



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

April 13, 2020

Submitted via Regulations.gov

Office of the General Counsel
Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW
Room 10276
Washington DC 20410-0500

Re: Fair Housing Act Design and Construction Requirements: Adoption of Additional Safe Harbors, [Docket No. HUD-2020-0012, RIN 2529-AA99]

To Whom It May Concern:

As Co-Chairs of the Consortium for Citizens with Disabilities (CCD) Housing Task Force, we submit the following comments with respect to the proposed additions to safe harbors identified by the U.S. Department of Housing and Urban Development (HUD) for compliance with the Fair Housing Act's requirements for the design and construction of covered multifamily housing as set forth in the Fair Housing Amendments Act ("the Act") (42 U.S.C. § 3604(f)(3)(C)). CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

As a threshold matter, we express our appreciation for HUD's publication of the matrix prepared by the International Code Council (ICC) that served as the basis for HUD's decision to establish additional safe harbors for compliance with the Act's requirements, and to extend the time period for comments. We urge HUD to continue to make the matrix publicly available on its website and through the Fair Housing FIRST (www.fairhousingfirst.org) program, because the continued availability of the matrix will enable designers, developers and advocates alike to understand key components of the safe harbors and to compare their provisions.

Our country continues to see high levels of noncompliance with the Act's requirement that all newly constructed multifamily housing, regardless of the funding that supports it, be designed and constructed to be accessible to and usable by people with disabilities. From the observation by Professor Robert Schwemm¹ that "[w]hile the precise degree of noncompliance with the

¹ Robert F. Schwemm, "Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases under the Fair Housing Act," 40 U. Rich. L. Rev. 753 (2006).

FHAA’s ‘design and construction’ requirements is hard to pin down, it is clearly substantial,” to the continued reports of design and construction violations found in cases handled by the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD) for enforcement, there are many reports of failures of multifamily housing for people at all income levels to provide even the minimal accessibility required by the Act.

The notable recent development of HUD and DOJ enforcement and private lawsuits against cities for failing to ensure that federally-funded and developed housing complies with Fair Housing Act and other access standards shows that noncompliance is significant and persistent.² In many enforcement cases brought by the government and by private litigants, many owners, developers and architects claim a defense based on a “safe harbor.” However, a subsequent inspection by a qualified expert has often demonstrated that the defense must fail, because the property does not, in fact, comply with one of the safe harbors that HUD has approved. As DOJ and HUD stated in their Joint Statement on Fair Housing Act accessibility, “In the context of the Act, a safe harbor is an objective and recognized standard, guideline, or code that, if followed without deviation, ensures compliance with the Act’s design and construction requirements.”³

The Joint Statement further explains that “HUD’s purpose in recognizing a number of safe harbors for compliance with the Fair Housing Act’s design and construction requirements is to provide a range of options that, if followed in their entirety without modification or waiver during design and construction, will result in residential buildings that comply with the design and construction requirements of the Fair Housing Act.”⁴ Thus, HUD has acknowledged certain guardrails to ensure that the safe harbors it approves actually result in the design and construction of properties that comply with the safe harbor parameters, and therefore assure that the property is accessible to and usable by individuals with disabilities.

In order to assure that an owner, developer or designer may safely rely on one of the International Building Code standards described in HUD’s proposed rule, HUD must require, through this regulation, the following:

² See, e.g., *Access Living of Metropolitan Chicago, Inc. v. City of Chicago*, 372 F. Supp. 3d 663, 670-71 (N.D. Ill. 2019) (failure by city to require compliance with access laws when the City... fail[ed] to adopt or enforce any policies or procedures to ensure that housing units ...are accessible to persons with disabilities or comply with Federal Accessibility Laws;...does not review architectural plans to ensure compliance with the Federal Accessibility Laws; does not conduct field visits during construction; and does not have a process for issuing construction and occupancy permits in a manner that ensures compliance with the Federal Accessibility Laws” constituted claims of sufficient injury to establish standing by plaintiff organization.)

³ Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings under the Fair Housing Act, April 30, 2013, Question and Answer 37, available at https://www.ada.gov/doj_hud_statement.pdf

⁴ *Id.* See also Joint Statement, Question and Answer 41, “If a state or local code requires, or is interpreted or applied in a manner that requires, less accessibility than the Act’s design and construction requirements, the Act’s requirements must still be followed. However, state and local governments can assist those involved in building housing subject to the Act’s design and construction requirements by incorporating one of the HUD-recognized safe harbors listed above into their building codes without deviation, amendment, or waiver. See 42 U.S.C. § 3604(f)(6)(B).”

1. The standard must have been adopted by a state or local entity without limiting amendments that would reduce the level of accessibility required by the International Building Code (IBC) standard that has been reviewed and approved by HUD.
2. The owner, developer and designer must have complied with the safe harbor.

We note that HUD has failed to include in its proposed rule a requirement that once a specific safe harbor document has been selected, the building in question must comply with all of the provisions in that document that address the Fair Housing Act design and construction requirements, in order to ensure the full benefit of the safe harbor.⁵ HUD should include a third required guardrail in its regulation:

3. The covered multifamily dwellings for which safe harbor is sought must comply with all of the provisions in the safe harbor.

Finally, HUD has noted in prior safe harbor announcements⁶ that ANSI standards lack adequate specifications for scoping. Scoping criteria define when a building, element or space must be accessible. Because it is critically important that any technical standards identified by HUD be consistent with the scoping requirements found in the Fair Housing Act as interpreted by case law, its regulations, and the Fair Housing Act Accessibility Guidelines, HUD's rule should include this requirement as well. This is important especially because "covered multifamily dwellings," which are required to comply with fair housing accessibility requirements, have been defined in judicial decisions, and adoption of a safe harbor cannot be interpreted to change a judicial ruling or a HUD regulation that addresses what the law requires to be covered.

4. The technical specifications set forth in the HUD-identified safe harbors must be read in conjunction with the scoping requirements in the Fair Housing Act, its implementing regulations, and the Fair Housing Act Accessibility Guidelines.

These requirements, which are consistent with long-standing HUD positions taken over several administrations, should be added as regulatory requirements and addressed in the preamble to the final rule and including in HUD technical guidance (including through the Fair Housing FIRST program) to maximize awareness among owners, developers, architects and designers, who in general seem to be unaware of these provisions.

Finally, as HUD indicates in its preamble to the proposed rule, the Fair Housing Act itself provides that, "[d]eterminations by a State or unit of general local government under [the Act] shall not be conclusive in enforcement proceedings...." 42 U.S.C. 3604(f)(6)(a). The fact that a property has been designed in compliance with plans that are approved by a state or local official is not an assurance to an owner, developer, architect or designer that the plans comply with a safe harbor, and the fact that a local or state official has not waived or misapplied a provision does not assure that the building has been built to comply with the requirements. Safe harbor status cannot be provided unless the provisions described above are met. For that reason, HUD should provide notice by regulation of the points described above.

⁵ See, e.g., "Report of HUD Review of the Fair Housing Accessibility Requirements in the 2006 International Building Code," 72 Fed. Reg. 39432, 39438 (July 18, 2007).

⁶ *Id.*, 72 Fed. Reg. at 39434.

Thank you for considering these comments.

Sincerely,

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