



Tsunami Warning:



**Property Impacts Of The New Federal
Accessibility Regulations &
America's Aging Population**

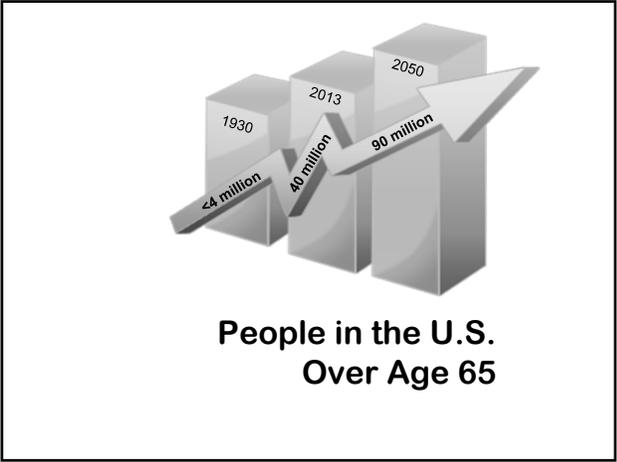
October 6, 2015



**The Update on
the Silver
Tsunami**



Starting this month,
more than 10,000
baby boomers a day
will turn 65, a pattern
that will continue for
the next 19 years.



In just 2 short years (2017), there will be more people 65 and older than there will be children younger than 5 **for the first time** in our nations history.





One in five Americans have some sort of disability affecting virtually every aspect of their daily lives.

United States
Census
Bureau



Diabetes afflicts almost 26 million adults and children in the USA. Most have type 2 diabetes. About 79 million Americans have prediabetes. The long-term complications of the disease include heart attacks, stroke, blindness, kidney failure, nerve damage and amputations.



29 million in US have diabetes

- up from 26 million in 2010

86 million in US have pre-diabetes

- more than 1 in 3 adults
- up from 79 million in 2010



- Chances of winning the lottery:
1 in 18 million
- Chances of being struck by lightning:
1 in 3 million
- Chances of having diabetes (in America):
1 in 9
- Chances of having diabetes and NOT knowing:
1 in 4

90%

**of all the people you see
with a disability were not
born with that disability**



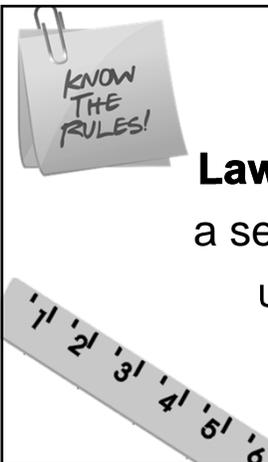
Federal Accessibility Laws and Regs

3 Federal Laws Regarding Accessibility

ADA
(American with Disabilities Act)

Section 504
of the 1973 Rehabilitation Act

The **Fair Housing** Amendments Act



Every
Law/Regulation has
a set of **“Standards”**
used to uphold
the regulation

ADA 2010
Prohibits
Discrimination
in All Areas of Public Accommodation

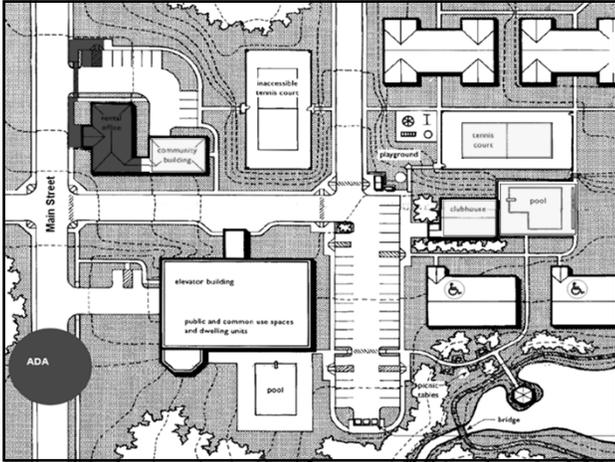
ADA Update:
A Primer For Small Business

The Reg: ADA
The Standard: ADAAG 2010

- Most common “public accommodation” in MFH is an on-site rental office
 - If community room or other common areas are rented out or available & open to “John Q. Public”, they are subject to ADA as well
- If ADA applies, ADAAG is the standard to use.

What is “Accessibility”?

- Title III of Americans with Disabilities Act Amendments Act
 - Public accommodations
 - Portions of residential development open to the general public



Section 504
of the 1973 Rehabilitation Act

Prohibits discrimination
in Programs or Activities Receiving
Federal Funding

UFAS:
Uniform
Federal
Accessibility
Standards

The Reg: Section 504 of the Rehabilitation Act
The Standard: UFAS

- Section 504 of the Rehabilitation Act of 1973 prohibits recipients of Federal financial assistance from discriminating against a qualified person with a disability in the sale or rental of housing
- Federal agencies primarily responsible for providing federal financial assistance in housing



What is "Accessibility" Under Section 504?

