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Appraisers and the Fair Housing Law: Accessibility Requirements for the Disabled

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Abstract. **In 1988 the Fair Housing Act of 1968 was amended to include the "handicapped" as being protected from discrimination in multiunit housing. The three general categories of discriminatory acts are refusal to make or allow reasonable physical modifications to a covered multiunit dwelling, refusal to make reasonable accommodations in rules and practices, and failure to follow certain design and construction standards. The U.S. Department of Housing and Urban Development has issued *Fair Housing Accessibililty Guidelines*, which provide technical guidance on multiunit dwelling design and construction standards. This study examines these guidelines and the impact the Act may have upon value when discriminatory practices are observed.**

Until the Fair Housing Act (hereafter FHA) was passed in 1968, discrimination in housing was possible in the United States. However, it was not until 1988, with the passage of sweeping amendments to the 1968 FHA, that a housing discrimination law came to the aid of those with physical and mental disabilities.[1] Those amendments, among other things, mandate that new multifamily housing must be made accessible and adaptable to the handicapped. Although its potential magnitude has not been fully realized by the real estate industry, Cardoza (1995) indicates the amendments truly signal a major legal change. And it could conceivably be very expensive and disruptive for those in the industry who have not prepared adequately for it. They allow, for example, unlimited actual and punitive damages, and even criminal sanctions in certain circumstances. As reported by Cardoza (1995, p. 12), attorney Stephen Durham has observed, "It's (the FHA 1988 amendments protecting the disabled) a monstrous problem for defendants . . . [a]ll it takes is a lawsuit and a landlord has a major problem." And, as Aalberts (1996) reports, noncompliance may be widespread. Indeed, in the Las Vegas area alone, over a ten-month period from October 1994 to July 1995, seventeen formal complaints had been filed with the Department of Housing and Urban Development (HUD) concerning alleged noncompliance with design and construction requirements. The National Fair Housing Advocate (1996), has reported that in Chicago, the Justice Department recently settled an inaccessibility claim against a partially completed twenty-eight-building rental condominium development that does not have wide enough doors and reachable lighting and heating controls for wheelchair users. Furthermore, the bathrooms are not equipped with suitable reinforcements for grab bars.

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The condominium designers and builders were required to reconstruct a ground floor unit to make it accessible and to pay $35,000 into a fund that can be used by tenants who wish to make their units accessible.

The purpose of this study is first to trace briefly the history of events leading up to the creation of fair housing laws in this country, and in particular those laws that apply to the disabled. Next, the statutory and regulatory provisions requiring that certain new multifamily housing be made accessible to the disabled are examined and discussed. Third, a demonstration is made as to how failure to abide by these laws will not only result in legal repercussions but also in expensive construction alterations to real estate owners. And lastly, the negative implications to value that may occur when appraisers fail to recognize the existence and cost of complying with these laws is presented.

Fair Housing Legislation and the Disabled

The ultimate creation of fair housing legislation can be traced to social, economic and legal developments commencing after World War I. These advances provided the foundation for the protection of a number of traditionally victimized groups of housing discrimination, with the eventual inclusion of the disabled.

Segregation was institutionalized legally in housing, as well as in public accommodations and transportation, as a result of the late 19th century decision of *Plessy* v. *Ferguson* (1896). Ultimately, however, its domination, if not its spirit, gradually began to erode starting in 1917. In that year, the Supreme Court ruled in *Buchanan* v. *Warley* (1917) that a city ordinance that prohibited blacks from moving to white neighborhoods or whites to black neighborhoods was an illegal restraint of a person's right to sell his property.

The most important development for the later abolishment of institutionalized segregation, and indeed many other kinds of discrimination, arose in 1954 in *Brown* v. *Topeka Board of Education* (1954), which overruled *Plessy*. The *Brown* case, of course, outlawed racially segregated schools. But in a broader sense it also served as the catalyst for the subsequent passage of key anti-discrimination legislation. The first was the Civil Rights Act of 1964 (1964) which prohibited discrimination in employment, businesses and most programs receiving federal assistance. Still it did not cover most FHA and VA loans and so had almost no impact on housing discrimination. Sensing a need to fill the legal void, Congress passed the Civil Rights Act of 1968 (1968), which incorporated what is known as the Fair Housing Act of 1968. The initial Act prohibited discrimination in the selling or leasing of residential realty based on race, color, religion, national origin, and was later amended to include sex.

The Fair Housing Amendments Act of 1988 (1988) was subsequently passed to correct several major deficiencies with the 1968 Act, as well as to add two new protected classifications—"handicapped" and "familial status." The addition of the handicap classification created substantial measures for protecting the disabled. For example, the amendments now outlaw the making of any statements or advertisements that may limit or discriminate against the handicapped, as well as forbidding any representations made to them that a dwelling is not available for sale or rent. The new amendments further prohibit using the entry of a disabled person into the neighborhood as a means of inducing someone to sell or lease.

