

Addressing Accessibility in Capital Needs Assessments:

A Legal Primer

Overview

We will discuss the legal requirements of:

- Fair Housing Act
- Section 504 of the Rehabilitation Act of 1973
- Americans with Disabilities Act

Overview

- Fair Housing Act—applies to both privately funded and federally funded housing
- Section 504—applies to federally funded housing

Overview

- Americans with Disabilities Act
 - Title II applies to the operations of public entities, like state and local governments
 - Title III applies to places that serve the general public, like stores and day care centers

Fair Housing Act

Fair Housing Act

- Fair Housing Act passed in 1968
- Prohibited discrimination in housing based on race, color, national origin, and religion
- In 1974, Congress added sex

Fair Housing Act

- Amended in 1988, adding familial status and disability as protected classes.
- Act's protections for persons with disabilities include affirmative obligations: reasonable accommodations, reasonable modifications, and requirements for designing and constructing accessible multifamily housing

Fair Housing Act

- The design and construction requirements are distinct and separate from requirements to provide reasonable modifications and reasonable accommodations for persons with disabilities.

Fair Housing Act

The Fair Housing Act embodies “a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream” by increasing the stock of accessible housing in furtherance of Congress’s “goal of independent living.”

-- H.R. Rep. No. 100-711, at 18 (1988)

Fair Housing Act

Congress believed that the accessibility provisions of the Act would

(1) Facilitate the ability of persons with disabilities to enjoy full use of their homes without imposing unreasonable requirements on homebuilders, landlords, and non-disabled tenants;

Fair Housing Act

(2) Be essential for equal access and to avoid future de facto exclusion of persons with disabilities, including older persons who would be able to stay in their own homes as they aged;

(3) Be easy to incorporate in housing design and construction.

Fair Housing Act

Accessibility requirements are “modest.”

“Features which do not look unusual and will not add significant additional costs”

-- House Report at 25 and 18.

Fair Housing Act

A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as a posted sign saying "No Handicapped People Allow."

-- House Report

Fair Housing Act

- See 42 U.S.C. 3604(f):
- Discrimination includes the failure to design and construct covered multifamily dwellings in such a manner that:
 - (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

Fair Housing Act

- (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

Fair Housing Act

- (iii) all premises within such dwellings contain the following features of adaptive design:

Fair Housing Act

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

Fair Housing Act

- (III) reinforcements in bathroom walls to allow later installation of grab bars; and
- (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Who must comply with design and construction requirements?

Developers

Architects who design housing

Engineers who design site plans

Builders and contractors

Owners

Anyone else involved in the “design or construction”

Fair Housing Act

The design and construction requirements apply to “covered multifamily dwellings” designed and constructed for first occupancy after March 13, 1991.

“Covered multifamily dwellings”

1. All dwelling units in a building containing four or more dwelling units if the building has one or more elevators

AND

2. All ground floor units in non-elevator buildings containing four or more units.

“Covered multifamily dwellings”

- Applies to housing for rental and for sale
- Applies to privately owned and publicly funded housing

“Covered multifamily dwellings”

- Examples include: condominiums and cooperatives, apartment buildings, time-shares, dormitories, homeless shelters that are used as a residence, student housing, assisted living housing, nursing homes, and others.

What is NOT covered

- Detached single family houses
- Duplexes or triplexes
- Multistory townhouses without elevators
- Renovations and substantial rehabs of pre-1991 buildings

What is “first occupancy”?

- A building was not constructed for first occupancy if:
 - It was occupied on or before March 13, 1991
 - If the last building permit or renewal of a building permit was issued before June 15, 1990.

First Occupancy

- Building is “occupied” if a certificate of occupancy was issued and at least one dwelling unit is occupied. If a rental unit, lease must be signed and resident must occupy unit.
- If unit is for sale, new owner must have completed settlement and moved into unit.

Additions to Buildings

- Additions to an existing, pre-1991 building → four or more units must comply
- If public or common use areas added, must comply

–Fair Housing Design Manual, p. 11

New Construction and Preservation of Façade

Façade of old building preserved and interior
of building completely gutted

New building constructed behind old façade

→ building is new construction

Cannot Remove Accessible Features

Buildings that were designed and constructed in compliance cannot be renovated later in a way that removes the required features of accessible design.

Guidelines

HUD adopted the Fair Housing Accessibility Guidelines in 1991.

