

CHAPTER 2: POLICY STATEMENT INTRODUCTION

This policy statement provides information on the design and construction requirements of the Fair Housing Act (the Act) with regard to new construction of residential housing built for first occupancy after March 13, 1991, and the U.S. Department of Housing and Urban Development's (HUD or the Department) administration and enforcement of these requirements. The policy statement, together with the Final Report of HUD Review of Model Building Codes (Final Report), provide technical assistance to building code organizations and officials regarding the accessibility provisions of four model building codes and identify variances between the model building codes and the requirements of the Act, the Department's implementing regulations at 24 CFR Part 14 et al. (the regulations), and the Fair Housing Accessibility Guidelines (the Guidelines).

This policy statement and the Final Report also provide guidance on the Department's policy concerning the relationship between the requirements of the Act and its enforcement by the Department and the model building codes and other accessibility laws and standards.

Further, this policy statement and Final Report responds to the House of Representatives Committee on Appropriations directive to HUD to complete its review of a matrix submitted by building and code organizations that compared the Guidelines with the accessibility provisions in the model building codes and to issue a policy statement by December 31, 1999. H.R. Rep. No. 298, 106th Cong., 1st Sess. 34 (1999).

BACKGROUND

The Fair Housing Act mandates that all covered multifamily dwellings designed and constructed for first occupancy after March 13, 1991, must contain specified features of accessible and adaptable design. 42 U.S.C. § 3604(f)(3)(C). In 1989, the Department issued its regulations implementing the Act's design and construction requirements. 24 CFR 100.205. Both the Act and the regulations state that compliance with the appropriate requirements of the American National Standards Institute (ANSI) A117.1 standard suffices to satisfy the Act's accessibility requirements. (The Act uses the term "handicap," however, in keeping with preferred terminology established in the Americans with Disabilities Act of 1990, this policy statement and Final Report uses the terms "persons with disabilities," "disability," or "disabled.")

On March 6, 1991, after consideration of extensive public comment from architects, developers, builders, persons with disabilities, and other interested groups, the Department published the "Fair Housing Accessibility Guidelines," which set forth specific guidelines for designing dwelling units consistent with the Act. 56 FR 9472-9515. In keeping with the Act and the regulations, the Guidelines are largely based on the ANSI A117.1 standard.

In 1992, the Department was contacted by the Council of American Building Officials (CABO), and the model building code organizations. CABO advised the Department of its interest in drafting building code language that would reflect the design and construction requirements of the Act, and asked the Department to provide technical assistance to its Board for Coordination of Model Codes (BCMC) in this regard. The Department recognized that incorporation of building code requirements that are consistent with the Act's requirements would provide an increased measure of compliance. Therefore, in support of this effort, the Department agreed to provide technical assistance to BCMC and the building industry organizations, and did so during 1992 and 1993. The model building code organizations subsequently incorporated the results of their efforts into the model building codes.

The American National Standards Institute (ANSI) is responsible for establishing technical standards in many different areas. Among the standards addressed by the ANSI, through the A117 Committee, are technical standards for the design of housing and facilities that are accessible to persons with disabilities. BCMC recommended that the ANSI A117 Committee set up a Residential Task force to develop technical criteria to address the Act's accessibility requirements. The Department is a member of the ANSI A117 Committee, and was asked to appoint representatives to serve on the Residential Task Force. The technical criteria developed by the ANSI Residential Task Force were included in the ICC/ANSI A117.1-1998. (The reference to ICC, International Code Council, reflects an organizational change in the ANSI only.)

Since 1961, ANSI A117.1 has been the accessibility standard used by the private industry, and, since 1980, has included technical criteria for fully accessible dwelling units. The 1998 ICC/ANSI A117.1 calls these fully accessible dwelling units "Type A dwelling units." The requirements for Type A dwelling units are found at Section 1002 of ICC/ANSI A117.1-1998. The 1998 ANSI also contains technical criteria for a "Type B dwelling unit." These criteria are found at Section 1003 of ICC/ANSI A117.1-1998 and are intended to reflect the technical requirements for dwelling units required to be accessible by the Act. Note, however, that the Act does not require that developers build new construction to the Type A standard in order to meet the requirements of the Act, although

a Type A unit will satisfy the Act's requirements.

In 1997, CABO, three model building code organizations and several building industry organizations contacted the Department to discuss, among other items, the importance of assuring that the design and construction requirements of the Act were accurately reflected in the three model building codes and in the draft International Building Code (IBC), which was scheduled for completion in 2000. The Department met with representatives of these groups along with representatives of disability advocacy organizations and indicated its willingness to review these model building codes for consistency with the requirements of the Act, the regulations, and the Guidelines, and then convene a public meeting at a later date to share the results of that review.

