against either party regardless of what lease provisions may be in place. Therefore, it is in every landlord and tenant's best interest to ensure that there is ADA compliance, regardless of whose responsibility specific compliance may be. As attorney Tobie Hazard notes, "such allocation does not affect [landlord and tenant] liability under the ADA."[60] Neither the revised ADAAG nor the DOJ's Advanced Notice of Proposed Rulemaking contemplates any change in landlord/tenant responsibilities.

The penalty for non-compliance with the ADAAG depends on whether the action is brought by an individual or the Attorney General. Under a private action, the most common remedy is injunctive relief, merely requiring the offending entity to bring the premises into compliance. If the Attorney General brings an action and the court finds a violation of the ADAAG, the court may choose to do any of the following:

- Grant any appropriate equitable relief, including

[59] 28 C.F.R. § 36.201(b) (2004).
[60] Hazard, Tobie. On the Drawing Board: New ADA Access Rules Holland and Hart, LLP. http://www.hollandhart.com/newsitem.cfm?ID=566.

    - Granting temporary, preliminary, or permanent relief
    - Providing an auxiliary aid or service, modification of policy, practice, procedure, or alternative method
    - Making facilities readily accessible to and usable by individuals or with disabilities;
- Award appropriate relief including monetary damages (if requested by the Attorney General), but not punitive damages;
- Assess a civil penalty against the entity
    - First violation: $50,000 or less
    - Subsequent violation (s): $100,000 or less[61]

The ADA regulations do specify one particular allocation of responsibility between landlord and tenant. When a tenant makes alterations that affect an area of primary function that only the tenant occupies, those alterations "do not trigger a path of travel obligation upon the landlord with respect to areas of the facility under the landlord's authority, if those areas are not otherwise being altered."[62]

When negotiating lease provisions regarding Title III ADA compliance, landlords and tenants should focus both on allocation of liability, in the form of indemnification provisions, and on allocation of cost. Trudy Ernst and Eric Labbe of Goodwin Proctor suggest that upon moving into a space, a tenant may be wise to have an ADA compliance audit conducted.[63] Conversely, a smart landlord should consider having an ADA compliance audit of tenant alterations or remodeling.

Ernst and Labbe also point out that tenants should "be aware that even where the landlord has agreed to be responsible for compliance, the tenant may wind up paying for a portion of the cost through the operating expense or 'CAM' pass-through provisions of the lease."[64] Through these provisions, landlords may be able to charge the tenant for barrier removal and alterations to common areas. While these provisions may be completely fair if the issue arises during the duration of the lease, it may be unfair "to

[61] 42 USCS § 12188 (2004).
[62] 28 C.F.R. § 36.403(d) (2004).
[63]Ernst, Trudy and Eric Labbe. Landlords, Tenants and Accessibility: When It's Time to Draft Lease Provisions, Part 2 of 2. *Banker and Tradesman*. Goodwin Proctor (June 11, 2001). <http://www.goodwinprocter.com/publications/ernst_labbe_6_11_01.pdf>.
[64] Ibid.

the extent [the expenses] arise from work required to correct noncompliance of the building at the commencement of the lease term and work done by or for other tenants."[65]

F. Employee Work Areas: The Most Significant Change

Most significant among the changes in the new ADAAG relates to employee work areas. An "employee work area" is defined under the revised guidelines as "all or any portion of a space used only by employees and used only for work."[66] The definition goes on to specify that, "corridors, toilet rooms, kitchenettes and break rooms are not employee work areas."[67]

While the former standards merely required an accessible route into and out of the work area, the new guidelines require there to be an accessible circulation route in all work areas of over 1,000 square feet. Having an accessible circulation route includes specifications beyond simply additional space—there are new specifications for door-closing speeds, slope in the route, and the force required for opening doors. [68]

206.2.8 Employee Work Areas. Common use circulation paths within employee work areas shall comply with 402.

EXCEPTIONS: 1. Common use circulation paths located within employee work areas that are less than 1000 square feet (93 m2) and defined by permanently installed partitions, counters, casework, or furnishings shall not be required to comply with 402.