Perhaps the most consequential components affecting the disabled arise in section

3604(f) of the Fair Housing Amendments Act of 1988 (1988). Those provisions ban any discrimination against the disabled in sale or rental of property, including the "terms, conditions, or privileges of sale or rental of a dwelling." The amendments also forbid owners and managers of developments, such as condominiums and planned unit developments, to issue "rules, policies, practices and services" that deprive the disabled of "equal opportunity to use and enjoy a dwelling."

The section further provides for an array of methods for creating more accessibility for the disabled. For example, one section provides that a landlord cannot refuse to permit a disabled person from modifying his leasehold at his or her own expense. Although the landlord can demand, when it is reasonable, for the renter "to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted."

Possibly the most significant new provision for the disabled mandates that certain multifamily dwellings must comply with various design and construction requirements. Basically, covered multifamily dwellings are those that were available for first occupancy after March 13, 1991. The Fair Housing Act Design and Construction Requirements (1991) indicate that these specifications *do not* apply to those structures which were "designed and constructed for first occupancy on or before March 13, 1991, if the dwelling is occupied by that date, or if the last building permit or renewal thereof for the dwelling is issued by a State, County or local government on or before June 15, 1990." Included are seven specific requirements, discussed in detail later in this study. These requirements dictate that better accessibility be created into and within multifamily dwellings for the disabled, especially wheelchair users.

It is likely that these new requirements will not only incur increased construction costs for new multifamily housing,[2] but will, if they are not initially complied with, be particularly costly if retrofitting becomes a legal necessity. Moreover, Roland (1991) indicates that the responsible party will be forced to conform since neither the statute nor the rules specify an exemption for economic impracticability.

A Brief Examination of the Fair Housing Act Amendments of 1988

In order to better understand the thrust of the Fair Housing Act's 1988 amendments regarding new construction for the disabled, certain statutory provisions need to be discussed. These include the legal definition of handicap, what multifamily dwellings are covered, and what design and construction standards are required under the new amendment.

The Definition of "Handicap"

The 1988 FHA definition of "handicap" is threefold (U.S. Department of Housing and Urban Development, 1995). The regulation provides that:

> "Handicap" means, with respect to a person—
>
> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance . . . .

The interpretive rules define "major life activities" as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."

In addition, the rules more precisely clarify the terms "physical" and "mental" impairment. The term "physical" impairment includes:

> [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculo-skeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic, skin; and endocrine.

The rules further define "mental" impairment as:

> [a]ny mental condition or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The rules also provide that the foregoing terms include the following common disabilities, but caution that the scope should *not* be limited to just these enumerated diseases and condition. They are:

> such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus (HIV) infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of controlled substance), and alcoholism.

It is interesting to note that the statutory definitions and regulatory interpretations are very similar to those in the Americans with Disabilities Act (ADA) (1992) and the Rehabilitation Act of 1973 (1995). Future court interpretations of the FHA may, as a result, be influenced by and perhaps may borrow from analogous interpretations issued under both of these important acts.

Multifamily Dwellings Covered under the Act

One of the most crucial provisions of the Fair Housing Amendments Act of 1988 concerns what multifamily dwellings must comply with the new requirements. Under section 3604, the term "covered multifamily dwelling" encompasses:

> (A) buildings consisting of 4 or more units if such buildings have one or more elevators; and
> (B) ground floor units in other buildings consisting of 4 or more units.

An apartment or condominium complex of four or more units would likely be the most common type of structure covered by this provision. If a building has an elevator which, of course, affords a disabled person access to multiple floors, *all* the multifamily dwelling units must be accessible, not just a reserved number of them for potentially disabled tenants or buyers. If the complex does not have an elevator, then only the ground floor units, defined as having an accessible route leading to them, must comply with the accessibility and user-friendly guidelines discussed later in this study. Included in this definition are garden apartments, custom-designed condominium and pre-sold units, as well as vacation timeshare units. Units separated by fire walls do *not* constitute separate

buildings. Excluded units consist of two-story townhouses and units with finished basements, since they do not contain an elevator and because the entire dwelling unit is not on the ground floor.

Enforcement of the Fair Housing Act

Under the Fair Housing Amendments Act of 1988 aggrieved parties are furnished with multiple procedures for securing a variety of remedies. Aggrieved parties can include victims as well as those who believe that a disabled party may be victimized by a discriminatory housing practice. The latter can include fair housing groups, testers, local governments, and the Secretary of HUD. All of these parties can initiate suits against property owners and associations and recover both legal and equitable remedies. Legal damages can include actual damages awarded to victims who were not provided with the required access to and enjoyment of housing facilities afforded them under the FHA amendments. In some situations, in which the law is egregiously transgressed, even unlimited punitive damages can be awarded. Equitable remedies, such as temporary or permanent injunctive relief, may be granted to either prevent an FHA violation or as a means to compel compliance. Finally, a criminal action is possible for a person who intentionally fails to testify or answer a lawful inquiry or produce records or other evidence pursuant to a subpoena. Damages include a fine up to $100,000 or imprisonment for up to a year or both.

