of race, color, religion, sex, disability, familial status, or national origin;

- using different qualification requirements, processing procedures, or evaluation standards in accepting applications or in approving home loans because of race, color, religion, sex, disability, familial status, or national origin; and,

- failing to make available the same information or the same types of home loans because of the race, color, religion, sex, disability, familial status, or national origin of the present or the prospective residents or occupants of dwellings in the area of the dwelling for which such loan is sought.

Although many of these basic prohibitions against mortgage lending discrimination have been in existence since the original Fair Housing Act was passed in 1968, most of the litigation dealing with this subject has occurred in recent years. The reason for this modern upsurge in lending cases can be traced in part to amendments made in 1989 to the Home Mortgage Disclosure Act ("HMDA"), which required most financial institutions to make yearly reports on the number and dollar amount of their mortgage loans and applications "grouped according to census tract, income level, racial characteristics, and gender." Publication of the HMDA data showed substantially higher rejection rates for African-Americans and Hispanics than for whites, a fact that prompted HUD and other federal agencies, as well as private organizations and litigants, to increase their efforts to challenge home lending discrimination.

Cases involving allegations of lending discrimination under the Fair Housing Act have tended to fall into two categories: (1) those involving discrimination based on the loan applicant's race or membership in some other protected class; and (2) those involving discrimination based on the racial makeup of the neighborhood where

the loan applicant's home is located, a practice that is sometimes called "redlining" or "neighborhood discrimination." Both types of claims may be present in a single case, but usually only one is involved.

It is important to distinguish between these two types of claims, because the proof needed to establish one is significantly different from the proof needed to establish the other. These two types of claims are dealt with, respectively, in Sections B and C, after which Section D discusses some general ideas for investigating lending discrimination cases.

B. Lending Discrimination Based on the Applicant's Protected-Class Status

Any person who is denied a housing loan or subjected to less favorable terms or conditions in connection with such a loan because of his or her race, color, religion, sex, disability, familial status, or national origin has a claim under the Fair Housing Act against the financial institution involved. One way of proving that the respondent institution denied a loan or exacted more stringent terms or conditions because of the complainant's race or other protected-class status is by direct evidence (e.g., a statement by a loan officer that the black complainant's application was being denied because of his race). This type of "smoking gun" evidence, however, is not often available.

More typically, the necessary discriminatory intent will have to be inferred from evidence that shows that the respondent gave less favorable terms and conditions of a loan to protected class applicants (specifically, the complainant) than were offered or provided to contrasting class applicants, who were generally similarly situated. To establish a prima facie case based on this type of evidence requires proving four elements. In the case of a loan denial, these four elements are:

(1) That the complainant is a member of a class protected by the Fair Housing Act, and this fact was known by the respondent;

(2) That the complainant applied and met the minimum qualifications for a home loan from the respondent;

(3) That the respondent rejected the complainant's loan application despite the complainant's qualifications; and,

(4) That the respondent approved loans for applicants of a contrasting class with qualifications substantially similar to the complainant's.

In a "terms or conditions" case (as opposed to a denial case), Elements 3 and 4 would have to be adjusted appropriately (e.g., the respondent has dealt with the complainant, but on less favorable terms than it has dealt with others whose qualifications are similar to the complainant's).

In both denial and "terms or conditions" cases, Elements (1) and (3) are usually easy to prove, which means that lending cases generally turn on Elements (2) and (4). It may be difficult to prove that a complainant was qualified for the loan, because, for example, the appraised value of the home is too low to support the requested loan. Even if the complainant's application is less than perfect, however, illegal discrimination may be shown if the respondent approved loans for similarly situated non-minority applicants.

Thus, the key is usually Element (4), which will require an analysis of the respondent's treatment of other loan applicants whose situation is comparable to the complainant's. Obtaining the information needed for such an analysis is generally essential to determining whether or not illegal discrimination has occurred in this type of lending case.

Only a handful of decisions have been reported in which such evidence of contrasting class "comparables" was held sufficient to prove illegal discrimination. One example occurred in a case where the proof showed that the respondent approved at least six loan applications from white couples with similar credit histories as the black plaintiffs'. The court held that this evidence "gives rise at least to an inference that the [plaintiffs] were treated differently on account of their race."

Once this type of evidence is presented, the burden shifts to the respondent to offer some legitimate reason for its preferential treatment of non-minority applicants. If the respondent cannot produce such a reason or if the evidence shows that the reason put forth by the respondent was not, in fact, applied even-handedly to all loan applicants, then a basis exists for concluding that this reason is simply a "pretext" for illegal discrimination against the complainant.

C. "Redlining:" Lending Discrimination Based on the Racial Characteristics of the Neighborhood where a Mortgage Loan is Sought

The term "redlining" refers to the practice of refusing to make loans or otherwise discriminating in providing financial assistance for housing in particular geographic areas. The courts have defined "redlining" as "mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling." By its very nature, redlining focuses not on the would-be borrower's characteristics, but on the characteristics of the area where the mortgage loan is sought. Thus, white as well as African-American home buyers may bring a redlining claim if they are injured by the denial of financing for a home because of its location in an integrated or predominantly black area.

While lending discrimination based on the race or other

protected-class status of the residents of the area where the mortgage loan is sought violates the Fair Housing Act, HUD has recognized that financial institutions are free to consider all other factors "justified by business necessity" in making their lending decisions. This concern for allowing lenders to exercise legitimate business judgments so long as the factors considered are unrelated to race or some other prohibited factor finds support in judicial opinions. For example, in one of the few appellate decisions dealing with lending discrimination, the court affirmed a decision holding that the plaintiffs' evidence failed to make out a case of illegal redlining, noting that:

> The Fair Housing Act's prohibition against denying a loan based upon the location of the dwelling does not require that a lender disregard its legitimate business interests or make an investment that is not economically sound. . . . The regulations implementing the Fair Housing Act [state that] lenders may legitimately consider "the present market value of the property offered as security . . . and the likelihood that the property will retain an adequate value over the term of the loan."

Thus, the basic problem in a redlining case will be to determine whether the respondent denied financial assistance because of a prohibited factor or because of some legitimate business consideration. In some cases, direct evidence of the respondent's discriminatory intent may be available (e.g., a loan officer's statement that the complainant's application is being denied because the home is in a "black neighborhood").

In the absence of such blatant statements, however, the respondent's illegal motive will have to be established by more circumstantial evidence. This may be done by establishing a "prima facie" case, which requires that the following five elements be shown:

(1) That the housing for which the loan was sought is located in a predominantly minority neighborhood;

(2) That the complainant applied for and met the minimum qualifications for a loan from the respondent;

(3) That the respondent rejected the complainant's loan application despite the complainant's qualifications;

(4) That an independent appraisal concluded that the value of the house supported the loan applied for; and,

(5) That the respondent approved loans in nonminority neighborhoods for homes and financing similar to those sought by the complainant.