2. Common use circulation paths located within employee work areas that are an integral component of work area equipment shall not be required to comply with 402.

3. Common use circulation paths located within exterior employee work areas that are fully exposed to the weather shall not be required to comply with 402.

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[65] Ibid.
[66] Revised ADAAG 106.5
[67] Ibid.
[68] Revised ADAAG 206.2.8

APPENDIX A

GEORGIA STATE AMENDMENTS TO THE NATIONAL ELECTRIC CODE

(2002 EDITION)

Georgia State Amendments to the National Electrical Code

(2002 Edition)

Georgia Department of Community Affairs
Office of Coordinated Planning
60 Executive Park South, N.E.
Atlanta, Georgia 30329-2231
(404) 679-3118
www.dca.state.ga.us

Revised January 1, 2003

GEORGIA STATE MINIMUM
STANDARD ELECTRICAL CODE

The National Electrical Code, 2002 Edition, published by the National Fire Protection Association, when used in conjunction with these Georgia Amendments, shall constitute the official *Georgia State Minimum Standard Electrical Code.*

Appendices
Appendices are not enforceable unless they are specifically referenced in the body of the code or adopted for enforcement in the ordinance of the authority having jurisdiction.

GEORGIA STATE AMENDMENTS

* *Revise the National Electrical Code, 2002 Edition, as follows:*

CHAPTER 2
WIRING AND PROTECTION

ARTICLE 210
Branch Circuits

210.8 Ground-Fault Circuit-Interrupter Protection for Personnel.

* Revise Article 210.8 (B) to read as follows:

(B) Other Than Dwelling Units. All 125-volt, single-phase, 15- and 20-ampere receptacles installed in the locations specified in (1), (2), (3) and (4) shall have ground-fault circuit interrupter protection for personnel.

(1) Bathrooms
(2) Rooftops
(3) Kitchens
(4) Within 6 feet of a sink or basin, excluding those listed in Section 517.21.

Exception: Receptacles that are not readily accessible and are supplied from a dedicated branch circuit for electric snow-melting or deicing equipment shall be permitted to be installed in accordance with the applicable provisions of Article 426.

ARTICLE 220
Branch-Circuit, Feeder, and Service Calculations
III. Optional Calculations for Computing Feeder and Service Loads
220.30 Optional Calculation – Dwelling Unit.

* Delete Section 220.30 (C) Heating and Air Conditioning Load and substitute as follows:

(C) Heating and Air-Conditioning Load. The largest of the following five selections (load in kVA) shall be included:

(1) 100 percent of the nameplate rating(s) of the air conditioning and cooling including heat pump compressors.
(2) 100 percent of the nameplate rating(s) of electric thermal storage and other heating systems where the usual load is expected to be continuous at the full nameplate value. Systems qualifying under this selection shall not be calculated under any other selection in 220.30(C).
(3) 65 percent of the nameplate rating(s) of the total central electric space heating including heat pump compressors. If the heat pump compressor is prevented from operating at the same time as the supplementary heat, it does not need to be added to the supplementary heat for the total central space heat load.
(4) 65 percent of the nameplate rating(s) of electric space heating if less than four separately controlled units.
(5) 40 percent of the nameplate rating(s) of electric space heating if four or more separately controlled units.

ANNEX D EXAMPLES
Example D2(c) Optional Calculation for One-Family Dwelling
with Heat Pump (Single-Phase, 240/120-Volt Service)
(see 220.30)

* Revise parts of Example D2 (c) to read as follows:

15-kW Electric Heat:

5760 VA + 15,000 VA = 20,760 VA or = 20.76 kVA

20.76 kVA x 65% = 13.49 kVA

*If supplementary heat is not on at same time as heat pump, heat pump kVA need not be added to total.

Totals

Net general load		19,280 VA
Heat pump and supplementary heat		13,490 VA
	Total	32,770 VA

Calculated Load for Service

32.77 kVA x 1000 ÷ 240 V = 136.5 A

Therefore, this dwelling unit would be permitted to be served by a 150-A service.

End of Amendments.