There are three potential legal avenues through which the alleged violators of the FHA can be sued. They are administrative enforcement, an action by the attorney general and by private lawsuit.

Administrative Enforcement. Under this provision an aggrieved party may file a complaint with HUD, as long as it is done within one year of an occurrence. Once the administrator receives the complaint, the complaint may either be investigated by HUD or transferred to state or local agencies that have "substantially equivalent" fair housing programs. But if HUD keeps it, it has 100 days to investigate and file a report. And if no voluntary resolution or conciliation is worked out during the 100 days, HUD must either dismiss it or file charges. Should HUD file charges, the complainant can elect to go to federal court for a jury trial, or the case can be given to an administrative law judge (ALJ). Assuming the latter, the ALJ has 120 days to commence a hearing, at the end of which he or she will make a recommendation to HUD. HUD invariably defers to these recommendations. The ALJ can award both legal and equitable remedies and civil penalties as well as attorney's fees. The losing party may appeal to the federal court of appeals.

Action by the Attorney General. In the event that HUD files a charge of discrimination and the aggrieved party chooses a jury trial in federal court, the Attorney General must file the civil action within 30 days. Both legal and equitable damages, including punitive damages, and attorney's fees, can be awarded in this proceeding. The Attorney General can also press a suit if he/she believes there is a pattern or practice of discrimination against a protected group.

Private Lawsuit. Lastly, an aggrieved party can sue privately, if this is done within two years of an occurrence. The private action can be maintained even if an administrative hearing is filed, but it is lost if the ALJ commences a hearing or a conciliation agreement is drawn up. In certain instances, if the aggrieved party cannot

afford it, a lawyer will be supplied and statutory cost and fees waived. Moreover, all damages, both legal and equitable and including punitive damages, can be awarded as well as attorney's fees.

Statutes of Limitations. As discussed above, the statute of limitations is one year for administrative proceedings and two years for a private action. Since the existence of non-conforming design and construction standards under the FHA would obviously be manifested in an ongoing manner, the statute of limitations would not presumably begin to run until the aggrieved party is either injured by the absence of these standards or when an aggrieved party believes that a disabled party will be injured by the lack of standards. For example, even if a covered apartment has not been in conformance with the FHA for, say, three years since it was first occupied, the statute of limitations would not begin to run until an aggrieved party becomes aware of the deficiency. For this reason, the Act may be viewed as a "ticking bomb" for those who designed and constructed these buildings.

Multifamily Dwellings and Design and Construction Standards

The FHA provides for seven design and construction provisions (see the Appendix, Design and Construction Provisions), summarized as follows:

1. Accessible building entrance on an accessible route;
2. accessible and usable public and common use areas;
3. usable doors;
4. accessible route into and through the covered dwelling unit;
5. light switches, electrical outlets, thermostats and other environmental controls in accessible locations;
6. reinforced walls for grab bars; and
7. usable kitchens and bathrooms.

The manner in which each of the seven standards may affect multifamily dwellings, followed by some examples of how real estate appraisers may handle observed noncompliance in the three approaches to value, comprise the remainder of this study.

Accessible Building Entrance

Covered multifamily dwellings are to have at least one building entrance on an accessible route unless it is impractical to do so because of site considerations.[3] For buildings with individual dwelling units, such as garden-style apartment complexes, all ground floor units must be accessible unless impracticality of the site is established, in which case a minimum of 20% of the total ground floor units must comply, regardless of site impracticality. If the building has an elevator, every dwelling unit on a floor served by an elevator must be accessible.

For example, if a garden-style apartment complex has five buildings with forty units per building, each comprised of twenty ground floor units and twenty second floor units, all ground floor units must be accessible. If two of the buildings have accessible routes with a slope exceeding 8.33%, these two buildings need not be accessible because the other three buildings exceed the 20% total ground floor requirement.

Accessible Public and Common Use Areas

Covered multifamily dwellings with an accessible route to the building entrance are to have the public and common use areas readily accessible and usable by handicapped persons.[4] Such areas include, but are not limited to, common use facilities (such as: rental offices, clubhouses, recreational facilities, mailbox areas, swimming pools, etc.), laundry rooms, toilet and bathing facilities, and drinking fountains. For example, ramps or lifts must be provided where steps are used to permit access to common areas such as a lobby, mailbox area, rental office, etc. Although the swimming pool area must be accessible, access into the pool itself is not required. For toilet and bathing facilities at least one of each provided fixtures per room (such as: toilets and stalls, urinals, lavatories and mirrors, bathtubs, shower stalls, and sinks), must be accessible. Fifty percent of the drinking fountains, or at least one if only one is provided in the facility or at the site, must be accessible.