Provide technical guidance to builders and developers on how to comply with the accessibility provisions of the Act.

Guidelines

In 1994, HUD issued the Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines

Safe Harbors

- HUD deemed certain accessibility standards as safe harbors, incorporating all requirements of Fair Housing Act
- If a designer or builder follows one of the safe harbor standards, he can be assured that he is complying with the Act.

Safe Harbors

Free to choose a particular safe harbor but must comply with ALL of the provisions of that safe harbor. No cherry picking.

Safe Harbors

1. HUD's March 6, 1991 Fair Housing Accessibility Guidelines and the June 28, 1994 Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines;
2. ANSI A117.1-1986 – Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations and the Guidelines;

Safe Harbors

3. CABO/ANSI A117.1-1992 – Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines;
4. ICC/ANSI A117.1-1998 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines;

Safe Harbors

5. HUD's Fair Housing Act Design Manual published in 1996, as revised in 1998;
6. Code Requirements for Housing Accessibility 2000 (CRHA), published by the International Code Council (ICC), October 2000;

Safe Harbors

7. International Building Code (IBC) 2000, as amended by the IBC 2001 Supplement to the International Codes;
8. 2003 International Building Code (IBC), with one condition (see next slide)

Safe Harbors

- Condition: The IBC 2003 is a safe harbor, conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating:
"ICC interprets Section 1104.1, and specifically, the exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7."

Safe Harbors

9. ICC/ANSI A117.1-2003 - Accessible and Usable Buildings and Facilities.

10. 2006 International Building Code, published by ICC, January 2006, with the 2007 erratum (to correct the text missing from Section 1107.7.5), and interpreted in accordance with relevant 2006 IBC Commentary.

Safe Harbors

Designers and builders may rely on State or local building codes that have adopted one of the safe harbor International Building Codes (IBCs) without any changes.

Technical v. Scoping Criteria

- Note: ANSI A117.1 contains only technical criteria
- Fair Housing Act, the regulations and the Guidelines contain both scoping and technical criteria
- In using ANSI, must consult the Act, HUD's regulations, and the Guidelines

Adaptable v. Accessible

The Fair Housing Act uses the phrases “adaptable” and “usable” to describe compliance with the specific requirements of the Act.

“Adaptable” does not mean that you can add the features later on.

Fair Housing Act

Enforced by:

- The Department of Housing and Urban Development
- The Department of Justice
- State and local fair housing enforcement agencies
- Private lawsuits in federal or state court

Noncompliance

- Must retrofit (more expensive than including accessible features upfront)
- Damages (including punitive damages in federal court)
- Civil penalties

Noncompliance

Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc. 3 F. Supp. 2d 661 (D. Md. 1998)

- \$333,000 retrofit fund for common areas and interior of inaccessible units
- Incentive payment of \$3,000 to individuals seeking to retrofit their units

Noncompliance

Consent Order in *Memphis Center for Independent Living v. R. and M. Grant, et al.*
(W.D. Tenn. Feb. 15, 2007)

- \$320,000 Community Retrofit Fund
- \$10,000 in compensatory damages to Plaintiff
- \$110,000 civil penalty

Noncompliance

Consent Decree in *United States v. Deer Run Management Co., Inc., et al.* (W.D. Ark. Nov. 24, 2004)

- Applies to 4,000 ground floor apartments in 34 housing complexes in 6 states
- \$1.2 million fund to compensate individuals injured or inconvenienced by inaccessible housing
- \$30,000 civil penalty

Noncompliance

Stipulated Judgment in *National Fair Housing Alliance v. A.G. Spanos Construction Inc., et al*
(N.D. Ca. Nov. 20, 2009)

\$4,200,466 to NFHA Housing Accessibility Fund

\$950,000 to Plaintiffs

\$1,325,000 in attorney fees and costs

Rejected defenses in design and construction cases

"I didn't know." *HUD v. Arave Construction Co.*, HUDALJ 10-99-0308-8 (Nov. 15, 2001)

"Requirements are vague/ambiguous."
Montana Fair Housing v. American Capital Dev., 81 F. Supp. 2d 1057 (D. Mo. 1999)

Rejected defenses (cont'd)

"Did not design AND construct." Montana Fair Housing v. American Capital Dev.