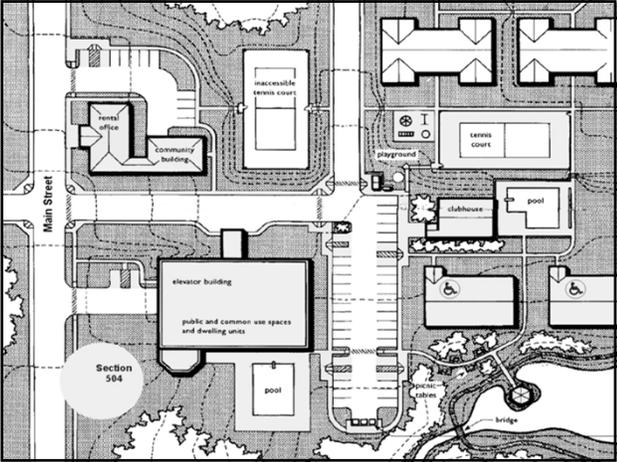


- Examples of programs defined as Federal Financial Assistance:
 - HUD funded (e.g. Section 202, Project-based Section 8)
 - RD funded (e.g. Section 515)
 - HOME
 - CDBG
- Examples of programs defined as **not** Federal Financial Assistance:
 - Low Income Housing Tax Credit*
 - Receipt of Section 8 Housing Choice Vouchers

My properties don't have to worry about all these Accessibility requirements because we are "*grandfathered in*"

For common areas,
NO Grandfathering

- For units, **HUD** properties built prior to July 11, 1988
- For units, **RD** properties built prior to June 10, 1982



**The Fair
Housing
Amendments Act**



**HUD's Fair
Housing Act
Design Manual**

The Reg: Fair Housing Act
The Standard: The Fair Housing Design Manual

- Applies to all housing providers with very limited exception
- Applies to conventional or subsidized housing
- Protects applicants and tenants on the basis of race, color, national origin, sex, religion, familial status, and disability

What is “Accessibility” Under FHAA?



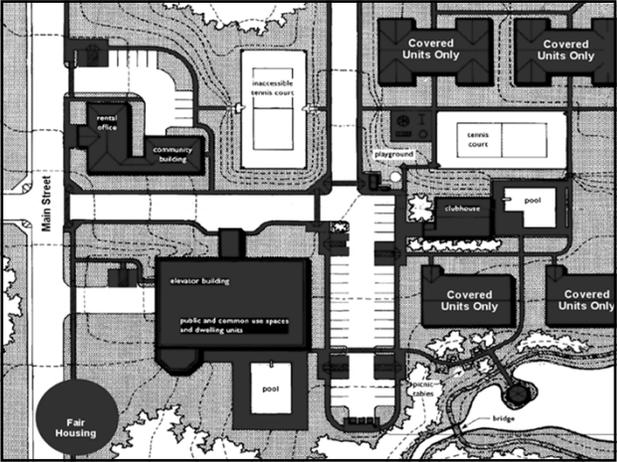
Fair Housing Act, as amended 42 U.S.C. § 3604(f)(3)(C)

Multifamily residential construction with buildings containing four or more units designed and constructed **for first time occupancy** after March 13, 1991

What is “Accessibility”?



- “Adaptable”
 - A common misinterpretation of accessibility requirements holds that the term “adaptable” contemplates a delay or deferral of the time when “features of adaptable design” required by the statute or regulations may be completed. This is inaccurate.
 - Virtually **all** accessibility elements are “as built” requirements





UFAS
Replaced By
ABAAS

NEW! "Proposed" Accessibility Guidelines

UFAS is being combined with ADAAG to produce a new Accessibility Standard titled "ABAAS"

Major ABAAS Changes 

 • Up until now properties built prior to 7/11/88 (HUD) were exempted from the 5% rule regarding accessible units (Note: Common areas are **NEVER exempted**)

• **Existing Reg:** F233.4: Accessible Units built after these dates are required in all Federally funded or assisted (loans or grants) properties

 • New ABAAS Regs will require 5% upon "substantial alteration," no matter when property built

Major ABAAS Changes

 • **Current Rule:** UFAS defines Substantial Alteration. If the total cost of Alterations during a 12 month period amounts to 50% or more of the full and fair cash value of the building, then you must meet new construction standards.

• **NEW Proposed Rule:** Altering the kitchen or bathroom (changing plan configuration or replacement of cabinetry), and at least one other room (changing plan configuration, replacing flooring, or any change effecting accessibility) 

What would NOT trigger substantial alteration?

One of the few changes that can be made that would NOT be considered substantial alteration is painting

What might trigger "Substantial Alteration" under the new rule?