In late December 1997, CABO submitted to the Department a matrix that compared model four building codes to the Fair Housing Act's design and construction requirements. In the fall of 1998, the Department awarded a contract to Steven Winter Associates, Inc., (SWA) to analyze the matrix and the model building codes and to identify those sections of the codes which did not meet the requirements of the Act, the regulations, and the Guidelines. The Department also requested that SWA draft recommendations on how each identified variance could be corrected in order to conform with the Act, the regulations, and the Guidelines. The four model building codes are as follows:

National Model Building Codes:

National Building Code, Building Officials and Code Administrators International (BOCA), 1996 edition

Uniform Building Code, International Conference of Building Officials (ICBO), 1997 edition

Standard Building Code, Southern Building Code Congress International (SBCCI), 1997 edition

International Building Code:

International Building Code, (First Draft) International Code Council (ICC) November 1997

Although the original matrix focused on the 1997 First Draft of the International Building Code (IBC), because the IBC had progressed to a proposed IBC 2000, the ICC asked the Department to include in its review, to the greatest extent possible, the proposed IBC 2000 and the new 1999 edition of the National Building Code published by BOCA. The Department agreed to undertake a limited review of the proposed IBC 2000, but due to time constraints, was unable to review the 1999 BOCA. To facilitate review of portions of the proposed IBC 2000, BOCA prepared an update to the December, 1997 matrix that compared the Guidelines with the First Draft IBC, and the proposed IBC 2000. In addition, the Department was provided with copies of Chapters 10 and 11, Appendix to Chapter 11, Section 3407, and Appendix 34-2 of the proposed IBC 2000.

The Department formed a Model Code Working Group (Working Group) to work with its contractor on the review of the model building codes. The Working Group consisted of staff from the Office of Fair Housing and Equal Opportunity, the Office of General Counsel, and the Office of Housing. A representative of the U. S. Department of Justice (DOJ) also participated in the Working Group.

The Department published a draft report and policy statement on October 26, 1999. On November 10, 1999, the Department convened a public meeting to listen to comments on the draft report. The Department solicited written comments as well. The Department carefully considered all of the comments it received and has made revisions accordingly so that the policy statement and Final Report reflects the public comments.

The Final Report consists of an Introduction (preamble), this policy statement, and four reports on the model building codes. The four model building code reports were prepared by SWA and have been reviewed and adopted by the Department.

The Final Report serves solely to respond to CABO's request for technical assistance and to provide technical assistance to other interested parties on this issue. The Department has not and does not intend to promulgate any new technical requirements or standards by way of this Final Report. The Department does not intend this Final Report to be considered an endorsement of any model building code.

The Department is not attempting through the issuance of this Final Report to shift its responsibility to enforce the design and construction requirements of the Act to any model code organization or to state and local building code officials. However, the Department recognizes that an important way to increase compliance with the design and construction requirements of the Act is to incorporate those requirements into state and local building codes.

HISTORY OF FAIR HOUSING ACT DESIGN AND CONSTRUCTION REQUIREMENTS

In 1988, Congress extended the protections of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, the nation's primary housing civil rights law, to families with children and to persons with disabilities. 42 U.S.C. § 3604. In response to the serious lack of accessible housing in the United States, Congress provided that all covered multifamily dwellings built for first occupancy after March 13, 1991, include certain basic features of accessible and

adaptive design. 42 U.S.C. § 3604(f)(3)(C). These basic accessibility requirements are known as the Act's design and construction requirements.

The Act mandates that all covered multifamily dwellings built for first occupancy after March 13, 1991, shall be designed and constructed so that:

- 1) the public and common use areas are readily accessible to and usable by persons with disabilities;
- 2) all doors designed to allow passage into and within all premises in covered dwellings are sufficiently wide to allow passage by persons using wheelchairs;
- 3) all premises within dwellings contain the following features of adaptive design:
 - a) an accessible route into and through the dwelling;
 - b) light switches, electrical outlets, thermostats and other environmental controls in accessible locations;
 - c) reinforcements in bathroom walls to allow later installation of grab bars; and
 - d) usable kitchens and bathroom such that an individual using a wheelchair can maneuver about the space.

42 U.S.C. § 3604(f)(3)(C). These provisions were incorporated in the Department's Fair Housing Accessibility Guidelines as seven requirements. The underlying concept behind the design and construction requirements is to create housing that is accessible for persons with disabilities but which does not necessarily appear to be different from conventional housing.