Usable Doors

All of the doors allowing access to and within all premises are to be sufficiently wide to allow passage of persons in a wheelchair. This applies to accessible routes in public and common areas as well to individual dwelling units. Within dwelling units the door must have a clear passage of 32 inches when the door is open 90 degrees. The door width requirement also applies to "walk-in" closets and patio/balcony doors. Lever handles are required on entry doors into the building and into individual dwelling units. However, lever hardware is not required for doors within the dwelling unit.

Route into and through the Dwelling Unit

All premises within the covered multifamily dwelling units are to contain an accessible route into and through the unit. Depending upon the circumstances, accesses at the threshold into the unit at exterior doors are to be between 1/2 and 3/4 inches with a change in level beveled at a slope no greater than 1:2.

In all dwelling units there is to be a minimum clear width passageway, such as hallways, of 36 inches. Design features such as a sunken or raised living room are permissible providing they do not interrupt the accessible route through the dwelling unit. However, a design feature such as a split-level entry that does not allow an accessible route must provide a ramp or other means of access to the accessible route.

Location of Environmental Controls

Light switches, electrical outlets, thermostats, and other environmental controls must be in accessible locations. The general guideline is that these controls are between 15 and 48 inches above the floor, although the *Fair Housing Accessibility Guidelines* (U.S. Department of Housing . . . , 1991) provide for additional limitations if the reach is over an obstruction, such as a shelf or cabinet. Controls that do not meet these requirements are acceptable provided that comparable controls are available in the same area and are accessible.

Reinforcing Walls for Grab Bars

Bathroom walls must be reinforced to allow later installation of grab bars around the toilet, tub, shower stall, and shower seat, where such facilities are provided. There is no specific requirement pertaining to the method of reinforcement (for example, by plywood or wood blocking) as long as the necessary reinforcement will permit the future installation of the appropriate grab bar(s). The guidelines do indicate the proper location of an appropriate grab bar(s). It is noted that grab bars are not required in a "powder room" (a room containing only a toilet and sink) unless it is the only toilet facility located on an accessible level of a multistory dwelling unit.

Usable Kitchens and Bathrooms

Kitchens and bathrooms must be designed and constructed so that an individual in a wheelchair can maneuver about the space and access such appliances as the range or cook top, sink, oven, dishwasher, refrigerator/freezer, or trash compactor.

Usable bathrooms must provide sufficient space for a wheelchair to maneuver, however, bathrooms have two sets of specifications for compliance with the FHA.[5] If a dwelling unit has only one bathroom, either specification may apply. If there are two bathrooms all bathrooms must comply with specification "A" *or* one bathroom must comply with specification "B", and the other bathrooms must be on an accessible route and have usable doors. For a complete description of the requirements the reader is referred to the *Fair Housing Accessibility Guidelines* (U.S. Department of Housing . . . , 1991).

Appraisers must be aware of the above requirements and penalties for noncompliance that their clients can incur. Clients who are sanctioned are angry clients. They may take out their wrath on their appraiser for not informing them about certain FHA provisions. Whether their claims are valid under the law or even viable may not stop them from pursuing the appraiser. Unfortunately, as revealed above, the consequences for noncompliance are potentially serious.

Appraisal Acknowledgment of the FHA

Because of the potential importance of the handicap provisions of the FHA to appraisers, the remainder of this study will investigate the effect of noncompliance upon value and how the real estate appraiser may handle noncompliance with the FHA in the final value estimate. The appraisal industry has acknowledged the existence of handicap accessibility in commercial properties under the Americans with Disability Act (ADA) (1992). There is much similarity between the FHA and ADA, particularly in the case of the "common areas" subject to FHA compliance. Therefore, the discussion presented herein will draw upon the ADA, where necessary, to help the appraiser attain the necessary knowledge to comply with the FHA requirements, specifically the Competency and Departure Provisions of the *Uniform Standards of Professional Appraisal Practice* (USPAP) (The Appraisal Foundation, 1996).

The *Uniform Standards of Professional Appraisal Practice* has been adopted by the Appraisal Foundation. Members of organizations belonging to the Appraisal Foundation are subject to the requirements of USPAP. In addition, individual states have

adopted USPAP in the licensing/certification of real estate appraisers in their states, thereby extending the coverage of USPAP. The Competency Provision of USPAP requires the appraiser to either (1) have the knowledge and experience necessary to complete a specific appraisal assignment, or (2) disclose the appraiser's lack of knowledge or experience to the client. Therefore, it is apparent that the Competency Provision of the USPAP requires knowledge of FHA regulations by real estate appraisers.