In a redlining case alleging discriminatory "terms or conditions" (as opposed to an outright denial), Elements 3 and 5 would have to be adjusted appropriately (e.g., the respondent has dealt with the complainant, but on less favorable terms or conditions than it has dealt with applicants from other neighborhoods whose homes and qualifications are similar to the complainant's).

If these elements are established, the respondent must produce evidence that its decision to deny financial assistance or to provide less attractive terms or conditions to the complainant was motivated by a legitimate business consideration. The key to resolving the case will then be determining whether the evidence shows that the respondent's claimed legitimate reason was in fact a pretext for discrimination.

In most reported redlining cases, the plaintiff has produced statistical evidence concerning the respondent's lending record in minority and nonminority

neighborhoods. Indeed, the persuasiveness of this type of evidence "lies at the very heart of any redlining allegation." In one important case, for example, the court ruled that the evidence was sufficient to establish illegal discrimination, because it showed that the respondent had rejected a high percentage of loan applications submitted from neighborhoods with a significant black population. (See Old West End Association v. Buckeye Federal S&L, 675 F. Supp. 1100 (N.D. Ohio 1987).)

On the other hand, lending redlining claims have been defeated where the statistical evidence of the respondent's different treatment of white and minority neighborhoods was seen as unpersuasive. In one of these failed cases, the plaintiffs showed that the respondent had approved many more loans in white areas than in black areas, but the court found this evidence flawed because it did not identify the number of qualified applications received by the respondent in the relevant areas. (See Cartwright v. American Savings Loan Association, 880 F. 2d 912 (7th Cir.1989).) The court's opinion stated that "it is absurd to allege a discriminatory refusal to approve loan applications in a particular area without proof that qualified borrowers actually applied and were rejected." Indeed, the respondent in this case claimed that it had approved all of the previous applications it received from the relevant minority neighborhood, and the court concluded:

> We fail to understand how [the defendant] can be considered as responsible for redlining a particular geographical area if in fact as the testimony reveals it granted every application submitted to it for homes located therein, and the [plaintiffs] failed to demonstrate that this is not, in fact, what occurred.

Clearly, the tasks of obtaining and presenting the proper kinds of statistical evidence to prove a redlining case will not be easy. In fact, private

plaintiffs have rarely been able to produce sufficient evidence of differential treatment to win a redlining case in the absence of direct evidence of the respondent's discriminatory intent.

D. Suggestions for Investigating a Lending Case

An excellent, non-technical article on "Investigating Claims of Discrimination in Housing Finance" was written by Stephen M. Dane, an experienced fair housing lawyer, for the Winter 1995 edition of the John Marshall Law Review (28 John Marshall L. Rev. 371-82). Many of the ideas discussed in this section are taken from this article.

Dane's first suggestion for investigators of lending discrimination cases is that they gain some general knowledge about the home finance industry. This would include learning about who the principal players are in the secondary market as well as the home loan origination business (e.g., loan intake officers, appraisers, and underwriters), and what these people do. Knowing the different types of companies, tasks, and decisions that are involved in the home loan process will provide the investigator with the equivalent of a good road map for a journey to an unfamiliar place.

The second key to a good lending investigation is to make sure that the investigation is focused on the critical areas of the particular case presented. This will save a great deal of time and trouble and will help guarantee that the evidence obtained is actually useful in resolving the charge that has been made.

One way to focus the investigation is to determine exactly who is accused of making the adverse decision (e.g., an underwriter with the loan originating company; an independent appraiser; someone employed by a secondary market buyer of the loan). There is no point in spending a lot of effort investigating the loan originating company if the crucial decision was

made elsewhere.

Another important way to focus the investigation is to determine whether the case involves a claim of neighborhood discrimination ("redlining") or a claim of discrimination based on the individual applicant's minority status. It is rarely necessary, for example, to develop facts relevant to a redlining claim if the case being investigated is based on the rejection of a black applicant who sought a loan for a house in a white suburb.

Another focusing factor is whether the case alleges discriminatory intent or discriminatory effect. For example, is the claim based on the theory that the lender has inconsistently applied legitimate underwriting guidelines to the minority complainant because of discriminatory intent, or is it based on the theory that the guidelines themselves, though consistently applied, are illegal because they disproportionately exclude minority borrowers? A different set of facts would need to be assembled to prove these two very different theories of discrimination.

In some cases, a full scale investigation of the lender's business might be called for, because its reputation and lending decisions suggest that discrimination permeates its entire operation. More often, however, the respondent institution will be accused of only one particular instance or type of discrimination, and focusing the investigation on developing facts relevant to this allegation will be the proper way to proceed.

Once the investigator has developed a proper focus, the next step is collecting the relevant information. There are a wide variety of possible sources of information in a lending case. Among the most likely to be helpful are:

<u>The Complainant</u>: For matters such as establishing the

exact sequence of significant events; the location of the property involved; the income, debts, and other factors relevant to the credit-worthiness of the complainant; and any written documents obtained in the loan application process (e.g., an adverse action notice from the lender).

The Respondent Institution: For matters such as its underwriting guidelines and the history of their use at this institution; application files of the complainant and other similarly situated applicants (e.g., those whose financial situation, requested loan, and value of home are similar to the complainant's); the institution's HMDA disclosure statements and any records that it is required to keep pursuant to the Community Reinvestment Act; and any information about how and to whom the institution markets its available loan products.

The Respondent's Employee Who Made the Crucial Decision: Of particular importance here will be the level of experience and training that this person has; the assumptions about the complainant's loan application that were made by this person, and why these assumptions were made; and what judgments were made by this person, and why (it is particularly important to obtain whatever written basis is claimed to exist for the decision, such as the institution's own underwriting guidelines).

Other Relevant Employees and Past Employees of the Respondent: These would include other personnel who have the same job as the employee who made the crucial decision (to determine if they have similar or different training, assumptions, and practices as the key employee), employees who have been designated by the institution as its Community Reinvestment Act officers, and former employees who were involved in the institution's home loan process.

Third Parties: A great deal may be learned about the respondent institution (e.g., how it markets itself,

what its reputation and practices are perceived to be) by interviewing local real estate agents, appraisers, community and neighborhood groups, and even employees of other lenders. In particular, experience has shown that minority real estate agents may be a rich source of information about whether a particular lending institution seems to be avoiding minority applicants and/or minority neighborhoods.

