

Complexity Hinders Compliance with Federal and Oregon Accessibility Laws

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1. Introduction.

Many recently-constructed multi-unit residential buildings in Oregon do not comply with all federal and Oregon laws regarding accessibility for people with disabilities, despite legal mandates that date back, in one form or another, to the 1960s.

Federal and Oregon accessibility laws are related but distinct from each other. They occasionally overlap to impose different requirements on a building or site. Thus, a building or site satisfying Oregon's building code may not comply with federal accessibility laws.

Therefore, designers and builders, particularly those involved in multi-unit and publicly-funded housing, must be aware of and understand the scope of all laws potentially governing their building's accessibility for people with disabilities. In addition, they must know how these laws apply to their building (i.e., the specific accessibility guides and standards).

Building officials have two opportunities to review building design and construction for compliance with accessibility laws. First, they review the designer's plans. Second, they review the builder's work in constructing the building. Like designers and builders, building officials must be aware of and understand not just the specific building code requirements but the scope of various accessibility laws.

As long as designers, builders, and building officials lack this knowledge, they will continue to design, construct, and approve noncompliant buildings.

2. Brief summary.

The complexity of accessibility laws arises in two general ways, which we identify as "multiplicity issues" and "code issues."

Multiplicity issues. Multiple laws, both state and federal, govern accessibility:

- (a) Four separate federal laws mandate accessibility. These differ from each other in the types of buildings to which they apply based on funding, use, or date of construction.
- (b) Multiple guidelines identify methods of providing accessible elements in sites and buildings. These differ from each other in dimensions and details.
- (c) Multiple standards, promulgated at different times, implement the various laws.
- (d) Oregon laws contain specific mandates. These include accessible parking and site accessibility, as well as accessibility requirements for any new housing funded, even in part, by public funds or tax credits.

Code issues. Oregon's building code governing multi-unit residential buildings (the Oregon Structural Specialty Code, or OSSC) includes a comprehensive set of accessibility requirements. Thus, designers, builders, and building officials can easily believe that compliance with the OSSC brings a project in compliance with all accessibility requirements. However, compliance with the OSSC does not assure compliance with all accessibility laws because:

- (a) While the OSSC draws on some of the same standards, the OSSC differs in many ways from other standards, and is thereby not formally or informally a "safe harbor" for compliance with any federal law.
- (b) The OSSC includes only those accessibility criteria and standards required to be included in the OSSC by Oregon law. It does not incorporate all federal accessibility laws or even all Oregon accessibility laws.

The complexity arising from these issues, in combination with the lack of a single source of comprehensive information on all the laws, leads to

misunderstanding on the part of project planners, constructors, and building officials. This misunderstanding, in turn, leads to noncompliant new, altered, or expanded multi-unit housing.

3. The regulation of accessibility.

A brief history of accessibility standards and guidelines.

Modern accessibility standards grew largely out of the efforts of the Easter Seals Society, based on a belief that people with disabilities are entitled to “the right to live a normal life,” which includes being able to get to buildings, and once there, to get into and through buildings.¹

The Easter Seals Society funded the first barrier-free design research, and the resulting data led to the first design specifications for accessibility to be approved by the American National Standards Institute (“ANSI”) in 1961, ANSI’s Standard A117.1.²

Later, various organizations and agencies joined ANSI’s effort to develop the A117.1, which was revised, expanded, or re-published in 1971, 1980, 1986, 1992, 1998, and 2003.

ANSI proposed the A117.1 not as a model law, but as a standard. ANSI said its A117.1 standard is “basically a resource for design specifications and leaves to the adopting enforcing agency the application criteria such as where, when, and to what extent such specifications will apply.”³

Most legislatures passing accessibility laws in the years since the first A117.1 included in their accessibility laws not only unique “application criteria” (scoping requirements), but they also used the A117.1 in different ways and used different versions of the A117.1.

Present trends in accessibility standards. In the early 1990s, ANSI’s goal for the A117.1 changed. Around the time that the Americans with Disabilities Act (“ADA”) became law, ANSI promulgated the A117.1 as a model law instead of a

passive resource for legislators to draw on when writing laws.

At the same time, ANSI transferred responsibility for further development of the A117.1 to the Council of American Building Officials (“CABO”). CABO continued development of A117.1 to meet the guidelines developed for the ADA so that the A117.1 would become a standard adoptable and enforceable as part of building codes throughout the United States.