USPAP also has a Departure Provision that permits limited exceptions to USPAP, although the appraiser must disclose any limitations. This provision would apply, for example, if the appraiser excluded any known barriers to handicapped access required to meet the FHA regulations. However, the appraisal report would then be based upon an extraordinary assumption which must be clearly and accurately stated as a disclosure or limiting condition. The result would be considered a limited appraisal report that may not adequately serve the original purpose of the appraisal request.

Guide Note 9 from the Appraisal Institute (1993) is titled, "The Consideration of the Americans with Disabilities Act in the Appraisal Process" and provides guidance in applying USPAP to appraisals that may be subject to the Act. Although the *Guide Note* pertains to ADA and commercial properties, it can serve as an aid to be used in complying with the residential properties covered under the FHA.[6] Real estate appraisers who do not belong to the Appraisal Institute are not required to follow *Guide Note 9*, however, it forms a written standard that is applicable to all appraisers. Also, the *Guide Note* contains recommendations that can be applicable to the FHA. One is that the appraiser inform the client of any possible noncompliance with ADA (interpret as FHA) which was not previously disclosed by the client and report any condition that might indicate a "readily achievable" barrier removal (interpret as provide access). Consequently, the appraiser appears to have an obligation to be familiar with the provisions of ADA (FHA) as they affect real estate.

Measuring the Effect upon Value

The existence of a violation of the FHA may have an adverse effect upon the value of the property being appraised. Although the appraiser is not expected to be an expert in FHA requirements, it has been previously suggested that USPAP contains requirements of appraisers in both its competency and departure provisions. Consequently, the appraiser has a duty to possess a "certain level" of knowledge concerning the FHA and its effect upon value. An analogy may be made concerning the knowledge an appraiser must have in building materials and methods for improving properties. The appraiser is not expected to be an expert in construction but must have sufficient knowledge to inspect and analyze the improvements and report and measure any significant depreciation. Similarly, in light of the ADA and USPAP the appraiser must be sufficiently knowledgeable to be able to measure the effect on value of any FHA violations.

Guide Note 9 provides that value loss attributable to changes resulting from the ADA (FHA) is measured in the same manner used to measure curable depreciation from other causes. However, the *Guide Note* cautions that just deducting the cost to cure from the value estimate before the required changes may not be proper. *Guide Note 9* also says that if the appraiser becomes aware of a condition that might constitute an accessibility situation during the property inspection or during normal research, the appraiser should note the condition(s) in the appraisal report.

In a video tape, the Appraisal Institute (1993) recommends that in ADA situations the appraiser ask the owner if a good faith effort has been made to comply with the ADA. Again, this can set a framework for dealing with the FHA regulations. If the building is not in compliance the appraiser should then find out if the owner has developed an "action plan" to make the necessary corrections. With these questions answered the appraiser can then proceed with the appraisal. Three scenarios that the appraiser may encounter involve: no evidence of noncompliance, noncompliance is apparent, or noncompliance exists but the client requests exclusion of ADA (FHA) considerations. In the last case the appraiser should ask for the exclusion request in writing and in all three scenarios the appraiser is cautioned to use a disclaimer. However, it is also pointed out that a disclaimer by itself is not always sufficient. For protection the appraiser needs a working knowledge and awareness of the regulations and their applicability to real estate. A "sharp eye" is also needed when inspecting the property. However, appraisers are cautioned not to claim expertise unless they have it.

In sum, the Appraisal Institute has considered that accessibility regulations can have a major impact upon real estate appraisers in the performance of their job. The remainder of this study will examine how real estate appraisers may wish to handle observed noncompliance with FHA regulations.

Noncompliance and the Cost Approach

As previously indicated the real estate appraiser is expected to have a "certain level" of knowledge concerning the FHA and its regulations and requirements. *Guide Note 9* indicates that the same techniques used to measure curable depreciation may be used in value loss attributable to the ADA (FHA). Furthermore, *Guide Note 9* indicates sometimes the cost to cure may be sufficient, whereas in other instances it may not be adequate. For example, if additional construction fees for retrofitting existing properties are involved standard cost calculations may be affected.

The depreciation approach to use in measuring value loss is under the functional obsolescence technique.[7] *The Dictionary of Real Estate Appraisal* (Appraisal Institute, 1993, 154–55) defines functional obsolescence as "an element of accrued depreciation resulting from deficiencies or superadequacies in the structure." The tenth edition of *The Appraisal of Real Estate* (Appraisal Institute, 1992, 352, 357) refers to functional obsolescence as a "loss in value resulting from defects in design. It can be caused by changes that, over time, have made some aspect of a structure, such as its materials or design, obsolete by current standards." Obviously, any FHA regulations that have not been complied with on applicable residential properties first occupied after March 13, 1991 may be considered to be obsolete by current standards concerning handicapped accessibility.