Regulatory Agencies: Federally insured banks, thrifts, and credit unions undergo regular reviews by Federal regulators for compliance with anti-discrimination laws such as the Equal Credit Opportunity Act (ECOA) and other relevant laws such as the Community Reinvestment Act (CRA). If a lender violates ECOA in a real-estate related lending transaction, that lender may well have violated the Fair Housing Act also.

The regulators' compliance reviews ordinarily include an MLIS-like analysis of the lenders' lending patterns, as well as comparative reviews of the lenders' files. Based on their review, the agencies prepare written reports evaluating the lenders' compliance.

Investigators should routinely request copies of these reports. MLIS shows which Federal regulatory agencies regulate which lenders. In addition to acquiring copies of regulators' compliance reports, informal dialogue between the investigator and the local office of the appropriate Federal regulator may be of great value and is highly encouraged.

Investigators should consider that other divisions of HUD, such as Ginnie Mae and FHA, also possess volumes of information on lenders. In addition, state agencies that regulate mortgage lenders may also have relevant information on lenders. New York, for instance, has a state version of the Community Reinvestment Act.

Fannie Mae and Freddie Mac: HUD has programmatic regulatory authority over Fannie Mae and Freddie Mac. Fannie Mae and Freddie Mac are privately owned,

congressionally chartered institutions that purchase loans from primary lenders such as banks, thrifts, and mortgage companies. In making these purchases, they collect a wide range of information about the loans to ensure that they are worth purchasing. Pursuant to HUD's authority, investigators can request information from Fannie Mae and Freddie Mac about lenders that they do business with.

This investigatory tool has great promise. Consider a case where whites are granted loans even though they exceeded loan-to-value ratios, while blacks were denied loans under the same circumstances. HMDA data does not include loan-to-value ratios, but Fannie Mae and Freddie Mac have this information about loans they purchase. Therefore, the investigator may submit a request to Headquarters to have Fannie Mae and/or Freddie Mac produce this information.

Local Fair Housing Groups: A local private or governmental fair housing organization may have information about the respondent institution and may even have conducted a testing program directed against the lending activities of this institution; contacting such an organization might, therefore, be worthwhile.

Finally, two points must be kept in mind in investigating any lending case where the defense is that the applicant was not credit-worthy. First, virtually every applicant for any type of loan in the United States today has some flaws in his or her credit background (e.g., a late payment on a credit card). The existence of such a flaw does not necessarily mean that the respondent's decision to reject the applicant or to impose more stringent terms or conditions on the applicant is justified when challenged under the Fair Housing Act. The law does not require that loans be made to poor credit risks, but it does require equality of treatment.

The key in most lending discrimination cases, therefore, is not whether the complainant has a credit

contrasting class received more favorable terms than did the complainant).

The prima facie case for a "redlining" type lending complaint would be:

(1) That the housing for which the loan was sought is located in a neighborhood associated with a protected group.

(2) That the complainant applied for and met the minimum qualifications for a loan from the respondent.

(3) That the respondent rejected the complainant's loan application despite the complainant's qualifications.

(4) That an independent appraisal concluded that the value of the house supported the applied-for loan.

(5) That applicants whose overall loan application package was substantially equal to or less favorable than the complainant's received approval when the homes financed were in non-minority neighborhoods.

8-7 THE "OCCUPANCY STANDARD" DEFENSE (Reserved)

8-8 DISCRIMINATION BASED ON DISABILITY: REASONABLE ACCOMMODATIONS; REASONABLE MODIFICATIONS; and ACCESSIBILITY STANDARDS

A. Introduction

The Fair Housing Act prohibits discrimination on the basis of disability in virtually all types of housing transactions. In addition to such traditional forms of discrimination as refusals to sell and rent and the imposition of discriminatory terms and conditions, the Act in Section 804(f)(3) outlaws three particular types

of discrimination that apply only to disability cases. These are: (1) refusals to make reasonable accommodations on behalf of persons with disabilities; (2) refusals to allow persons with disabilities to make reasonable modifications in their housing premises; and (3) failures to include certain accessibility features in the design and construction of new multifamily housing. These three special forms of disability discrimination are discussed below in, respectively, Sections B, C, and D.

B. Reasonable Accommodations

1. Introduction

Section 804(f)(3)(B) makes it unlawful to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled person] equal opportunity to use and enjoy a dwelling." This provision has been called a "rule that requires the breaking of rules." It means that, under certain circumstances, housing providers and others must change their ordinary operating procedures to accommodate the housing needs of disabled persons.

Examples of accommodations that would be required by Section 804(f)(3)(B) include: (1) allowing a blind tenant to have a seeing eye dog even if the building has a "no pet" policy; (2) reserving a parking place for a mobility-impaired tenant closer to his unit than other tenants are entitled to have; and (3) waiving a rule against non-tenants using the laundry room to allow the friend of a disabled tenant to do that tenant's laundry.

A violation of Section 804(f)(3)(B) may also occur if a municipality refuses to make changes in its zoning or other land-use regulations needed to allow the operation of a group home for disabled persons. These group home cases, which have accounted for much of the litigation interpreting Section 804(f)(3)(B), are

discussed along with other zoning and land-use cases in Part 8-8.

Under what circumstances must a housing provider make an accommodation for a disabled tenant? A discussion of this issue and of the elements necessary to establish a violation of the "reasonable accommodations" provision of the Act is contained in Part 2. Part 3 gives some additional examples of situations where reasonable accommodations may be called for. Evidentiary considerations in "reasonable accommodation" cases are discussed in Part 4.

2. Elements of a "Reasonable Accommodation" Case

A close reading of Section 804(f)(3)(B) shows that there are four elements that must be present to establish a violation of this provision. First, there must be a rule, policy, practice, or service that is the target of the requested accommodation. Second, an accommodation in this rule, policy, practice, or service "may be necessary" to afford a disabled person (or someone residing or associated with such a person) the "equal opportunity to use and enjoy a dwelling." Third, the accommodation requested must be "reasonable." And fourth, the respondent must have refused to make the accommodation; however, it is not necessary that this refusal be shown to have been prompted by ill will or hostility towards disabled persons.

The key to most "reasonable accommodation" cases will be the second and third elements, because the first and fourth elements are rarely in dispute. Nevertheless, it is important to remember that there must be a specific rule, policy, practice, or service that the respondent has put into effect and there must be a refusal by the respondent to make an accommodation for the complainant in this rule, policy, practice, or service. The "refusal" required by the last element may result from some sort of formal request by the complainant; but this is not required. In some cases,

it is sufficient that the respondent knew or should have known of the complainant's need for an accommodation and failed to provide it. Conversely, other cases have required that the complainant articulate the need for the accommodation and establish the relationship between the accommodation and the complainant's disability.