In 1998 CABO became the International Code Council (“ICC”), and the ICC issued the 1998 and 2003 editions of A117.1 along with its model International Building Code (“IBC”), which incorporates the A117.1 by reference.⁴

Future prospects. It appears likely that the current momentum toward creation of a uniform accessibility standard will continue. Eventually, this trend may result in a broadly-accepted and fairly uniform accessibility code based on the enhanced ICC/ANSI A117.1 standard.

However, since there are so many different scopes and standards already written into accessibility laws, we may be many years away from such a uniform accessibility standard. Until then, full compliance with accessibility laws within the State of Oregon will require understanding and the independent application of both Oregon and federal accessibility laws.

4. Federal Accessibility Laws.

There are four federal accessibility laws, each with a particular scope of application:

1. The Architectural Barriers Act (“ABA”).⁵ In 1968, the ABA mandated that federal buildings become accessible to people with disabilities. The ABA covers buildings and facilities designed, constructed, or altered with federal funds or leased by a federal agency. The ABA required these buildings and facilities be made readily accessible to, and usable by, the “physically handicapped.” The criteria for compliance with the ABA, the ABA Accessibility Guidelines, were developed by the

Architectural and Transportation Barriers Compliance Board (the “Access Board”)

2. Section 504 of the Rehabilitation Act of 1973 (“Section 504”).⁶ This 1973 law expanded the opportunities for people with disabilities to participate in the workplace and society. Within it, Section 504 mandated accessibility to most buildings or programs which receive federal financial assistance.

The 1973 law also reinforced the ABA. First, Section 504 created the Access Board to develop accessibility criteria compliant with the ABA. Second, the Act also provided for the creation of Uniform Federal Accessibility Standards (“UFAS”) to provide a uniform standard of application for the ABA guidelines and Section 504 requirements to all federal or federally-funded facilities.

3. The Fair Housing Amendments Act (“FHA”).⁷ The 1988 FHA amended existing civil rights law to make discrimination against people with disabilities illegal. The FHA also defined what non-discriminatory housing was. The FHA covers: housing that receives federal financial assistance, state and local government housing, and *new* private multifamily housing with four or more units. HUD created and maintains the standards which regulate compliance with this law, the Fair Housing Guidelines.

4. Americans with Disabilities Act (“ADA”).⁸ Two years after the FHA, the ADA broadened the definition of disability to include those with “a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.”

While the ADA broadly covers employment and many other areas, Title III of the ADA covers public accommodations and many other types of privately-owned buildings which are open to the public and affect interstate commerce (e.g., stores, services, and places of public gathering).

ABA/ADAAG. Responsibility for creation of ADA-compliant guidelines was given to the Access Board. The Access Board developed the ADA Accessibility Guidelines (“ADAAG”) from the ABA guidelines (which were in turn based on the earlier ANSI A117.1 standard). The Access Board continues to maintain them as the ABA/ADAAG. While ABA/ADAAG contains different application, scoping, and administration provisions for compliance with the ABA and ADA requirements, the technical criteria for accessibility are common to both.

5. Oregon Accessibility Laws.

Specific Oregon accessibility laws.

The State of Oregon has its own laws addressing certain aspects of accessibility:

ORS 447.210 et seq., passed in 1971, extends the requirements of the ADA accessibility standards beyond those covered by the federal law to include certain private educational facilities, “private membership clubs, and churches” when located in buildings of two stories or more which are either: a) over 4,000 square feet in ground floor area, or b) over 20 feet in height).^{9, 10}

ORS 447.233 contains explicit numerical requirements for accessible parking spaces and related signage, dimensional requirements, and access spaces.^{11, 12}

ORS 456.506 et seq., passed in 2003, adopted most of the accessibility criteria of the FHA and extended them to all new non-owner-occupied housing, even single units, if financed or subsidized in any way by state or federal funds, guarantees, or tax credits.¹³

ORS 701.525 et seq., passed in 2005, requires the Oregon Construction Contractors Board (“CCB”) to adopt by rule a model list of accessibility features that developers of residential housing may provide to customers purchasing new residential housing from the developer.

Accessibility criteria within the OSSC. ORS 447.231 mandates that the OSSC include the requirements of the ADA and FHA. Oregon's Building Codes Division ("BCD") has done a yeoman's job of incorporating the: 1) current ADAAG standards, 2) Fair Housing Accessibility Guidelines, and 3) other Oregon laws, into the OSSC.