The Act's design and construction requirements apply to "covered multifamily dwellings," which are buildings consisting of 4 or more units if such buildings have one or more elevators; and ground floor units in other buildings consisting of 4 or more units. The terms "dwelling unit," "ground floor," and "building" all have particular meanings that are set forth in the Act, the regulations, and the Guidelines. The Act's design and construction requirements apply to all covered multifamily dwellings built for first occupancy after March 13, 1991. The Act's design and construction requirements do not apply to alterations or renovations to multifamily dwelling units or to single-family detached houses.

The Act does not set forth specific technical design criteria that builders have to follow in order to comply with the design and construction requirements. It does provide, however, that compliance with the appropriate requirements of the American National Standard Accessible and Usable Buildings and Facilities (commonly referred to as ANSI A117.1) would satisfy the Act's design and construction requirements for the interiors of dwelling units. 42 U.S.C. § 3604(f)(4).

In the Department's 1989 regulations implementing the design and construction requirements of the Fair Housing Act, the Department specifically stated that compliance with the appropriate requirements of ANSI A117.1-1986 suffices to satisfy the requirements of the Act relating to interiors of dwelling units. 24 CFR 100.205(e). The Department also references ANSI A117.1-1986 for the public and common use areas, in its definition of "accessible." At the time Congress passed the Act, and the Department promulgated its regulations, the current version of ANSI A117.1 was the 1986 edition.

The Act emphasizes that Congress did not intend the Department to require states and units of local government to include the Act's accessibility requirements in their state and local procedures for the review and approval of newly constructed covered multifamily dwellings. However, Congress authorized the Department to encourage the inclusion of these requirements into their procedures. 42 U.S.C. § 3604(f)(5)(C).

The Act makes it clear that it does not invalidate or limit any other state or federal laws that require dwellings to be designed or constructed in a manner that affords persons with disabilities greater access than that required under the Act. 42 U.S.C. § 3604(f)(8).

Congress charged the Secretary of HUD to "provide technical assistance to states and units of local government and other persons to implement the requirements of paragraph 3(C) [setting forth the design and construction requirements]." 42 U.S.C. § 3604(f)(5)(C). To this end, in order to properly meet this obligation, on March 6, 1991, the Department published the "Fair Housing Accessibility Guidelines," (the Guidelines) published at 56 FR 9472-9515, which set forth specific guidelines for designing dwelling units consistent with the Fair Housing Act. On June 24, 1994, the Department published its "Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines," published at 59 FR 33362-33368 (the Questions and Answers About the Guidelines).

Section I of the Guidelines states:

"These guidelines are not mandatory, nor do they prescribe specific requirements which must be met, and which, if not met, would constitute unlawful

discrimination under the Fair Housing Act. Builders and developers may choose to depart from these guidelines and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act. These guidelines are intended to provide a **safe harbor** for compliance with the accessibility requirements of the Fair Housing Act." 56 FR at 9499.

The Department also published a Fair Housing Act Design Manual (Design Manual). In addition to describing the design and construction requirements of the Act, the Design Manual provides further technical guidance of a practical nature on the application of the Guidelines. The Design Manual also serves as a safe harbor for compliance.

CABO/ANSI A117.1-1992 AND ICC/ANSI A117.1-1998 AS SAFE HARBORS

Through its review of the SWA draft reports, the Department reviewed the technical standards in the CABO/ANSI A117.1-1992 and the ICC/ANSI A117.1-1998, particularly the latter's technical standards for the interiors of dwelling units, called Type B dwelling units, to determine whether these later editions of ANSI meet the requirements of the Act, the Guidelines, and the 1986 edition of ANSI A117.1. The 1992 and 1998 editions of ANSI A117.1 have been adopted by several of the model building code associations. Mindful of the language of the Act, and having now reviewed those technical standards, the Department believes that CABO/ANSI A117.1-1992 and ICC/ANSI A117.1-1998 are consistent with the Act and are additional safe harbors for compliance with the Act's technical accessibility requirements. Therefore, the Department will soon be publishing an interim rule amending certain sections of 24 CFR 100.200, to state that compliance with the appropriate requirements of ICC/ANSI A117.1-1998, ANSI A117.1-1986, and CABO/ANSI A117.1-1992 suffices to satisfy the requirements of the Act related to interiors of dwelling units and public and common use areas. Additionally, the Department maintains its position that compliance with its Fair Housing Accessibility Guidelines also constitutes compliance with the Act. The Design Manual also serves as a safe harbor for compliance.