In practice, to ensure a clearly focused investigation, a complainant will have undertaken the following steps prior to filing a complaint:

- identified the individual with authority to provide the necessary accommodation;
- provided some documented notice of the need for the accommodation; and
- provided enough information about the disability to allow the person to understand that the request results from a need related to the disability.

It is not, however, necessary that a complainant await an explicit and documented denial of his or her request before filing claim -- a substantial delay in allowing the accommodation or the imposition of overly burdensome conditions upon the complainant may amount to a refusal of the accommodation.

What sorts of accommodations "may be necessary" to afford "equal opportunity to use and enjoy a dwelling"? Usually, this question turns on the nature of the particular disability experienced by the complainant (or by the person residing or associated with the complainant). For example, a blind person who cannot move about effectively without a seeing eye dog would be severely limited in her ability to use an apartment in which animals are forbidden.

The goal of the "equal opportunity" part of Section 804(f)(3)(B) is to permit a disabled person "to

experience the full benefit of tenancy." This calls for a three-part inquiry. First, it should be noted specifically how the complainant is limited in the use or enjoyment of the residence by his or her disability. Second, an analysis must be done of how the requested accommodation will reduce this limitation so that the complainant can use and enjoy the dwelling on an equal basis with non-disabled tenants. And finally, it must be determined whether the requested accommodation "may be necessary" for this equalization or whether there are other ways that this equalization could be just as well achieved. The concept of "necessity" requires at least that "the desired accommodation will affirmatively enhance a disabled [person's] quality of life by ameliorating the effect of the disability."

Even if a requested accommodation may be necessary to afford a complainant equal housing opportunity, the respondent may still legally refuse to make it if the accommodation is not "reasonable." An accommodation is not considered reasonable if it imposes an undue financial and administrative burden on a respondent or requires a fundamental alteration in the nature of its program. The law does not obligate housing providers to do everything humanly possible to accommodate disabled persons. For example, a landlord is not required to offer new supportive services -- such as counseling and medical care -- that it would not otherwise provide to its tenants.

In determining whether an accommodation is "reasonable," cost is usually an important consideration. Landlords may be required to bear some financial burdens in accommodating disabled residents, but unreasonable costs need not be incurred.

In one case, for example, a mobility impaired tenant who lived on an upper floor asked the landlord to install a new elevator after the current elevator experienced a number of breakdowns. The landlord refused, and the court held that this refusal was reasonable, because the landlord had contracted with a

maintenance company to make needed repairs on the current elevator and because the $65,000 cost of a new elevator was considered out of proportion to the legitimate demands of the tenant, who was on a month-to-month lease and was therefore "free to walk away from [the landlord] on payment of only one month's rent." (See Congdon v. Stine, 854 F. Supp. 355 (E.D. Pa. 1994).) While this case may seem to deal with a requested reasonable modification, the court treated it as a request for accommodation because, it was alleged, that the respondents engaged in the practice of failing to maintain their elevators.

In focusing on the costs or other hardships to a respondent in a "reasonable accommodation" case, only those costs and hardships associated with making the specific accommodation requested by the individual complainant should be considered. In some cases, respondents have argued that they could not make an accommodation for the complainant without also providing similar treatment for all other tenants, which would be too difficult or costly to do. This argument has been rejected, because a landlord is under no legal obligation to make the same accommodations for non-disabled tenants as it must make for disabled tenants. Thus, for example, a landlord who is asked by a mobility-impaired tenant to provide an assigned parking space near the tenant's unit could not refuse this request on the ground that all of its other, non-disabled tenants would also be entitled to the same privilege.

While the complainant's need for an accommodation and the respondent's hardship in making this accommodation should be analyzed separately, the outcome of a particular case may well turn on a comparative evaluation of these two factors. Thus, according to one court, "determining whether a requested accommodation is reasonable requires, among other things, balancing the needs of the parties involved." A similar notion was expressed by another court, which observed that a required accommodation "must survive a

cost-benefit balancing that takes both parties' needs into account."

In some cases, landlords have attempted to justify their refusal to make accommodations for disabled tenants on the ground that these tenants pose a danger to other persons or property and are therefore outside the protection of the Fair Housing Act. This defense is based on Section 804(f)(9) of the Act, which provides that housing need not be made available to disabled individuals whose tenancies would "constitute a direct threat to the health or safety of other individuals" or would "result in substantial physical damage to the property of others." Generally, courts have rejected this defense, at least until after the landlord has made whatever reasonable accommodations may be necessary to reduce this danger. In one case, for example, a landlord sought to evict a mentally ill tenant because of his threatening behavior toward other tenants, but the court held that this eviction could not proceed until after reasonable efforts were made to accommodate the tenant's disability, because the Fair Housing Act "requires defendants to demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize the risk [a tenant] poses to other residents before they may lawfully evict him."

3. Other Examples of "Reasonable Accommodations"

As the examples mentioned in the previous section demonstrate, "reasonable accommodation" cases may involve a wide variety of fact patterns. Thus far, however, three particular types of accommodations have accounted for much of the litigation.

One of these involves the situation where a disabled tenant requests an assigned parking space near his unit. This type of case is often easy to evaluate and has usually resulted in a decision for the tenant (i.e., the landlord is required to make the requested accommodation in its parking arrangements). However, a landlord may be entitled in such a case to condition

its approval of a special parking space on the tenant's providing certain information (such as a description of the tenant's vehicle and its license number), so that the landlord may be sure that the assigned space is in fact being used only to benefit the disabled tenant.

A second common type of "reasonable accommodation" case involves assistive animals. Here, a disabled tenant claims that a dog or other animal is needed to help the tenant cope with the requirements of day-to-day living. These cases usually turn on the issue of just how necessary a particular animal is for this particular tenant, since the hardship to the landlord of waiving its "no pet" rule is usually not great. A well-trained seeing eye dog for a blind tenant or "hearing" dog for a deaf tenant usually results in an easy win for the complainant, although a strong defense was raised in one case where a hearing dog was alleged to be poorly trained and therefore of no great value -- other than as a companion -- to the complainant. (See Bronk v. Ineichen, 54 F.3rd 425, 7th Circuit, 1995.) It should be noted that even an untrained animal may qualify as an assist animal. If, for example, a complainant had a disability with a profound psychological impact on the complainant, and an untrained animal companion relieved this distress and thus enabled the disabled person to use and enjoy a dwelling essentially as a non-disabled person would, then the burden to distinguish the animal as an assistive animal and not a simply a pet would probably be satisfied. The key in all assistive animal cases will be proof of the relationship between the service provided by the animal and the impact of the complainant's disability upon his or her ability to use and enjoy a dwelling.

