

# Dirt Alert

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## **Joint Statement on Fair Housing Act Accessibility Highlights HUD and DOJ Positions, Including Virtually Unlimited Statute of Limitations**

On April 30, the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD) issued a Joint Statement on the Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act (FHA). The Joint Statement is in question and answer format and provides a comprehensive look at the positions of DOJ and HUD on the FHA accessibility requirements for newly constructed multifamily housing. While many of the issues addressed in the Joint Statement are well settled, developers, design professionals, and builders should take note of several questions and answers that spell out the enforcement positions of DOJ and HUD, which until now have not been directly addressed.

### **Enforcement and Statute of Limitations**

Perhaps the most striking position contained in the newly released Joint Statement addressed the statute of limitations for FHA accessibility cases. The FHA contains a one-year statute of limitations for administrative

complaints filed with HUD and a two-year statute of limitations for complaints filed in court. The question with regard to design and construction cases is when the statute of limitations actually begins to run. Most courts that have addressed the issue have held that the statute of limitations begins to run when construction on the last building in a covered development is complete (i.e., the date the builder receives the Certificate of Occupancy for the last building in the development).

The Joint Statement takes a much more liberal view of the statute of limitations. It proclaims that “HUD and DOJ believe that the Act is violated, and the one- or two-year statute of limitations begins to run, when an ‘aggrieved person’ is injured as a result of the failure to design and construct housing to be accessible as required by the FHA.” Therefore, “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.” In other words,

the statute of limitations does not begin to run on a design and construction violation until the violation has been corrected. HUD will accept an administrative complaint alleging accessibility violations that caused an injury to a person with a disability regardless of when the housing development was constructed, as long as it is filed within one year of when the injury occurred (e.g. the date when the person with a disability discovers the violation and is unable to purchase or rent a covered unit).

The Joint Statement also concludes that where a builder, architect, or developer does not comply with the design and construction requirements over a period of time at multiple properties, violations at all of the properties may constitute a “continuing violation” or “pattern or practice” of illegal discrimination. Several courts have applied this “continuing violation” theory to builders, and a Virginia federal court recently held that the theory applies equally to architects who allegedly have designed multiple non-compliant properties over a number of years.

## **HUD's Ten "Safe Harbors" & Warning Not To Rely On Local Building Codes**

DOJ and HUD explain that compliance with any of HUD's ten recognized "safe harbors" will ensure compliance with the FHA accessibility requirements. If builders or designers choose to rely on one of the ten safe harbors, they must use the selected safe harbor in its entirety. The benefit of the safe harbor "may be lost" if a builder or designer chooses to select elements from more than one safe harbor.

The Joint Statement reminds builders and developers that simply following a state or local building code does not ensure compliance with the FHA. The FHA accessibility requirements are separate from and independent of state and local code requirements. Local building inspectors do not inspect for compliance with the FHA. Even if a state or local government has purportedly adopted one of the ten "safe harbors" in its building code, builders and designers should review the building code to ensure that the entire "safe harbor" has been adopted. If the entire "safe harbor" has not been adopted into the building code, or if waivers of the accessibility requirements are given, builders and designers cannot rely on the building code as a "safe harbor."

The Joint Statement also expresses that DOJ and HUD will use the Fair Housing Act Accessibility Guidelines (Guidelines) to determine whether a covered development complies with the FHA accessibility requirements.

If a covered development does not comply with the Guidelines or with one of the safe harbors, the builder or designer bears the burden to rebut the presumption of non-compliance by showing the development was designed and constructed to comply with some other "recognized, comparable, and objective standard."

### **Pedestrian Accessible Route Required**

The Joint Statement also clarifies the FHA requirement that all covered units and public and common use areas must be on a pedestrian accessible route that connects to all site arrival points. This includes public sidewalks and the site arrival point to the development. This requirement prohibits site plans designed without pedestrian routes (e.g., developments with individual unit garages that provide only vehicular access to the garage and unit). Under this requirement, a developer must plan a pedestrian accessible route to the boundary of the property even where there are no public sidewalks that connect to the development. The Joint Statement does note, however, that in "rare circumstances that are outside the control of the owner" in which the finished grade exceeds 8.33 percent or physical barriers or legal restrictions prohibit a pedestrian accessible route, the Guidelines allow a vehicular route that arrives at an accessible parking space that serves the unit or public and common use area.

