

NELSON & ASSOCIATES

3131 EAST 29TH STREET, SUITE E, BRYAN, TEXAS 77802

979/774-7755

E-MAIL: info@hazardcontrol.com

FAX: 979/774-0559

APPLICATION OF THE ADA MEANS OF EGRESS PROVISIONS TO NEW CONSTRUCTION, ALTERATIONS, AND EXISTING FACILITIES OF PRIVATE ENTITIES

Jason T. English and Gary S. Nelson

PURPOSE AND APPLICATION

The purpose of 28 CFR Part 36 is to implement the provisions of the Americans with Disabilities Act of 1990 (under Title III of the Act) that prohibit discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.¹

NEW CONSTRUCTION

Subpart D of Part 36 is titled *New Construction and Alterations*. According to Section 36.401 of this subpart, titled *New Construction*, Section 36.401(a) states that **any public accommodation² or commercial facility^{3,4}** designed and constructed for first occupancy after January 26, 1993 be **readily accessible to and usable by individuals with disabilities.**^{5,6,7}

Section 36.104 defines the term **public accommodation** as a private entity⁸ that owns, leases (or leases to), or operates a place of public accommodation. The term **place of public accommodation** means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories:

1. An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor.

2. A restaurant, bar, or other establishment serving food or drink.
3. A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment.
4. An auditorium, convention center, lecture hall, or other place of public gathering.
5. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment.
6. A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.
7. A terminal, depot, or other station used for specified public transportation.
8. A museum, library, gallery, or other place of public display or collection.
9. A park, zoo, amusement park, or other place of recreation.
10. A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.
11. A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment.
12. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or

recreation.

Section 36.104 defines a **commercial facility** as those facilities whose operations will affect commerce...intended for nonresidential use by a private entity.⁹

Additionally, according to Section 36.207 (and 36.401(b)), when a place of public accommodation (or commercial facility) is located in a **private residence**, the portion of the residence used exclusively as a residence is not covered, but that portion used exclusively in the operation of the place of public accommodation (or commercial facility) or that portion used both for the place of public accommodation (or commercial facility) and for residential purposes is covered. Coverage also extends to those elements used to enter the place of public accommodation (or commercial facility), including the homeowner's front sidewalk, if any, the door or entryway, hallways, and those portions of the residence, interior or exterior, available to or used by customers or clients (employees or visitors), including restrooms.

Regarding facilities not covered by the ADA, Section 36.102(e) states that the ADA **does not apply** to any **public entity**¹⁰, **religious entity**¹¹, or **private club**¹² (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation).

Application of ADAAG Appendix A Guidelines to New Construction

Regarding **new construction** of any **public accommodation**² or **commercial facility**,^{3,4} Section 36.406(a) of Subpart D states that new construction subject to this part [28 CFR Part 36] **shall comply** with the standards for accessible design published as Appendix A – *ADA Accessibility Guidelines for Buildings and Facilities* (ADAAG).

FACILITY ALTERATIONS

According to Section 36.402(a) of Subpart D, titled *Alterations*, **any alteration to a place of public accommodation**² or **commercial facility**^{3,4} **undertaken after January 26, 1992**,⁵ **shall be made so as to ensure that, to the maximum extent feasible**,¹³ **the altered portions of the facility are readily accessible to and usable by individuals with disabilities**, including [but not limited to] individuals who use wheelchairs.

Section 36.402 (b) defines *alteration* as a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof. According to 36.402(b)(1), alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions.¹⁴

Application of ADAAG Appendix A Guidelines to Facility Alterations

Section 36.402(b)(2) then states that if existing elements, spaces, or common areas are **altered**, then they **shall comply** with the applicable provisions of Appendix A to this part [28 CFR Part 36].

Further, Section 36.406(a) of Subpart D reiterates that **alterations** to any **public accommodation**² or **commercial facility**^{3,4} subject to this part [28 CFR Part 36] **shall comply** with the standards for accessible design published as Appendix A – *ADA Accessibility Guidelines for Buildings and Facilities* (ADAAG).

Path of Travel Requirements

Section 36.403(a) states that an alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function, shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps, clear floor paths through lobbies, corridors, rooms, and other improved areas, parking access aisles, elevators and lifts, or a combination of these elements.

A "primary function" is defined as a major activity for which the facility is intended. Examples of areas that contain a primary function include, but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and restrooms **are not** considered areas containing a primary function.

Paragraph (f) of this section discusses disproportionality and states that alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area. However, paragraph (g) confers that when the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs. Furthermore, when choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

1. An accessible entrance.
2. An accessible route to the altered area.
3. At least one accessible restroom for each sex or a single unisex restroom.
4. Accessible telephones.
5. Accessible drinking fountains.
6. When possible, additional accessible elements such as parking, storage, and alarms.