In another case, a HUD administrative law judge ruled that the managers of a California apartment complex violated the Fair Housing Act by attempting to evict a disabled tenant because he had a cat. In that case (HUD v. Dutra, No. HUDALJ 09-93-1753-8 (HUD Office of Administrative Law Judges 11-12-96), See Exhibit 8-4), Mr. Durand Evan rented an apartment at the River

Gardens Apartment, which had a no-pets policy. Mr. Evan was disabled as a result of fybromyalgia, a musculoskeletal condition, and mental anxiety.

When Mr. Evan moved into River Gardens, he had a cat. He obtained verification from his mental health counselor and his physician that the cat served a therapeutic purpose, but the River Gardens management refused to let him keep his cat and initiated eviction proceedings. As a result, Evan suffered extreme mental stress and was hospitalized on one occasion. After he filed an administrative complaint of disability discrimination with HUD, River Gardens allowed him to keep the cat.

A third active area of "reasonable accommodation" litigation involves a condition called "multiple chemical sensitivity" ("MCS"). A person who suffers from MCS may have an allergic-like reaction to various chemicals that substantially impairs one or more major life activities, including one or more chemicals used by a landlord in cleaning, maintenance, or construction activities. These are often difficult cases. The proof of the complainant's condition and its causal relationship to the chemicals used by the respondent usually requires the testimony of doctors or other expert witnesses. In addition, the complainant often suffers an adverse reaction to a variety of substances, which means that more than one type of accommodation may be needed. Finally, determining whether the landlord can make the requested accommodations in an MCS case without undue cost or hardship also often involves analysis of a number of difficult factual issues, such as the availability of alternative substances and their costs. Thus far, there is little in the way of judicial guidance in MCS cases, which means that each of these cases must be dealt with on the basis of its own particular facts and the general principles set forth above in Part 8-8-B-2.

Of course, "reasonable accommodation" cases may arise in situations that do not fall into any of these three

categories. One example involved a retirement community that was held liable for refusing to allow a mobility-impaired tenant to use a specially equipped golf cart to move about the grounds. As with MCS cases, these less typical situations must be dealt with on the basis of the particular facts presented and the guidance set forth in Part 8-8, B.2.

4. Evidentiary Considerations

The investigation of a "reasonable accommodation" case will produce evidence concerning at least five elements. These are: (1) whether the complainant (or a person residing with or associated with the complainant) has a disability within the meaning of the Act; (2) whether the respondent knew or should have known of the disability; (3) whether the accommodation in the respondent's rules, regulations, policies, or procedures is needed in order for the person to use the housing (or, put another way, how will the accommodation equalize the use and enjoyment of the housing in comparison to non-disabled persons); (4) whether the respondent knew or should have known of the need for the accommodation; (5) whether the accommodation was denied, or delayed so much that it amounted to a denial. The respondent may challenge the accommodation by claiming that it is unreasonable, as posing an undue hardship through financial and administrative burden; by claiming that the tenancy of the person will pose a risk to the health or safety of others or to the property of others; or by refuting one or more elements of a prima facie case.

Depending on the particular circumstances of the case being investigated, the gathering of evidence concerning each of these elements may be easy or difficult. For example, in the case of a blind tenant who has requested permission to have a seeing eye dog in her apartment, there may be no dispute as to her disability, the respondent's knowledge of the disability, or the way in which this disability limits her use and enjoyment of her apartment. Still, the

file should contain objective evidence that may be available (such as medical and governmental records that would verify the nature of the disability) beyond the complainant's own statement to help establish these elements. Care should be taken not to ask overly intrusive questions of complainants about the nature or severity of his or her disability. Additionally, the diagnosis or "label" attached to the person's disability is generally irrelevant to the case -- if, for example, a person in a wheelchair needs a reasonable accommodation in a landlord's policy that no wheeled vehicles may be used on grassy areas, the reason for the person's use of a wheelchair is not relevant to the case.

In other cases, these matters may turn out to be hotly contested by a respondent who claims that the disability is not nearly so limiting as the complainant alleges. In cases where these matters are disputed, the expert testimony of a doctor or other health care professional will almost certainly be required. The complainant will often have a regular doctor whose statement should be obtained. The respondent may also have consulted an expert on these matters, and obtaining that person's views will be important. Lay witnesses (such as other tenants or friends and relatives of the complainant) may also testify as to how limiting the disability appears to be, although their testimony is usually not given as much weight as that of health professionals. Again, medical and government records (such as prior Social Security claims or awards) may be helpful in establishing relevant facts about the complainant's disability and how it impacts on his or her daily living.

It is important to be as specific as possible in identifying what accommodation in the respondent's rules, policies, practices, or services is being requested. Accommodations such as waiver of a "no pet" rule or assignment of a particular parking space are fairly straight forward matters, but others (such as those involved in MCS cases) may be hard even for the

complainant to precisely articulate.

It is also helpful to develop a chronological list of the verbal and written communications between the complainant and the respondent on this matter. This chronological account should reveal such important facts as: (1) whether the complainant requested that the respondent take some particular action; (2) when and how this request was communicated to the respondent; (3) when and how the respondent dealt with this request; and (4) any other basis for concluding that the respondent should have known of the need for an accommodation and failed to make it. This chronology will also be helpful in providing evidence concerning the final element of a "reasonable accommodation" case; that is, how and in what way did the respondent manifest its refusal to make the requested accommodation.

Evidence concerning how the accommodation will help the complainant is of two types. The first deals with how the accommodation will remove limitations on the complainant's use and enjoyment of the dwelling. This may well involve many of the same sources of evidence as are available to establish the nature of the complainant's disability (e.g., the complainant's medical records). The goal of this evidence is to show that the accommodation will substantially advance the complainant's ability to use and enjoy the dwelling.

The second type of evidence on this point deals with whether the complainant can achieve this heightened ability to use and enjoy the premises without this <u>particular</u> accommodation. In one case, for example, a landlord attempted to show that two deaf tenants had successfully lived in an apartment prior to deciding that they needed a "hearing" dog. The point here is to explore alternatives to the accommodation sought. Find out what evidence exists that supports or refutes the proposition that alternative arrangements may be just as helpful to the complainant as the requested accommodation. If the complainant claims that he or

she would not be just as well off with the alternative arrangements, make an effort to identify the specific ways in which the alternative would be inferior to the requested accommodation (e.g., how it would involve greater risk of injury, illness, or humiliation).

A respondent's claim that an accommodation is not "reasonable" must be explored in detail. What are the precise reasons given by the respondent for this claim? For example, if the claimed reason is financial, then the actual costs of making the requested accommodation must be determined. In addition, it must be determined whether the respondent is simply speculating about such costs or whether he has done some actual investigation of what these costs would be (e.g., by getting a bid from a construction company for additional parking spaces). It is also important to note whether the costs or other hardships alleged by the respondent involve just the accommodation requested by the complainant or also those that the respondent feels would have to be made for all other tenants if he accommodates the complainant.