- Properties following a CNA or a PNA and replacing cabinetry and flooring on schedule would meet "substantial alteration" under this definition
- Standard replacement over time would trigger it as well (if you replace flooring and cabinetry in a unit during the same year)
- Government Logic? If you are replacing cabinetry, it's a perfect time to make that unit a fully accessible unit until the required 5% is met

Substantial Alterations



- What would trigger "substantial alteration"?
 - A determination was made that cabinet replacement was an ideal time because if a property is replacing kitchen and / or bathroom cabinetry, they typically are doing considerable rehab to the unit
 - Cabinetry changes are an ideal time to make the kitchen / bathroom accessible
 - Kitchens and bathrooms are the substantial cost rooms for accessibility



Why is this Change Necessary?

- ABAAS is the proposed "new" / "replacement" for UFAS (Uniform Federal Accessibility Standard), so the transition time is the ideal time to make changes
- Disability Advocacy Groups raised issue of insufficient accessible units in the market place
 - The new properties built since 1991 under the Fair Housing Law are **helping**, but that law has not previously been strictly enforced (up until the last 18 months)
 - The number of new Federally funded properties (which must provide 5% fully accessible units) has been reduced over time, so fewer new fully accessible units are coming on line

Disability Advocacy Groups

Why is this Change Necessary?

- Older existing properties (pre-1988 for HUD) were not required to have accessible units when originally built.
- Although accessible units were not required at time of construction, these properties are now old enough to be going through "substantial rehab".
- With "new dollars" going in, this is an ideal time to include the 5% requirement.

ABAAS Requirements

- The discussions and compromises came down to the present ABAAS criteria:
 - a rehab that requires vacating a building will require 5% fully accessible units in that building
 - if an single unit is "altered", on a per unit basis, these units must be made fully accessible until the 5% is met
 - "altered": altering the kitchen or bath (change plan configuration or replacement of cabinetry) and alter at least one other room (for example, replace flooring), then you have "altered" that unit
 - exception for 2nd floor units without elevators, a ground floor unit may be substituted

HUD's Approach to Replacing UFAS

- At some future point in time, HUD will adopt ABAAS
- For now, HUD offering the option to use UFAS, or use ADAAG 2010 (with some exceptions)
- Remember, ADAAG 2010 and ABAAS are the same document except for two chapters
- "Substantial Alteration" is biggest difference for MFH Properties

HUD's Approach to Replacing UFAS

- Exception required to use ADAAG 2010 in place of UFAS
- "Structural Impracticality" must use UFAS definition
- Alterations and additions must meet UFAS requirements (ADAAG) requirements are less strict
- ADAAG 2010 doesn't define number of accessible units, so use 5% (from UFAS)



**April 30, 2013
HUD / DOJ Joint
Statement**

HUD/DOJ Position on Statute of Limitations



- SOL begins to run when “aggrieved person” is denied housing as a result of the failure to design and construct property per FHAA
- “a failure to design and construct a multifamily property in accordance with the FHA may cause an injury to a person at any time until the violation is corrected. A person may be injured before, during or after a sale, rental or occupancy of a dwelling.”

HUD/DOJ Position on Statute of Limitations



- Take away
- Any property built after 3/13/91 (implementation date of the FHAA) that is NOT in complete compliance with the design and construction requirements is at fault until the violation has been corrected
- Can face a complaint today for a development constructed in the 1990s



It
NEVER
goes
away

HUD/DOJ Position on "Pattern or Practice"



- "Continuing Violation" **"pattern or practice"**
- New statement further says
 - If a builder, architect or developer does not comply with the design and construction requirements at multiple properties over time, violations at all properties constitutes a "continuing violation" or "pattern or practice" of illegal discrimination
 - In past occasionally applied to builders, **now can apply to architect or developer as well**

Manhattan U.S. Attorney Files Civil Rights Lawsuit

- Against Major Real Estate Developers And Architects
- To Remedy *Pattern And Practice* Of Inaccessible Design And Construction Of New York City Apartment Buildings
- Monday, March 17, 2014
- <http://www.justice.gov/usao/nys/pressreleases/March14/RelatedFHALawsuit.php>



HUD/DOJ Joint Statement on FHA Accessibility



- What should you do?
 - Owners of older covered Multi-Family development (built after 3/13/91) should consider having their properties evaluated to determine if there are non-compliant features, and consult an expert to determine what corrective actions to take
 - Management companies, Federal agencies, etc. should strive to make sure properties are fully complying with the FHAA design and construction requirements



**Recent Settlements
Concerning
Design & Construction**

**Dept. of Justice
Settlements in Disability
Discrimination Cases**



- DOJ announced June 25, 2012 a settlement involving One company with 210 properties in 26 states. The company was ordered to pay **\$10.5 million** in settlement.
- DOJ announced May 16, 2013 another settlement involving multifamily units in MS, LA, and TN.
 - One owner of 9 properties alleged to have violated the FHA and ADA.
 - Approved Settlement: **\$865,000** to make the complexes accessible and **\$60,000** to compensate the aggrieved persons for a total of **\$925,000**

**All based on Design
and Construction Issues**



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