It is important to note that ANSI A117.1 contains only technical criteria, whereas the Fair Housing Act, the implementing regulations, and the Guidelines contain both "scoping" and technical criteria. Scoping criteria define when a building element or space must be accessible; technical criteria provide the technical specifications on how to make an element accessible. Therefore, designers and builders relying on ANSI A117.1 also need to consult the Act and the Department's regulations, or the Guidelines for the scoping criteria.

As a further note, the Department wishes to emphasize that the safe harbors for compliance outlined above apply only to the accessibility requirements of the Fair Housing Act, and do not constitute a safe harbor for compliance for Federally funded facilities and dwelling units covered by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a); 24 CFR 8 and 9; the Architectural Barriers Act of 1968 (ABA), 42 U.S.C. § 4151-4157; 24 CFR 40 and 41, which must comply with their respective regulatory requirements, including the Uniform Federal Accessibility Standard (UFAS); and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101-12213. However, to the extent that the requirements of the Fair Housing Act overlaps with the requirements of Section 504, the ABA, or the ADA, it is necessary to read the laws together and meet the requirements of all applicable laws.

ENFORCEMENT OF THE FAIR HOUSING ACT DESIGN AND CONSTRUCTION REQUIREMENTS WHERE A STATE HAS ADOPTED A BUILDING CODE THAT CONFORMS TO THE ACT

The Act makes it clear that while state and local building code officials are responsible for enforcing the building code standards adopted in their respective jurisdictions, 42 U.S.C. § 3604 (f)(5)(B); 24 CFR 100.205(g), the Department is responsible for enforcing the design and construction requirements of the Fair Housing Act. 42 U.S.C. §§ 3604(f)(6)(A), 3610. If a jurisdiction adopts a model building code that HUD has determined conforms with the design and construction requirements of the Act, then covered residential buildings that are constructed in accordance with plans and specifications approved during the building permitting process will be in compliance with the requirements of the Act, unless the building code official has waived one or more of those requirements, or the building code official has incorrectly interpreted or applied the building code provisions.

However, the fact that a jurisdiction has adopted a code that conforms with the accessibility requirements of the Act, or that construction of a residential building was approved under a code, does not change the Department's statutory responsibility to conduct an investigation based on receipt of a complaint from an aggrieved person to determine whether the requirements of the Act have been met. 42 U.S.C. § 3604(f)(6)(A); 24 CFR 100.205(h). Section 804 of the Act provides that: "determinations by a State or unit of general local government under paragraphs 5(A) and (B) shall not be conclusive in enforcement proceedings under this title." 42 U.S.C. § 3604(f)(6)(B).

FAIR HOUSING ACT PROCEDURES WHEN A DESIGN AND CONSTRUCTION COMPLAINT IS FILED

The Department is required to conduct investigations of housing discrimination in response to a complaint filed with the Department. 42 U.S.C. § 3610; 24 CFR 103.200. Discrimination complaints may be filed by an individual or organization that is an "aggrieved person" under the Act. 42 U.S.C. § 3602(i)-(j); 24 CFR 103.15. A discrimination complaint may also be filed by the Secretary or his designee, the Assistant Secretary for Fair Housing and Equal Opportunity. 42 U.S.C. § 3610(a); 24 CFR 103.15.

When a complaint is filed with the Department, all of the parties to a complaint are notified of its receipt. 42 U.S.C. § 3610(a)(1)(B)(i)(ii); 24 CFR 103.45 and 103.50. The Department then conducts an investigation to determine whether there is reasonable cause to believe that the allegations in the complaint are true. 42 U.S.C. § 3610(a)(1)(B)(iv); 24 CFR 103.200. The Department also attempts to resolve housing discrimination complaints through conciliation. 42 U.S.C. § 3610(b)(1); 24 CFR 103.300. If the Department finds that there is reasonable cause to believe that the allegations of unlawful discrimination are true, and attempts to resolve the complaint through conciliation have failed, then the Department issues a charge of discrimination. 42 U.S.C. § 3610(g)(1)-(2); 24 CFR 103.400(a)(2). The parties then have the right to elect to pursue litigation through the Department's administrative adjudicative process or in federal district court. 42 U.S.C. § 3612(a); 24 CFR 103.410.

