

TENANT IMPROVEMENTS, TENANT RESPONSIBILITY? AN EXAMINATION OF THE TEXAS ACCESSIBILITY STANDARDS

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When a tenant performs all of the finish-out work for its space, which is commonly the case in retail developments, the landlord often states in the lease that it is the tenant's responsibility to comply with the requirements concerning handicapped accessibility certification. But is that statement enforceable? The answer is "yes," although many tenants, landlords, and consultants are unaware that that is the case.

Identifying Who is Responsible for Signing the TDLR Compliance Form

Recently at my law firm, a retail tenant finished out its space in a shopping center, but was informed by the [Texas Department of Licensing and Registration](#) (TDLR) that the space did not comply with the requirements of the [Texas Accessibility Standards](#) (TAS). The tenant hired a consultant, through which it effected the required changes. Although the landlord was not involved at any point during the finish-out, inspection, or corrections, the consultant demanded that the landlord sign the [Architectural Barriers Inspection Response Form](#) (Form) because it was the "owner."

I set out to determine who was really responsible for executing the Form in that situation. Was it the tenant or the landlord? The law and the practical application of the law by the TDLR both confirm that it is the tenant, not the landlord, who is responsible for signing the Form in those circumstances.

Two Owners of Two Estates, Leasehold and Reversionary

There are two "owners" of estates in tenanted property—the tenant is the owner of the leasehold estate and the landlord is the owner of the reversionary estate. All of the improvements done to the tenant space in the situation described above were done to the leasehold estate (of which the tenant is the owner) and were done by the tenant. A landlord was not the proper authority to make any of the representations or warranties set forth in the Form because it is not the owner of the leasehold estate and did not perform the work.

This is not to say that the owner of a shopping center has no obligations under TAS. Landlords have joint liability *to the state* with tenants under Texas Government Code § [469.058\(a\)](#),¹ yet this is distinct from liability *to third parties*, such as visitors or employees of a tenant's property. This nuance is typically the source of confusion, but the law clearly demonstrates that tenants are held accountable to third parties for accessibility compliance, as I describe below.

TDLR Website Confirms Tenant Responsibility

The TDLR website states that if a renovation to a tenant space occurs, and those alterations are being made by the tenant in areas that only the tenant occupies, TAS will not require the landlord to

¹ "The commission may impose an administrative penalty under Subchapter F, Chapter [51](#), Occupations Code, on a building owner for a violation of this chapter or a rule adopted under this chapter." TEX. GOV'T CODE § 469.058(a).

certify to the quality of the work. In addition, [Texas Accessibility Solutions](#) confirms that “[I]f a tenant is altering a lease space in a shopping center, the scope of the review and inspection *is limited to the tenant space*” (emphasis added).

Texas Accessibility Standards Confirm Tenant Responsibility, Even If There are Path of Travel Implications

TAS § [202.4](#) was revised in 2012 and added an important exception to the new standards. The exception provides that if the scope of a project is limited only to tenant’s improvements, the landlord is not held accountable for TAS compliance, even along the path of travel. The revised provision is reproduced below in its entirety; please note the exception emphasized in bold:

2012 TAS § 202.4: Alterations Affecting Primary Function Areas. In addition to the requirements of 202.3, an alteration that affects or could affect the usability of or access to an area containing a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area, including the *parking areas*, rest rooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, unless such alterations are disproportionate to the overall alterations in terms of cost and scope. For purposes of ensuring compliance with requirements of Texas Government Code, Chapter [469](#), all determinations of maximum extent feasible and disproportionality are made by the Department in accordance with the variance procedures contained in Chapter [68](#), Texas Administrative Code. If elements of a path of travel at a subject building or facility that have been previously constructed or altered in accordance with the April 1, 1994 Texas Accessibility Standards (TAS) they will enjoy safe harbor and are not required to be retrofitted to reflect the incremental changes in the 2012 TAS solely because of an alteration to a primary function area served by that path of travel. Those elements would be subject to compliance with the 2012 TAS only when the elements of a path of travel are being altered.

EXCEPTIONS:

1. Residential dwelling units shall not be required to comply with 202.4.
2. ***If a tenant is making alterations as defined in 106.5.5 that would trigger the requirements of this section, those alterations by the tenant in areas that only the tenant occupies 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*** (emphasis added).

[Texas Access](#), a website maintained by a team of state-licensed Registered Accessibility Specialists, issued a news update discussing the implications of this massive overhaul when TAS was newly revised. The bulletin confirmed that landlords have no obligation to review or inspect anything outside of a tenant’s space under this exception. It even went so far as to say, “If [landlords] aren’t dancing a jig after reading this, then there’s no hope for any of us.” See [TDLR Related News and Events](#), TEXASACCESS.COM (last visited Feb. 10, 2017). I tend to agree.