In addition to these basic elements, other sources of evidence will be available in certain types of "reasonable accommodation" cases. For example, a number of these cases involve landlord-tenant disputes, some of which have resulted in the landlord bringing eviction proceedings against the tenant after the tenant refused to follow the landlord's rules (e.g., by having a dog despite a "no pet" rule). In these cases, it will be important to fully explore the details of this dispute, including, if an eviction proceeding occurred, facts concerning when and how the landlord initiated this proceeding, how the tenant defended against it, and what decision, if any, was rendered by the state court that handled the matter.

In eviction and certain other "reasonable accommodation" cases, the landlord may claim that the disabled tenant posed a health or safety danger. In these cases, the specific nature of the dangers

allegedly posed will have to be explored, as will the potential accommodations that might have been made to reduce or eliminate these dangers.

C. Reasonable Modifications

1. Introduction

Section 804(f)(3)(A) makes it unlawful to refuse "to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises." In rental situations, landlords may condition permission for such modifications, where it is reasonable to do so, "on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted."

The "premises" to which these modifications may be made include not only the interior of the disabled person's unit, but also lobbies, main entrances, and other public and common use areas of a building. The modifications may be made at any time during a tenancy (i.e., they need not all be made when the tenant first moves in).

Examples of modifications covered by Section 804(f)(3)(A) include: (1) widening doorways to make rooms more accessible; (2) installing grab bars in bathrooms; and (3) lowering kitchen cabinets to a height suitable for persons in a wheelchair.

Renters who seek to make such modifications must not only pay for the work themselves, but must also seek the landlord's approval in advance. Although housing providers do not have the right to select or approve who will do the work, they are entitled to secure some protection against improper modifications and faulty workmanship. Thus, "[a] landlord may condition permission for a modification on the renter providing a

reasonable description of the proposed modification as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained."

In rental situations, the statute provides for an additional restriction: the landlord may condition permission for a modification on the renter agreeing to restore the premises to their prior condition. This restoration requirement, however, is subject to a number of limitations. First of all, the restoration requirement may be imposed only on modifications made to the interior areas of an individual unit, not on those made to public or common areas. In addition, landlords may insist on restoration only where "it is reasonable to do so." It would usually not be reasonable, for example, to insist that widened doorways be made narrow again; on the other hand, landlords may require that grab bars be removed or that lowered kitchen cabinets be restored to their original height. Furthermore, there is the statute's specific exception for "reasonable wear and tear."

When this restoration requirement is properly invoked, landlords may negotiate as part of the restoration agreement a provision requiring the disabled tenant to make payments into an interest-bearing escrow account to ensure that funds will be available to pay for the restoration work. However, landlords are generally not allowed to charge disabled tenants an additional security deposit to ensure that the work will be done, although such a charge is permitted under certain limited circumstances.

2. Elements of a "Reasonable Modification" Case

Thus far, very few Section 804(f)(3)(A) cases have been decided. Both of the major decisions to date have involved wheelchair-bound residents who wanted to install a ramp or other device to make gaining access to their units easier, and both resulted in fairly easy victories for the complainants. With little judicial

guidance available, the key to understanding most "reasonable modification" cases remains the specific language used in Section 804(f)(3)(A) and HUD's regulation interpreting this provision, which appears at 24 C.F.R. §100.203.

The first point to note about the statutory language is that Section 804(f)(3)(A) divides "reasonable modification" cases into two groups: those that involve rental situations and those that do not. The requirement for allowing reasonable modifications applies to both, but the restoration requirement applies only in rental cases. Thus, the first fact that an investigator of a "reasonable modification" case should determine is whether or not a rental is involved.

Generally, when reasonable modification cases arise, additional issues may be raised. They could include a respondent's request that additional insurance be paid for by the complainant to indemnify the respondent from injuries suffered from a modification, a requirement that the complainant undertake future upkeep of the modification, a requirement that the complainant sign special waivers of liability, etc. Generally, these issues may be addressed as claims that there has been a failure to provide reasonable accommodation or that unequal treatment based on disability has occurred.

These situations are analytically separate from the reasonable modification claims and should be identified and investigated separately. For example, a requirement that only persons with disabilities sign a waiver of liability has been found to constitute unequal treatment under the analogous provision of Section 504. Similarly, a requirement that special insurance be carried on a modification could be found to constitute a denial of a reasonable accommodation in policies and practices or unequal treatment based on disability, especially where additional insurance has not been required of other tenants or where the existing insurance coverage includes coverage of

injuries arising from use of fixtures on the common area.

If a rental is not involved (e.g., the case involves a condominium where a unit-owner seeks to make the modification), then only the basic "reasonable modification" requirement of the first part of Section 804(f)(3)(A) needs to be considered. This requirement has four elements: (1) that the proposed modification "may be necessary to afford such [disabled] person full enjoyment of the premises"; (2) that the modification must be "reasonable"; (3) that the modification must be "at the expense of the disabled person"; and (4) that permission to make the modification has been refused or conditioned or delayed in a way that is not reasonable.

With respect to the first element -- the need for the modification -- the language of Section 804(f)(3)(A) is somewhat similar to the language dealing with the need for an accommodation in the "reasonable accommodations" provision of Section 804(f)(3)(B). Thus, many of the same considerations discussed in connection with that provision (see the discussion of the second element in Part 8-8-B-2) would also be relevant here.

There are some key differences, however, in how the two provisions treat this "need" element. The "reasonable accommodations" provision is designed only to give disabled persons "equal opportunity" vis-a-vis non-disabled persons, whereas the "reasonable modifications" provision speaks in terms of affording disabled persons "full enjoyment" of the premises. This difference in language suggests that modifications may go beyond what is needed for equalizing a disabled person's opportunity to enjoy a dwelling to include all physical changes that may be necessary for that person's "full enjoyment" of the housing. In addition, the "reasonable modification" provision speaks of full enjoyment "of the premises," not just of "a dwelling" as does the "reasonable accommodations" provision, which means that, as noted above, modifications may be made to the public and common use areas of a multiple-

unit dwelling as well as to the individual's own unit.

The second element of a modification case is that the proposed modification must be "reasonable." As with the first element, this element sounds much the same as the "reasonableness" requirement in "reasonable accommodations" cases, but there is at least one key difference. In both types of cases, a respondent may defend its refusal to make a proposed accommodation or to permit a proposed modification on the ground that the proposal puts an unreasonable burden on the respondent. (See the discussion of element three in Part 8-8-B-2 for a review of this defense.) The difference lies in the fact that this burden in a "reasonable accommodations" case is usually financial, whereas there should be no financial burden in a "reasonable modification" case because the modification must be made "at the expense of the disabled person."