The OSSC is based on the IBC, but it does not incorporate the new ICC/ANSI A117.1. In part, this is because the new ICC/ANSI A117.1 contains revisions based on proposed, but not yet adopted, changes to federal accessibility guidelines.¹⁴

Rather, in order to comply with Oregon law and incorporate three distinct standards into OSSC, BCD wrote Chapter 11 of the OSSC as a custom accessibility code. Chapter 11 of the OSSC is devoted completely to accessibility.

As a merger of three separate standards, Chapter 11 necessarily differs in significant ways from the IBC/ANSI standard in its organization, its numbering system, and its inclusion of the most stringent standards from each of the mandated codes.

Limitations of approval under Chapter 11. It is important to remember that most of the laws mandating accessibility are federal laws. While Chapter 11 incorporates the provisions of some of these federal laws, the ultimate authority for interpreting the meaning and consequence of these laws remains with the federal agencies charged with their enforcement.

Consequently, approval of project plans or inspection of actual construction by Oregon building officials is limited to compliance with the OSSC, including Chapter 11. Building designers and construction contractors (and building owners) must independently consider federal accessibility law and federal agencies' interpretations of accessibility standards based on federal accessibility laws.

6. HUD's Role in Promoting Accessibility.

Among federal agencies, the Department of Housing and Urban Development ("HUD") has a special role in development, interpretation, and enforcement of accessibility standards in housing. In particular, in carrying out its assigned role under the FHA, HUD establishes scoping and standards for the accessibility required by the FHA, interprets their application, and enforces compliance.

Fair Housing Accessibility Guidelines. In 1991, HUD published its Fair Housing Accessibility Guidelines. HUD's Guidelines are standards for implementing the FHA and contain both scoping language and application criteria.¹⁵ The criteria incorporate by reference some, but not all, of the specific requirements in the then-current 1986 A117.1 standard.

In the years since, HUD has built up a body of interpretation based on its own independent understanding of the FHA, its own Guidelines, and ANSI A117.1-1986. HUD's interpretation alone of these requirements determines compliance with the FHA, and HUD's interpretation can differ from that of other authorities.

"Safe harbors". As noted above, HUD has granted "safe harbor" status to each edition of the A117.1 since 1986, including the current IBC/ANSI edition.

However, Oregon designers, general contractors, and building owners must remember that since the OSSC is not identical to any version of the A117.1, the OSSC is not a safe harbor.

It should also be noted that the original standard reference by the Fair Housing Guidelines, the 1986 edition of A117.1, is still a HUD-approved standard – even though it is considerably different from accessibility criteria required by other laws that are based on more recently-published standards.

HUD interpretations. In the years since HUD published its Guidelines, HUD has developed a body of interpretations of the meaning of the Guidelines based on past decisions regarding specific accessibility questions. These

interpretations can vary from interpretations of similar requirements in other accessibility codes.

For example, under HUD's interpretation, a step from an accessible unit down to its patio may in some cases be up to 4 inches instead of the 3/4 inch maximum in A117.1-based standards (where HUD has determined the height is necessary to assure exterior weathertightness of the unit). Conversely, HUD's requirements for exemptions from site accessibility requirements based on site conditions are extremely rigorous compared to other jurisdictions' requirements for exemptions.

HUD resources. HUD provides a number of useful, free resources for understanding housing accessibility requirements through the Fair Housing First organization including the *Fair Housing Act Design Manual*, a thorough guide to planning projects for compliance with the FHA.¹⁶

7. Conclusions.

A broad and diverse range of building types, whether new, existing, or altered, must comply with at least some of the federal or Oregon laws mandating accessibility for people with disabilities.

Furthermore, if the building is either used as housing or in conjunction with housing, the probability is very high that it must comply with more than one of these laws.

Consequently, those who design, build, and own housing, especially multiple-unit housing, must have a good understanding of both the scope of these laws and their application.

Unfortunately, not all professionals gain this clear understanding of accessibility requirements due to the sheer number of laws and standards which contain different accessibility requirements and apply to different types of buildings, different building uses, different building ownerships or possession (private or government ownership or possession), different building funding (private, public, or a mix), and different points in a building's life (buildings existing when an

accessibility law is enacted or new construction or alteration after the law is enacted).

Beyond that, the relationship between building codes and accessibility laws, guidelines, and standards is ambiguous as well. Most accessibility laws, guidelines developed from early A117.1 documents and the ABA/ADAAG, and application standards such as the UFAS and the FHA requirements stand apart and distinct from the OSSC that Oregon building officials enforce.