Functional obsolescence is further broken down into curable and incurable. For the item in question to be curable the cost of replacing it must be the same as or less than the expected increase in value (Appraisal Institute, 1992, 352) whereas incurable functional obsolescence "cannot be practically or economically corrected" (Appraisal Institute, *The Dictionary . . .* , 1993, 179–80). Because the FHA requires compliance, any noncompliance should be treated as curable. Roland (1991) indicates that according to the FHA, economics is not a consideration. Curable functional obsolescence may result from a deficiency requiring an addition or a deficiency requiring substitution or modernization.[8]

To measure the loss in value of an FHA deficiency requiring an addition, for example, assume that in an inspection of the subject property the appraiser observes the lack of a curb cut and ramp from the parking lot to a readily accessible walkway. Further assume that the cost to cure, construct a curb cut and ramp, is less than, or equal to, the expected increase in value; therefore correcting the lack of a curb cut is considered curable. The value loss is measured as presented in Exhibit 1.

In the case of an FHA deficiency that requires substitution or modernization, for example, assume that in appraising a garden-style apartment complex with 200 ground floor units the appraiser observes the doors to the bedroom and bathroom have a 30-inch clear passage versus the minimum requirement of 32 inches, as required (Fair Housing Act Design . . . , 1995). (For simplicity it is assumed that all units have only one bedroom and one bathroom.) The loss in value is calculated as presented in Exhibit 2. The calculations of loss in value caused by curable deficiencies apply regardless of whether the appraiser uses the reproduction or replacement cost method (Appraisal Institute, 1992, 353–55).

In summary, the treatment of noncompliance with FHA regulations in the cost approach is under the category of functional obsolescence. Because the FHA is mandatory, all functional obsolescence is considered to be "curable." The methods of handling noncompliance apply to both the replacement and the reproduction cost approaches.

Exhibit 1
Value Loss Measurement When a Deficiency Requires an Addition

Cost to construct a curb cut	$1,500
Less: Cost to construct a curb cut if the curb was being installed new on the date of the appraisal	−1,000
Loss in value	$ 500

Exhibit 2
Value Loss Measurement When a Deficiency Requires Substitution or Modernization

Cost of existing doors in cost estimate	$ 70,000
Less: Physical deterioration charged	−3,000
Less: Salvage value	−10,000
Plus: Old door removal and new door installation costs	+190,000
Loss in value	$ 247,000

The cost of the existing doors and door jambs are estimated at $175 each, depreciation is estimated at 4%, salvage value of the existing doors is $25 per door, and removal and installation of new doors is $475 each, which includes widening the door jamb, purchasing and installing the new door and completing all finish work.

Noncompliance and the Sales Comparison Approach

In the sales comparison approach the noncompliance may be considered under the physical characteristic category of "functional utility," an area in which to make comparisons between the comparable property and the subject property. *The Appraisal of Real Estate* (Appraisal Institute, 1992, 385, 383) notes that "the appraiser must be careful not to assume that an element of comparison affects value unless its influence is indicated by the market data," and, "the value added or lost by the presence or absence of a differing item in a comparable property does not usually equal the cost of installing or removing the item." Although there are several techniques available to measure adjustments, the most commonly used technique, referred to as "comparative analysis," uses one of two methodologies. Paired data analysis involves comparing two or more market sales to show the size of adjustment for a single characteristic, and relative comparison analysis examines relationships without quantification.

To use paired data analysis when considering the implications of the FHA, the appraiser seeks to identify comparable sold properties that comply with the FHA and comparable sales that do not meet the FHA regulations and requirements. If all other things are equal, the difference between sale prices should indicate the discount, or premium, that the market is willing to pay for FHA compliance. For example, assume that two similar garden-style apartment complexes have recently sold and a sales price difference can be isolated to Sale A, which has ground floor units that comply, and Sale B, which does not comply. Both sales are assumed to comply with the FHA concerning common areas, i.e., accessible walkways, club house accessibilities, etc. If Property A sold for an adjusted price of $35,500 per dwelling unit and Property B sold for an adjusted sales price of $34,250 per unit then the premium paid per dwelling unit to comply with the FHA is $1,250. If the subject apartment complex does not comply with FHA requirements then any comparable sales that do meet ground floor unit compliance would need to be adjusted downward by $1,250 per ground floor unit.[9] If a comparable sale had 200 ground floor units the downward adjustment would be $250,000.

In the relative comparison technique the appraiser analyzes the sales without regard to quantification. This may be relevant when the appraiser cannot derive dollar adjustments, as in paired data analysis. The appraiser analyzes the sales for the different factors of comparison and indicates whether the comparable sale is superior, equal, or inferior to the subject property. An overall rating is given to each comparable sale and the sales are arrayed according to some unit of comparison. For example, in Exhibit 3, Relative Comparison Analysis, assume that sales are evaluated according to the factors of location, condition and compliance with the FHA.