With the cost defense eliminated, it will be harder for a respondent to establish "unreasonableness" in a modification case than it would be in an accommodation case. In a modification case, a respondent will be limited to claiming that the proposed modification is objectionable for nonfinancial reasons, such as that it is not planned properly or that it is likely to cause some administrative or other nonfinancial burden (e.g., by unreasonably interfering with the use or enjoyment of the premises by other residents of the complex).

In one case, for example, a mobility-impaired resident of a trailer park sought to install, at her own expense, a wheelchair ramp to her trailer. The owners of the trailer park objected, but the court ruled that they had not shown that the proposed modification would be unreasonable. The court noted that the construction of the ramp would be paid for by the resident and concluded that the defendants' nonfinancial reasons for objecting to it -- that the ramp might obstruct traffic and/or make parking more difficult -- were not borne out by the evidence. (See United States v. Freer, 864 F. Supp. 324 (W.D.N.Y., 1994).)

The third element of a "reasonable modification" case is that the disabled person must pay for the modification. This is a fairly straight-forward requirement that will generally not cause much dispute, but two items should be noted. First, this requirement does not exist as part of a "reasonable accommodation" claim. It is important, therefore, to distinguish between claims alleging refusals to make accommodations and those based on refusals to permit modifications, because only in the latter type of claim is the disabled person required to pay for the change. Note that both types of claims may be made in a single case, but, because these claims involve somewhat different elements, they must be analyzed separately.

A second potential problem in the payment requirement is the question of who will pay for the upkeep of the modification. This will not be a problem in many cases; for example, once a doorway has been widened, its upkeep will presumably require no more expense than would the original doorway. On the other hand, some modifications, such as an outdoor ramp for a wheelchair, might require some maintenance costs. The clear intent of the statute is that all of the expenses of a modification must be borne by the disabled person, but it is not clear whether a housing provider may demand some sort of advanced guarantee that this will be done, and no guidance from the case law is yet available on this question.

The fourth element in a modification case is that the respondent must have refused to permit the modification or delayed or conditioned the modification unreasonably. It is not necessary to show that this refusal was based on ill will or hostility to disabled persons. Therefore, establishing this element is fairly easy in most cases, particularly since modification cases usually involve a rather formal proposal made to the respondent by the disabled person.

In one case, however, the respondents did not formally

refuse the proposed modification, but rather engaged in protracted negotiations with the complainant over a period of many months about the details of the proposal. There was also evidence in this case of the respondents' frustration with, if not outright hostility towards, the demands of the disabled resident. Ultimately, the respondents were found to have engaged in "dilatory conduct and delaying tactics aimed at defeating" the complainant's proposed modification, and therefore their behavior was held to constitute to a "refusal" in violation of Section 804(f)(3)(A). (See HUD v. Ocean Sands, Inc., Fair Housing -- Fair Lending Reporter, ¶25,055 (HUD ALJ 1993).)

In addition to these four basic elements, modification cases involving rentals may also involve the element of restoration, under which a landlord may require the renter to agree in advance to restore the premises to their pre-modification condition. No reported cases have yet dealt with this provision. The statute makes clear that this requirement only applies to modifications made to "the interior of the premises" and that a landlord may invoke the restoration requirement only "where it is reasonable to do so."

As discussed in the previous section, it would not be "reasonable" to demand restoration of some types of modifications (e.g., widened doorways), whereas restoration would be reasonable for others (e.g., lowered kitchen cabinets). The key to deciding whether a landlord's demand for restoration is reasonable will usually depend on whether the particular modification being proposed is likely to interfere with the landlord's or the next tenant's use and enjoyment of the premises. If it is, then conditioning permission for the modification on restoration will generally be considered "reasonable."

There are other "reasonableness" factors that may also have to be analyzed in a case involving the restoration requirement. These include whether the landlord has

asked that an escrow account or other type of advance payment be made by the tenant to ensure that the restoration work will be done.

3. Evidentiary Considerations

The investigation of a "reasonable modification" case will produce evidence concerning at least nine elements. These are: (1) the nature of the disability of the complainant (or of the person residing or associated with the complainant); (2) how this disability limits the disabled person's enjoyment of the premises involved in the case; (3) what modification is being proposed by the complainant; (4) how and to what degree will this modification increase the disabled person's enjoyment of the premises; (5) has the complainant prepared or caused to be prepared plans for the modification that are sufficiently specific and professional to ensure that the work will be done properly; (6) is the complainant willing and able to pay for the modification; (7) how will the modification interfere with the use or enjoyment of the premises by other persons or otherwise adversely affect the respondent; (8) how has the respondent manifested its refusal to permit the modification; and (9) does the case involve a rental and, if so, has the landlord insisted that the renter eventually restore the premises to their pre-modification condition. If the answers to the questions in Element (9) are "Yes," then additional elements concerning the reasonableness of the landlord's restoration demand will be presented.

Elements (1), (2), (4), (7), and (8) are similar to elements that must be explored in a "reasonable accommodation" case. For a discussion of the evidentiary considerations relating to these elements, see the discussion of these elements in Part 8-8-B-4.

Also, the suggestion in that discussion that a chronological list be developed of the verbal and written exchanges between the complainant and the respondent concerning the changes sought by the

complainant is equally applicable in "reasonable modification" cases. Among other things, these exchanges may contain evidence of the respondent's frustration or hostility in dealing with the needs of the disabled tenant, and although such hostility is not a required element of a "reasonable modification" case, it is nevertheless relevant in such a case.

The additional elements in a "reasonable modification" case are those dealing with the complainant's construction plans and commitment to pay for the modification (Elements (5) and (6)) and the possibility of the respondent's invoking the restoration requirement if the case involves a rental situation (Element (9)). With respect to the former, the specific plans should be obtained, along with any supporting documents and testimony from building or other professionals concerning whether the modification is designed in a proper and workmanlike manner. In addition, copies should be obtained of any written estimates that have been prepared for the complainant by the firm(s) chosen to do the work, as well as some documentation of the complainant's ability to pay for this work (e.g., bank statements or other financial records).

In rental cases where the landlord insists on restoration, an additional set of issues may be presented. These will not have to be explored if the tenant has agreed to do the restoration, but if he objects, then the investigation will have to deal with whether the landlord's restoration demand is authorized by the statute (i.e., whether it is limited to "interior" modifications) and whether it is "reasonable" (e.g., by detailing the ways in which the modification may interfere with the use or enjoyment of the apartment by subsequent tenants). An additional area that might have to be explored in these restoration cases is whether the landlord has insisted on some form of advance payment to ensure that the work is eventually done and, if so, whether this insistence is "reasonable" under the circumstances (e.g., whether

the tenant's financial condition and/or other evidence concerning the tenant's general reliability raise legitimate doubts about his ability or willingness to pay for the restoration when the time comes).