TDLR Approves Landlord Documents that Impose Obligations on Tenant

Not only is this a relatively recent change (2012), but it is also a nuanced issue. Therefore, it is common for tenants, landlords, and even their lawyers to misconstrue the law as it has been amended. Fortunately, sophisticated property developers and landlords have been putting the amended rule into

practice. [Simon Property Group](#) (Simon), one of the largest real estate development companies in the United States, has employed this clarification in myriad tenant guidance documents. To illustrate, Simon's standard notice to tenants explicitly imposes the obligation for compliance on the tenant: the Inspection Response Form "***must be completed by the Tenant or Tenant's Consultant***" once the violations have been corrected by the Tenant. I have attached Simon's bulletin to this article for reference. It was circulated in August 2016 with TDLR's stamp of approval, for which all landlords should be grateful.

Conclusion

Although a superficial review of TAS guidelines on accessibility may appear to place the burden of compliance on the landlord as "owner" of the shopping center, the law and practical application of the law clearly establish that because the tenant is the owner of the leasehold interest and performs the work, the tenant is ultimately the entity responsible for ensuring that any alterations within the space comply with the requirements of the TDLR. As a result, a landlord is not the proper party to certify to the quality of tenant improvements with respect to an Architectural Barriers Inspection Response Form.



Texas Department of Licensing and Regulation
(TDLR)
La Plaza Mall

**IMPORTANT INFORMATION FOR THE TENANT, PROJECT ARCHITECT,
DESIGNER OR ENGINEER**

Pursuant to the Texas Elimination of Barriers Act, the State of Texas has adopted the Texas Accessibility Standards (TAS), a State law that is regulated by the Texas Department of Licensing and Regulation-Architectural Barriers Division (TDLR). Although the TAS is similar to the federal ADA Accessibility Guidelines (ADAAG), the TAS in some instances is more stringent than ADAAG. The State requires that construction documents be submitted to TDLR or a "Registered Accessibility Specialist" (RAS) for plan review and a subsequent inspection to ensure compliance with TAS.

This Bulletin is intended to provide the Tenant with a general guideline of the Tenant's responsibilities related to the construction of their store, and answer some frequently asked questions with regard to TDLR process and compliance. Questions pertaining to the information in this bulletin should be directed to Clarence Haynie, RAS at (512) 459-2121. Mr. Haynie's firm has an excellent web site that will walk you through the registration process. They also have a fee schedule for plan review and final inspections based on the estimated cost of construction. The web site and registration and plan submittal information can be found at <http://devassoc.net/index.html> and <http://devassoc.net/services.html>. For specific questions related to TAS or TDLR you can also refer to the TDLR website: <http://www.license.state.tx.us>

A TDLR Owner Agent Designation Form must be completed at the start of each project, so that the Tenant or Tenant's Consultant may complete all paperwork related to the TDLR plan review and inspection. Contact your tenant coordinator to obtain this form signed by the Owner.

A TDLR Architectural Barriers-Project Registration Form must be completed prior to submitting plans to the City. Under State Law, the City may not accept building permit applications unless there is written confirmation that a project registration number (AB#) has been assigned by TDLR.

TDLR plan review is separate from Building Department plan review for permit, and TDLR site inspection is separate from Building Department inspection. Local Building Inspectors do NOT inspect for compliance with TAS during the course of the construction of a Tenant's space.

A TDLR Request for Inspection Form must be completed at the conclusion of the Tenant's construction. Tenant must request the inspection from the Shopping Center's RAS no later than thirty calendar days after the completion of construction.

The physical inspection of the Tenant's space for compliance with TAS must occur not later than the first anniversary of the date the construction or substantial renovation of the space is completed.

The Tenant or Tenant's Consultant must provide Simon Property Group a copy of the Inspection Report issued by the RAS. If the Inspection Report indicates that there are violations in the Tenant space, the

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Tenant is responsible to correct/ remedy the non-compliant items within the timeframe indicated in the Inspection Report.

A TDLR Architectural Barriers - Inspection Response Form must be completed by the Tenant or Tenant's Consultant and submitted to the RAS who completed the physical inspection of the space, once all violations have been corrected.

Failure to comply or to remedy any non-compliant items may result in a maximum fine of \$5,000 per occurrence per day.

Once the Tenant space is found to be in substantial compliance with TAS, the project will be approved. If an RAS Inspector was utilized, they will issue a letter to this effect and forward the project file to TDLR for issuance of the Final Approval Letter.

TDLR will issue a Final Approval Letter for the Tenant's Space. The Tenant is required to ensure that Simon Property Group receives a copy of the Final Approval Letter from TDLR.

ALL Tenants are required to utilize the Shopping Center's RAS for plan review and inspection of their space. There is no exception to this policy. The Mall's required RAS is:

Development Associates
Mr. Clarence Haynie, Registered Accessibility Specialist No. 54
8213-A Shoal Creek Blvd., Suite 102
Austin, TX 78757
512-459-2121 Office
512-791-7750 Mobile
Web Site Information: <http://www.devassoc.net/index.html>
Contact: Clarence Haynie
chaynie@devassoc.net

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