The comparable sales are then arrayed, as in Exhibit 4, Array of Comparable Sales. From the array the appraiser can then reconcile a unit of comparison applicable to the subject property. Comparable Sale A indicates a downward (negative) direction in the price per square foot, Comparable Sale C indicates an upward (positive) direction in the price per square foot, and Comparable Sale B indicates a unit price that should be somewhat similar to that for the subject property.

As discussed above, to handle noncompliance with the FHA in the sales comparison approach the appraiser looks to the market for deviations in sales prices based upon functional utility. The recommended technique involves either paired sales or relative comparison analysis. Either of these techniques requires that the appraiser add to the list

Exhibit 3
Relative Comparison Analysis

Factor of Comparison	Subject	Comparable A	Comparable B	Comparable C
$/Sq. Ft	----	$54	$50	$44
Location	Average	Much Better	Better	Worse
Condition	Good	Similar	Worse	Worse
FHA	Yes	No	Yes	No
Net Adjustment		(Better) Negative	(Equal) None	(Worse) Positive

Exhibit 4
Array of Comparable Sales

Comparable	$ Per Sq. Ft	Net Adjustment
A	$54.00	Negative
B	$50.00	Equal
C	$44.00	Positive

of questions used when verifying sales. It needs to be learned if the purchaser recognized noncompliance with the FHA and, if so, was the purchase price adjusted accordingly.

Noncompliance and the Income Approach

In the income capitalization approach the value estimate is based upon the income-producing capabilities of the subject property. This value approach is based upon the premise that the greater the income the greater the value. The two techniques used in the income capitalization approach are the direct capitalization technique, which uses a stabilized income stream, and the discounted cash flow technique, which is applicable for variable income streams. In theory, any ongoing adjustments for noncompliance with FHA regulations and requirements will be reflected in the income generated by the property. However, *The Appraisal of Real Estate* (Appraisal Institute, 1992) cautions that in the direct capitalization technique the appraiser must be careful and not include any expenditures for capital improvements in the expense estimates because they do not occur on an annual basis. Rather, as indicated by Aalberts and Clauretie (1992), any expenses for compliance (with the ADA) should be deducted from the final value estimate as a necessary cost. For example, assume the value estimate for an apartment complex by direct capitalization is $7,000,000 but there is an estimated cost of $500,000 in items necessary to bring the complex into compliance with FHA regulations and maintain the present income stream. The final value estimate will then be shown as $6,500,000 ($7,000,000 less $500,000 compliance cost). In the direct capitalization approach the appraiser must not stop at deducting the cost of current compliance but must also

examine the effect that compliance will have upon the net income in future years. (Aalberts and Clauretie, 1992, also examine this scenario.)

The Appraisal of Real Estate (Appraisal Institute, 1992) indicates that if the value estimate is based upon discounted cash flow analysis then it is acceptable to treat the expenditure associated with FHA compliance in the year in which the expense occurs. Discounted cash flow analysis is particularly relevant when there may be variable expenditures on FHA items over a period of years because the net operating income will vary each year based upon the expenditures. For example, assume that a property needs several structural repairs in the ground floor dwelling units, such as door widening, lowering of electrical switches and reinforcements for grab bars in the bathrooms, as well as handicapped accessibility in the "clubhouse". The time schedule and cost of repair to bring the apartment complex into compliance may be of such magnitude that the repairs will occur over more than two years. Assume the dwelling unit repairs in years one and two will be $300,000 per year, and in year three "clubhouse" repairs will be $100,000. Since the FHA expenditures are nonrecurring items they do not readily fit into the replacement allowance category under expenses but are treated as cash outflows in the year of their occurrence. The discounted cash flow technique is well suited to treat variable cash flows that may occur over succeeding years with FHA compliance.

In summary, the techniques to handle noncompliance with the FHA requirements in the income approach are dependent upon the nature of the expenditures upon the income stream. In direct capitalization, nonrecurring expenses should be deducted from the final value estimate. In discounted cash flow analysis the expenses are deducted in the year in which they occur. Because the expenses are nonrecurring, they are not placed in the reserves category.

Summary and Conclusions

The 1988 amendments to the Fair Housing Act of 1968 make it unlawful to conduct discriminatory housing practices against a disabled person. Included as a discriminatory practice is the failure to follow certain design and construction standards for covered multifamily dwellings. Violaters must not only remedy deficiencies and pay legal damages, but can even be fined up to $100,000 and/or imprisoned up to one year for those who refuse to cooperate in the enforcement of the law.

The FHA requires a certain level of expertise from the appraiser to properly value real estate. The amount of expertise is dictated by the USPAP, specifically in the Competency and Departure Provisions. The FHA has identified seven specific areas in which multifamily residences must be accessible to handicapped persons. The expenditures necessary to provide accessibility may have an effect upon the value of real estate. It is the effect of these expenditures that concern the real estate appraiser. Not only must the appraiser recognize noncompliance with the FHA but the appraiser must be able to measure the effect of noncompliance upon value, where appropriate.