The Department refers to the appropriate administrative agency a complaint that arises in a jurisdiction that has been determined to have a state or local law that provides rights and remedies substantially equivalent to the Act, and which has a Cooperative Agreement with the Department to process housing discrimination complaints. 42 U.S.C. § 3610(f); 24 CFR 103.100. Additionally, the United States Department of Justice (DOJ) has authority to commence litigation when it determines that there is a pattern or practice of discrimination. 42 U.S.C. § 3614(a); 24 CFR 103.500.

When the Department receives a potential housing discrimination complaint alleging violations of the design and construction requirements of the Act, it first makes an initial determination whether it has jurisdiction to investigate the complaint. In making that determination, the Department examines whether: (1) the person or organization filing the complaint alleges an injury because of the fact that the property in question was not designed and constructed to meet the accessibility requirements of the Act; (2) the complaint was filed within one year of the date on which the alleged discrimination occurred or terminated; (3) the Department has jurisdiction over the owners, developers, architects and others involved in the design and construction who are named in the complaint (the respondents); and (4) the property is a "covered multifamily dwelling" under the Act that was designed and constructed for first occupancy after March 13, 1991.

An investigation of an accessibility discrimination complaint under the Act typically involves a review of building permits and certificates of occupancy, plans and specifications showing the design of the buildings and the site, and an on site inspection of the property. During the investigation, Department investigators or contractors takes measurements of relevant interior and exterior elements on the property. All parties to the complaint have an opportunity to present evidence concerning whether the Department has jurisdiction over the complaint, and whether the Act has been violated as alleged.

In making a determination whether the design and construction requirements of the Act have been violated, the Department uses the language of the Act, the regulations, the Guidelines, and the technical standards for the interiors of dwellings and for public and common use areas found in the ANSI A117.1-1986 standard. The respondents to the complaint have an opportunity to demonstrate that the requirements of the Act have been met even if the standards in the Guidelines, the Design Manual, or ANSI A.117.1-1986 have not been met. Upon publication of an interim rule announcing the Department's position that ICC/ANSI A117.1-1998 and CABO/ANSI A117.1-1992 also constitute safe harbors for compliance, as explained earlier in this policy statement, the Department will also consider evidence provided by a respondent showing that the respondent has complied with either of those editions of ANSI A117.1.

When the Department or DOJ finds that the design and construction requirements of the Act have been violated, the Department or DOJ seek to remedy the violation, including appropriate remedies for the victim of discrimination. Where technically and otherwise feasible, the Department or DOJ seek to have the property retrofitted so that it meets the requirements of the Act. The requirement to retrofit applies even though a building code may not require properties to be altered in order to meet the requirements of the Act. Where it is not feasible to retrofit the property, the Department or DOJ explore with all parties other remedies that will provide accessible housing opportunities for persons with disabilities.

OTHER ACCESSIBILITY STANDARDS

Nothing in the Act precludes a jurisdiction from adopting accessibility standards that provide a greater degree of accessibility than is required under the Act. 42 U.S.C. § 3604(f)(7). In addition, residential properties may be subject to more than one accessibility standard. For example, when a residential property receives federal financial assistance, it must comply with the accessibility requirements of Section 504, 24 CFR 8.1, et seq.; and may also be subject to the ABA.

The Americans with Disabilities Act (the ADA) also contains accessibility requirements, which have been incorporated in the Americans with Disabilities Act Standards for Accessible Design (ADA Standards), 28 CFR Part 36, Appendix A (1999). The requirements of Title II of the ADA, which prohibits discrimination on the basis of disability by public entities, apply, in relevant part, to housing that is designed and constructed by a state or local governmental entity (including a public housing authority). 42 U.S.C. §§ 12131-12134. The requirements of Title III of the ADA, which prohibits discrimination by private owners or operators of public accommodations, apply, in relevant part, to commercial facilities and public accommodations in connection with housing. 42 U.S.C. §§ 12181-12189.

The Department wishes to stress that developments may be subject to more than one accessibility requirement and all applicable laws must be read together. If the Fair Housing Act's accessibility requirements apply to a development that is also subject to the ADA, Section 504 or the ABA, the Fair Housing Act requirements do not preempt the ADA, Section 504 or ABA requirements.

CONCLUSION

Overall, the Final Report acknowledges that the model building codes reflect the majority of the technical requirements of the Act. In addition, the Final Report found that all four model building codes applied accessibility requirements to most, but not all, of the covered multifamily dwellings that are subject to the design and construction requirements of the Act. The Final Report identifies areas where the model building codes need to be revised in order to ensure that they are consistent with the requirements of the Act, and makes recommendations to assist the model building code organizations in developing model building codes that are consistent with the design and construction requirements of the Act.