## **Swimming Pools**

The Joint Statement addresses the requirements for pools in covered multifamily dwellings. If the pool in the multifamily development is restricted to residents and their guests, the pool must be located on an accessible route but need not be equipped with special features to offer greater access into the pool for persons with disabilities. The Joint Statement also notes, however, that the ADA applies to a pool in a covered multifamily development if the owner opens the pool to persons other than residents and their guests. In that case, the pool becomes a "place of public accommodation" under Title III of the ADA, likely requiring the development to install a pool lift, among other accessible elements, to ensure compliance with the ADA.

### **Additions to Covered Multifamily Dwellings**

The Joint Statement highlights the requirements for additions to existing construction. DOJ and HUD reinforce that the FHA design and construction requirements apply only to buildings with four or more dwelling units designed and constructed for first occupancy after March 13, 1991. However, if buildings with four or more dwelling units are added to construction that existed before that date, the newly constructed buildings and any newly constructed public and common use areas must meet the FHA requirements. In addition, any newly added public and common use areas to a covered multifamily dwelling built for first occupancy after

March 13, 1991, must meet the FHA accessibility requirements. For example, construction on a covered multifamily condominium development is completed in 2002, and the condominium association decides that it will add a rooftop garden in 2013. The new rooftop garden would be covered by the FHA, and the association must ensure the garden can be reached by a pedestrian accessible route.

### **Custom-Designed Units and Subsequent Changes to Accessible Features**

The Joint Statement provides that the FHA design and construction requirements apply equally to custom-designed and pre-sold units. Consequently, an individual buyer may not choose to deviate from the accessibility requirements, and the custom unit must be fully compliant with the FHA design and construction requirements when construction is complete. HUD and DOJ also state that the original and subsequent “owners of covered multifamily buildings” must maintain the accessible features of the buildings to ensure they continue to meet the FHA’s requirements. While maintenance of accessible features is sensible for subsequent owners of covered dwellings, it is unclear if a subsequent owner who was not involved in the design and construction of the development could be subject to a discrimination complaint if it fails to maintain the accessible features. Moreover, the Joint Statement refers to owners of multifamily “buildings” rather than owners of “dwelling units.” So it is unclear whether, for example, an individual buyer of a covered

condominium unit must maintain the accessibility features in his or her individual unit.

### **Unique Concerns for Buildings “With Elevators”**

The FHA requires ground floor units in buildings without elevators to include the FHA accessibility features. Additionally, in buildings without elevators, the FHA does not apply to multistory townhouse units that have living space on more than one floor within the individual unit. However, if the building has an elevator, all of the units in the building are covered, including multistory townhouses.

The Joint Statement clarifies HUD’s interpretation of what constitutes a “building with an elevator” in unusual circumstances. The Joint Statement provides that if a building has only a freight elevator, it is nonetheless considered a building with an elevator and all units in the building are covered. It also states that buildings that contain multistory townhouse units with elevators within the individual units themselves are considered “buildings with an elevator.” In that case, the individual units that have elevators are covered and must meet the FHA design and construction requirements. Additionally, the public and common use areas that serve the units containing elevators must comply with the FHA requirements. DOJ and HUD also note that if a developer of a building with four or more units that includes multistory townhouses offers unit-specific elevators as an option, and one or more buyers elect to have the

elevator installed, those units are covered.

Importantly, the Joint Statement provides that if a multistory townhouse in a building with four or more units is designed and constructed for the later installation of an internal elevator (e.g., with an elevator shaft or stacked closets), the multistory townhouse is covered. HUD notes that a “stacked closets” unit will be covered if the stacked closets “have been designed in a manner that will accommodate later installation of an elevator, e.g., inclusion of an elevator pit with a temporary flooring insert, and a raised ceiling to accommodate future elevator cab override.” Again, once a unit is covered, all of the public and common use areas serving that unit are also covered and must be designed and constructed in compliance with the FHA.

### **Conclusion**

The Joint Statement is arguably way overdue considering the FHA accessibility requirements became effective on March 13, 1991. However, builders and design professionals are clearly still struggling to design and construct FHA-compliant multifamily housing. The Joint Statement makes clear that HUD will continue to accept FHA complaints alleging violations at covered multifamily developments for which the two-year statute of limitation has arguably long passed. Owners of older covered multifamily developments should consider evaluating existing properties to determine if the developments have non-compliant

features and what steps to take to ensure persons with disabilities are not excluded from the property because of those non-compliant features. Because builders and designers cannot rely on local building inspectors to evaluate FHA accessibility, they should ensure they are receiving the proper education and training on how to comply with the FHA accessibility requirements. ■

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