The three approaches to value require different methodologies in the treatment of noncompliance with the FHA. In the Cost Approach, noncompliance is treated as functional obsolescence. In the Sales Comparison approach value differences are derived by examining the reaction of buyers in the marketplace. In the Income Approach the necessary expenditures for FHA compliance are examined as to their effect upon the income stream. In all three approaches, the real estate appraiser is required to obtain additional information to properly measure the effect upon value.

In conclusion, real estate appraisers must become more knowledgeable about the various facets of the FHA and its regulations. Not only must they do so to comply with national, state and professional organizational requirements, but the lack of doing so may not adequately meet the needs of their clients. Appraisers do not need to become experts in the FHA, just as they do not need to be experts in architecture and building construction, but they must have sufficient knowledge to recognize noncompliance and its effect upon value.

Appendix
Design and Construction Provisions

The following requirements are adapted from the U.S. Department of Housing and Urban Development, *Fair Housing Accessibility Guidelines*, in 24 CRF Ch 1, Vol. 56, No. 4 (June 24, 1991), 9503–15,

Requirement 1

Accessible building entrance on an accessible route - covered multifamily dwellings shall be designed and constructed to have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual characteristics of the site. (9503)

Requirement 2

Accessible and usable public and common use areas—covered multifamily dwellings with a building entrance on an accessible route shall be designed in such a manner that the public and common use areas are readily accessible to and usable by handicapped persons. (9504)

Requirement 3

Usable doors—covered multifamily dwellings with a building entrance on an accessible route shall be designed in such a manner that all the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs. (9506)

Requirement 4

Accessible route into and through the covered dwelling unit—all covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain an accessible route into and through the covered dwelling units. (9507)

Requirement 5

Light switches, electrical outlets, thermostats and other environmental controls in accessible locations—covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain light switches, electrical outlets, thermostats, and other environmental controls in accessible locations. (9507)

Requirement 6

Reinforced walls for grab bars—covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain reinforcements in bathroom walls to allow later installation of grab bars around toilet, tub, shower stall, and shower seat, where such facilities are provided. (9509)

Requirement 7

Usable kitchens and bathrooms—covered multifamily dwellings with a building entrance on an accessible route shall be designed and constructed in such a manner that all premises within covered multifamily dwelling units contain usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space. (9511)

Notes

[1]Although the Fair Housing Act of 1988 applies to individuals with both physical and mental disabilities, this paper covers only the industry's response to physical disabilities.
[2]A study prepared for the U.S. Department of Housing and Urban Development indicated cost increases as a percentage of project costs ranging between 0.07% to 0.85% under *Guideline* requirements and 0.23% to 0.98% under ANSI A117.1 requirements, for a total project increase of less than 1%. (See U.S. Department of Housing and Urban Development, 1993.) In 1989 it was reported that New York State estimated an additional cost of $400 to $480 per unit and the National Association of Home Builders estimated a per unit additional cost of $364. (See National Coordinating Council . . ., 1989.)
[3]The reader is referred to the FHA itself for a discussion of the tests of practicability for sites.
[4]The reader is referred to U.S. Department of Housing and Urban Development (1991) for a table titled "Basic Components for Accessible and Usable Public and Common Use Areas or Facilities" (p. 9506).
[5]The guidelines for bathroom space requirements have several specifications and are difficult to summarize. In fact, referring to the kitchen and bathroom guidelines Roland (1991) stated, "They cannot really be summarized and there is no attempt to do so" (p. 85).
[6]The four priorities of the Americans with Disabilities Act (1992) are: accessible entry, access to goods and services, access to restrooms, and access to common areas. As may be observed, these are similar to the priorities of the FHA.
[7]The depreciation procedures for the cost approach are adapted from those presented in Chapter 16 of *The Appraisal of Real Estate* (Appraisal Institute, 1992). Cost estimates are adapted from those presented by the Institute of Real Estate Management (1992, p. 27) in *ADA Title III: Compliance Made Practical*; and from personal interviews in March 1996 with: Dennis Smith, Durango Construction, Inc.; Jeff Weikel, Chermal Builders, Inc.; and Elaine Martin, Michael Martin General Contractors, all, Las Vegas, Nevada.
[8]Curable functional obsolescence may also result from a superadequacy, which the Appraisal Institute's *Dictionary of Real Estate Appraisal* (1993) defines as "an excess in the capacity or quality of a structure or structural component; . . ." (p. 357). For the purposes of FHA compliance in this study a superadequacy may be considered to be not applicable.
[9]It is understood that when applying paired sales analysis an adjustment amount should be derived from more than one paired sale but when there is only limited data the technique should not be discarded because there are no more than one paired sale (Appraisal Institute, 1992).

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