Rejected defenses (cont'd)

“Post-litigation changes”

Memphis Center for Independent Living v. R. and M. Grant, et al., Order Granting Partial Summary Judgment, (W.D. Tenn. Apr. 26, 2004) (Changes to make public and common use areas more accessible after complaint filed does not end liability).

Rejected defenses (cont'd)

“Reliance on expertise of another”

United States v. Quality Built Construction,
309 F. Supp. 2d 756 (E.D.N.C. 2003)

(contractor and its president were not
relieved from liability by their alleged
reliance on the designer's expertise)

Rejected defenses (cont'd)

"No disabled applicants."

"We will adapt when someone who is disabled moves in."

**Section 504 of the
Rehabilitation Act of 1973**

Section 504

- Prohibits discrimination on the basis of disability in programs or activities receiving Federal financial assistance
- 29 U.S.C. 794

Section 504

- The Department of Justice coordination regulations are at 24 CFR part 41
- Other Federal agencies have Section 504 implementing regulations
- HUD's Section 504 regulations are at 24 CFR parts 8 and 9

Who Must Comply?

- **Recipient** - a State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended for any program or activity directly or through another recipient, but excluding the ultimate beneficiary of the assistance (24 CFR 8.3)

What qualifies as Federal financial assistance?

- **Federal financial assistance** - Any assistance provided or otherwise made available by the Department through a grant, loan, contract or any other arrangement

What qualifies as Federal financial assistance?

Assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real or personal property or any interest in or use of such property

(24 CFR 8.3)

Examples

- HUD funded programs or activities, including:
 - Public housing authorities
 - HUD-assisted housing
 - States, cities and counties that receive Federal funds

Examples

- Section 811 program
- Section 202 program
- Project-based voucher program
- Tax Credit Assistance Program (TCAP)

Examples

- HOME Program
- HOPWA Program
- CDBG Programs
- Neighborhood Stabilization Program (NSP)

***NOT an exhaustive list**

Basic Requirements

- As enforced by HUD, Section 504 requires:
- Non-discrimination because of disability
- Effective communications
- Reasonable accommodations

Basic Requirements

- Administering programs and activities in the most integrated setting appropriate to the needs of persons with disabilities

Basic Requirements

- Physical access
- Making new and existing housing and non-housing facilities accessible for persons with disabilities
- Includes dwelling units, public and common use areas

Program Accessibility

- Equal opportunity to access and use HUD-funded programs and activities
- Subpart C of 24 CFR part 8
- General Requirement, Section 8.20

New Construction – Housing Facilities

New Construction

- New multifamily housing projects (projects containing five or more dwelling units) shall be designed and constructed to be readily accessible to and usable by individuals with disabilities
- Effective July 11, 1988

New Construction

- At least 5% of the units in a project or one unit, whichever is greater, must be accessible to people with mobility impairments
- An additional 2% of the units in a project or one unit, whichever is greater, must be accessible to people with vision or hearing impairments (24 CFR 8.22)

New Construction

- In circumstances where greater need is demonstrated, HUD may prescribe higher percentages or numbers (24 CFR 8.22(c))

New Construction

- Accessible units must be on an accessible route from site arrival points and connected by an accessible route to public and common use facilities located elsewhere on the site

Distribution of Units

- Required accessible dwelling units shall be distributed throughout projects and sites and shall be available in a sufficient range of sizes and amenities to provide meaningful housing choice (24 CFR 8.26))

Alterations of Existing Housing Facilities

Substantial Alterations

- Multifamily housing project with 15 or more units
- Cost of alterations is at least 75% of the replacement cost of the completed facility
- New Construction Requirements Apply
(24 CFR 8.23(a))

Other Alterations

- Alterations that do not qualify as “substantial alterations” require that alterations to units be made accessible to the maximum extent feasible
- Up to the point that would constitute an undue financial and administrative burden (24 CFR 8.23(b))

Other Alterations

- If alterations of single elements or spaces of a dwelling unit, when considered together, amount to an alteration of a dwelling unit, the entire dwelling unit shall be made accessible
- Up to 5% requirement unless higher % is required (24 CFR 8.23(b) & (c))

Other Alterations

- Alterations to common areas or parts of facilities that affect accessibility of existing housing facilities shall, to the maximum extent feasible, be made to be accessible to and usable by individuals with disabilities (24 CFR 8.23(b))