Under these circumstances, it is easy to see how misunderstanding occurs. Misunderstanding leads to mistakes, and these mistakes are built into housing intended to be accessible. Until developers, designers, builders, and owners understand both the OSSC and accessibility laws, they will continue to develop, design, build, and own noncompliant buildings.

If those developers, designers, and builders are to create new housing that is fully accessible to people with disabilities, they must understand which standards apply and develop strategies to meet them.

8. Recommendations.

Oregon developers, designers, and builders cannot rely upon the building permit approval and inspection process alone. Improving compliance requires both improved awareness and understanding of the laws and standards that govern accessibility.

The first step is awareness. Oregon developers, designers, and builders must be aware of the accessibility laws and standards and how careful planning and execution are essential to ensuring compliant buildings.

The second step is education. We hope the Matrix and Application Worksheet included with this report as appendices, along with other information regarding the laws and their application, will facilitate understanding.

Additionally, increased awareness of the large number of resources available through the Internet, particularly those offered without charge at the Fair Housing First (“FHF”) website, can be a critical part of the educational process as well.

In particular, the *Fair Housing Design Manual*, available from FHF’s website, will help anyone involved in developing of housing of any scale. Additionally, the Access Board’s website contains a number of links to other online resources.

Organizations that provide housing as well as those that provide housing support services should take initial steps to publicize accessibility requirements.

Design and construction professional associations as well as associations of building owners should publicize them as well and provide training and education for their members.

Additionally, building officials must take responsibility to enforce the OSSC both at the plan review and field inspection stages since they alone have the legal authority to issue building permits and permit the public to occupy buildings.

There are also a number of agencies and independent organizations directly connected with key players involved in the creation and operation of housing.

Among these, public agencies include the State’s licensing boards for architects, engineers, and contractors: the Board of Architect Examiners, Board of Examiners for Engineering and Land Surveyors, and Construction Contractors Board. Other public agencies with important roles in accessibility are the Building Codes Division of the Department of Consumer and Business Affairs, and city and county building departments.

Private professional and industry organizations include the Oregon Building Officials Organization, Professional Engineers of Oregon, and the local chapters of the American Institute of Architects, the Construction Specifications Institute, and Associated General Contractors of America. Many

of these groups also promote educational meetings and seminars that could easily incorporate education on accessibility.

Through direct distribution of informational materials and cooperation with targeted agencies and organizations, the Fair Housing Council of Oregon can have a significant impact on the level of knowledge and understanding of issues, laws, and standards for providing accessibility for people with disabilities.

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Appendices.

Appendix A: Matrix of laws

Appendix B: Application worksheet

Footnotes.

¹ American National Standards Institute (1986), *American National Standard for Buildings and Facilities – Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1-1986)*. New York: American National Standards Institute. *Foreword*.

² *Id.*

³ *Id.*

⁴ International Code Council (2008), *American National Standard, Accessible and Usable Buildings and Facilities (IBC/ANSI A117.1-2003)*. New York: American National Standards Institute.

⁵ 42 U.S.C. §4151 et seq.

⁶ 29 U.S.C. §792 et seq.

⁷ 42 U.S.C. §3602 et seq.

⁸ 42 U.S.C. §12181 et seq.

⁹ This Statute referenced in OAR 839-006-0290, OAR 123-057-0210(5)

¹⁰ This Statute referenced in OAR 165-018-0015(c)

¹¹ This Statute referenced in OAR 574-085-0070(11)

¹² Explanatory note. Bills passed by the Oregon legislature and signed into law are codified into the Oregon Revised Statutes (ORS). Many of these laws contain language assigning responsibility and authority for the creation of rules, which govern how the law is to be applied, generally in much greater detail than is contained in the actual bill passed by the legislature. These rules are codified into the Oregon Administrative Rules (OAR). An understanding of both the ORS and the OAR requirements is necessary for compliance with the law. Where this report refers to Oregon Revised Statutes by number, the related rules (OAR) are noted for reference.

¹³ Rules pertaining to these laws constitute OAR Chapter 813, Division 310, Subsidized Development Visitability (OAR 813-310-0005 to -0110)

¹⁴ International Code Council (2008), *American National Standard, Accessible and Usable Buildings and Facilities (IBC/ANSI A117.1-2003)*. New York: American National Standards Institute.

¹⁵ Published in the *Federal Register*, Vol. 56, No. 44, Wednesday, March 6, 1991, Pages 9499 to 9515

¹⁶ Barrier Free Environments, Inc. (1998), *Fair Housing Act Design Manual*. Washington, U.S. Department of Housing and Urban Development.