D. Failure to Include Accessibility Features in Certain Multifamily Housing

1. Introduction

Section 804(f)(3)(C) makes it unlawful to fail to include certain accessibility-enhancing features in the design and construction of "covered multifamily dwellings" built for first occupancy on or after March 13, 1991. The "covered multifamily dwellings" subject to this provision are buildings consisting of four or more dwelling units that have at least one elevator and also ground floor units in non-elevator buildings with four or more units. A failure to design and construct in accordance with the Act is a continuing violation of the Act.

All such multifamily dwellings are required to have six accessibility-enhancing features that are specifically set forth in Section 804(f)(3)(C). These requirements are that:

(1) public and common use areas must be "readily accessible to and usable by disabled persons";

(2) all doors designed to allow passage must be wide enough to accommodate persons in wheelchairs;

(3) an accessible route into and through the dwelling must be provided;

(4) light switches, electrical outlets, thermostats, and other environmental controls must be placed in accessible locations;

(5) bathroom walls must be reinforced to allow installation of grab bars; and,

(6) kitchen and bathrooms must have sufficient space to allow people in wheelchairs to maneuver about.

The third requirement -- that of providing an accessible route into the building -- is excused if it is impracticable to provide such a route because of the terrain or unusual characteristics of the site. Examples of situations where this exception might apply include hilly terrain that necessitates entering the building by means of a long, steep stairway or a waterfront site where a building is constructed on stilts.

There are a number of ways for architects and builders to be sure that they have complied with the requirements of Section 804(f)(3)(C). The statute provides that compliance with the appropriate requirements of the American National Standards Institute for buildings and facilities providing accessibility and usability for physically disabled people (commonly known as "ANSI A117.1") suffices to satisfy the last four requirements of Section 804(f)(3)C). In addition, HUD has issued a detailed set of "Fair Housing Accessibility Guidelines" to provide technical guidance to builders and developers in complying with Section 804(f)(3)(C)'s requirements. While compliance with these HUD guidelines is not mandatory, they are "intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act." The statute also provides that compliance with a state or local law that includes the Section 804(f)(3)(C) requirements will be deemed to satisfy this part of the Act.

An increasing number of complaints alleging violations of Section 804(f)(3)(C) have been filed and judicial decisions are beginning to outline the applicability of this part of the law. In addition, there are

increasing numbers of settlements requiring retrofitting or other creative remedies to ensure more accessible housing where retrofitting is not physically possible. There are three critical elements to the investigation of a design and construction case: first, if the building is still under construction, preliminary investigation (and consideration of a possible referral to the Department of Justice for a temporary restraining order) should occur on an expedited basis. Second, all of the relevant respondents should be identified and named during the course of the investigation, including builders, developers, architects and business successors to these entities, including homeowner associations. The Department has taken the position that it will not name individual purchasers of units for personal use as respondents in design and construction cases. Third, it is most useful to be aware of all potential violations before extensive conciliation efforts are made, to ensure that corrective actions are taken with respect to all violations.

As the case law develops, the guidance for investigating these complaints will also develop. However, investigation of design and construction cases may be guided by use of the checklist attached as Exhibit 8-5, with additional references made to the American National Standards Institute (ANSI) standards and, in particular, the Design Manual published by the Department as exemplifying a "safe harbor" for compliance with the Act itself as well as HUD's interpretative guidelines found at 24 CFR Section 100.205 and the commentary found on at 24 CFR Chapter I, Subchapter A, Appendix I, Appendix II, and Appendix III.

2. Elements of a Section 804(f)(3)(C) Case

There are only two elements that must be shown to establish a violation of Section 804(f)(3)(C). These are: (1) that the housing involved in the case is covered by this provision; and (2) that one or more of

the accessibility-enhancing features specified in this provision has been omitted from the design and construction of this housing.

With respect to the first element, there are two parts to the issue of whether the particular housing involved in the case is covered by Section 804(f)(3)(C). One of these has to do with the physical nature of the housing, and the other is concerned with how recently it was constructed.

Physically, the housing must be a building with four or more units. Coverage does not extend to single-family units, duplexes, or any other buildings with fewer than four units. This means, for example, that Section 804(f)(3)(C) does not apply to any units in a large apartment complex consisting of many buildings, each of which has less than four units.

Another physical requirement for coverage deals with whether the building has at least one elevator. If it does, then all units in the building are covered. If it does not, then only ground floor units and public and common use areas on the ground floor are covered.

The second part of the nature-of-the-building element is timing. Only new dwellings that were built for first occupancy on or after March 13, 1991, are covered. HUD regulations also exempt all new construction that received its last building permit by June 15, 1990, regardless of how late occupancy occurred. Thus, for example, if the last building permit for a multifamily housing complex was issued on June 1, 1990, but the complex was not completed for first occupancy until March 15, 1991, it would not be covered by Section 804(f)(3)(C).

The second element in a Section 804(f)(3)(C) case is whether any of the required design and construction features specified in this provision have been omitted from a covered multifamily dwelling. As noted in the previous section, there are a number of ways for

architects and builders to be sure that they have complied with these requirements. On the other hand, if any of the six requirements has not been included, the statute is violated. And, as with the other parts of Section 804(f)(3), there is no requirement that the respondent be shown to have acted with an ill will or based on some degree of hostility toward disabled persons. The simple failure to design and construct the covered dwelling as required by Section 804(f)(3)(C) is sufficient to establish a violation.

One additional factor that should be noted is who would be a proper complainant and who would be a proper respondent in a Section 804(f)(3)(C) case. Certainly, an existing disabled tenant whose use and enjoyment of his or her unit is limited by the absence of the required features would have standing to sue, but other potential complainants might also have valid claims. These might include potential tenants who are deterred from applying by the lack of accessibility features, testers, and fair housing and/or disabled rights groups that wish to challenge the failure of a building to include the required features. With respect to potential respondents, virtually everyone who participated in the design and construction of the building could be held liable, including architects, builders, building contractors, site engineers, and others in the development chain.

3. Evidentiary Considerations

Investigation of a Section 804(f)(3)(C) claim should be a fairly straight-forward matter. Referring to the elements that must be established as set forth in the preceding section, an investigator must first determine if the building involved is a "covered multifamily dwelling." This can be done simply by determining the number of units in the building and also determining whether the building has at least one elevator. In addition, the time when first occupancy occurred must be noted; if this is after March 13, 1991, it will also be necessary to determine when the last building permit