Existing Housing Facilities

Existing Housing Facilities

- A recipient shall operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities (24 CFR 8.24)

Existing Housing Facilities

- Does not require making each existing facility accessible; or
- Require action that will result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens (24 CFR 8.24; PHAs subject to 24 CFR 8.25)

Accessibility Standard

- Uniform Federal Accessibility Standards (UFAS)
- Departures from technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided (24 CFR 8.32)

Accessibility Standard

- The U.S. Access Board issued new Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Guidelines in 2004
- The ABA Accessibility Guidelines, once adopted by HUD as an enforcement standard, will replace the current UFAS

Accessibility Standard

- The ABA Accessibility Guidelines, as adopted by HUD, will only apply to new construction and alterations and generally will not apply to existing facilities that are in compliance with Section 504 and UFAS except where altered

Accessibility Standard

HUD recipients are not required to comply with the new Guidelines for purposes of Section 504 compliance until HUD adopts them as enforceable standards

Americans with Disabilities Act (ADA)

Purpose of the ADA

Provide comprehensive access for individuals with disabilities

ADA Coverage

- **Relevant parts of ADA**
- **Title II** – State & local government entities
- **Title III** – Public accommodations and commercial facilities

HUD's Role under the ADA

- HUD is the designated agency under Title II to investigate and resolve complaints relating to state and local public housing, housing assistance, and referral
- HUD cannot enforce Title III but Title III requirements may make enforcement of the Fair Housing Act /Section 504 easier

Title II of the ADA

- Covers all programs, services, and activities of state and local governments
- Does not depend on receipt of Federal financial assistance
- 28 CFR part 35

Title II of the ADA

- Applies to housing built, operated, or sponsored by state or local governments (tax credits, tax exempt bonds)
- For example, Public Housing Authorities, entities operating CDBG, HOPWA, HOME funds, etc.

Title III of the ADA

- Public accommodations associated with housing that are open to the general public and commercial facilities
- For example, rental offices, sales offices, homeless shelters, and commercial spaces associated with housing like daycare centers
- 28 CFR part 36

Architectural Requirements

- All newly constructed facilities must be designed and constructed in accordance with DOJ standards
- All altered facilities must be altered in accordance with DOJ standards

Architectural Requirements Existing Facilities

- Program access in facilities built pre-ADA (Title II)
- Readily achievable barrier removal (Title III)

Architectural Requirements

- Many recent changes to ADA Architectural Requirements

Architectural Requirements

- As of March 15, 2012, the 2010 Standards must be followed for new construction, alterations, and program access

Architectural Requirements

- Prior to March 15, 2012:
 - 2010 Standards;
 - 1991 Standards (no elevator exception);
or
 - UFAS
- Must follow standards consistently in facility

2010 Standards

- Based on the ADA Accessibility Guidelines adopted by the U.S. Access Board
- ADA Application and Scoping Ch.1-2;
- Common Technical Provisions Ch.3-10

2010 Standards

- The additional technical and scoping requirements set by the DOJ:
 - Title II - Section 35.151
 - Title III - Sections 36.401-406
(Subpart D)
- DOJ website, <http://www.ada.gov/>

- Requirements of ADA are similar to, but not identical, to the requirements of Section 504

Application of Multiple Laws

- Many properties are subject to more than one law and accessibility standard
- Compliance with one law does not ensure compliance with other laws
- Must follow all applicable laws

Application of Multiple Laws

- Fair Housing Act requirements apply to 100% of covered dwellings
- Section 504 requirements would apply a greater level of accessibility in 5% / 2% of those dwellings
- ADA requirements as applicable

Application of Multiple Laws

- State and local disability rights laws
- If state or locality has more stringent standards than federal access laws, you must build in compliance with the more stringent standards

Law	Applicability
Fair Housing Act	<ul style="list-style-type: none">•Covered multifamily dwellings•Private and public housing•24 CFR part 100

Law	Applicability
Section 504	<ul style="list-style-type: none">•Programs & activities receiving Federal financial assistance•HUD assisted housing•24 CFR part 8

Law	Applicability
ADA	Not dependent on Federal funds
Title II	<ul style="list-style-type: none">• State & local government entities• 28 CFR part 35
Title III	<ul style="list-style-type: none">• Public accommodations & commercial facilities• 28 CFR part 36