Paragraph (h) of this section further states that the obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking. In fact, if an area containing a primary function has been altered without providing

an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate. However, only alterations undertaken after January 26, 1992, shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

Alterations to Historic Buildings

Section 36.405 states that alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act, or are designated as historic under State or local law, shall comply to the maximum extent feasible with Section 4.1.7 of appendix A to this part. If, in the rare situation it is determined under the procedures set out in Section 4.1.7 of Appendix A, that it is not feasible to provide physical access to an historic property that is a place of public accommodation in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of Subpart C of this part.

EXISTING BUILDINGS

According to 28 CFR 36.304(a), effective January 26, 1992 ^{4, 14} **public accommodations** shall remove architectural barriers (*including means of egress barriers*) in existing facilities...where such removal is readily achievable – that is, where the removal of such barriers is easily accomplishable and able to be carried out without much difficulty or expense.

Readily Achievable Defined

As defined in Section 36.104, readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

1. The nature and cost of the action needed

- under this part.
2. The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site.
 3. The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity.
 4. If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities.
 5. If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Removal of Barriers

Section 36.304(a) regarding the removal of barriers states that a public accommodation shall remove architectural barriers in existing facilities where such removal is readily achievable.

Specific examples of steps to remove barriers (including means of egress barriers) are listed in Section 36.304(b), which include, but are not limited to installing ramps, and making curb cuts in sidewalks and entrances. According to Section 36.304(c), a public accommodation is urged to take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities:

1. A public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking

spaces.

2. A public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, widening doors and installing ramps.
3. A public accommodation should take measures to provide access to restroom facilities. These measures include, for example, widening of doors and the installation of ramps.
4. A public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Alternatives to Barrier Removal

According to Section 36.305, where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable. Alternatives to barrier removal listed in this section include, but are not limited to:

1. Providing curb service or home delivery.
2. Retrieving merchandise from inaccessible shelves or racks.
3. Relocating activities to accessible locations.

Application of ADAAG Appendix A Standards to the Barrier Removal

Section 36.304(d)(1) states that, except as provided in paragraph (d)(2) of this section,¹⁶ measures taken to comply with the **barrier removal** requirements **shall comply** with the applicable requirements for **alterations** in Section 36.402 (*Alterations*), 36.405 (*Historic Preservation*) and 36.406 (...*Alterations*) of this part for the element being altered. Accordingly, Section 36.402(b)(2) then states that if existing elements, spaces, or common areas are **altered**, then each such altered element, space, or area **shall comply** with the applicable

provisions of Appendix A to this part [28 CFR Part 36].

Likewise, Section 36.406(a) also states that **alterations** subject to this part **shall comply** with the standards for accessible design published as Appendix A, ADA Accessibility Guidelines for Buildings and Facilities (ADAAG).

Maintenance

According to Section 36.211, a public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

Appendix A analysis further states that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or “accessible” routes that are obstructed by furniture, filing cabinets, or potted plants are neither “accessible to” nor “usable by” individuals with disabilities.

Section 36.211(b) states that it does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. However, the analysis in Appendix A to this part states that allowing obstructions or “out of service” equipment to persist beyond a reasonable period of time would violate this part, as would repeat mechanical failures due to improper or inadequate maintenance. It further states that failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Technical Assistance

As stated in 36.507, a public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

¹ This purpose is stated in 28 CFR 36.101. Title III refers to Public Law No. 101-336 (42 USC, Chapter 126, Subchapter III).

² As required by 36.102(b), Subpart D applies to public accommodations.

³ As required by 36.102(c), Subpart D applies to commercial facilities.

⁴ The term “facility” means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

⁵ Section 36.508 titled *Effective Date* states in 36.508(a) that except as otherwise provided in this section (concerning the limitation of civil action and exemption of certain transportation vehicles until certain dates) and this part, this part shall become effective on January 26, 1992.

⁶ According to 36.401(a)(2), a facility is subject to the new construction requirements of the ADA only if the last application for a building permit or permit extension for the facility is certified to be completed after January 26, 1992 (or in jurisdictions that do not certify completion of applications, if the last application for a building permit or permit extension for a facility is received after January 26, 1992), and the first certificate of occupancy for the facility is issued after January 26, 1993.

⁷ Section 36.401(c) states that full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. It further states that if full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use

wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

⁸ A private entity means a person or entity other than a public entity.

⁹ Exceptions: (a) Facilities that are covered or expressly exempt from coverage under the Fair Housing Act of 1968, as amended (42 USC 3601-3631), (b) aircraft, or (c) railroad locomotives, railroad freight cars...and other railroad cars (see 36.104 for a more detailed list of railroad exemptions).

¹⁰ A *public entity* means any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority (as defined in Section 103(8) of the Rail Passenger Service Act, 45 USC 541).

¹¹ A *religious entity* means a religious organization, including a place of worship.

¹² A *private club* means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964, 42 USC 2000a(e).

¹³ The phrase “to the maximum extent feasible,” as used in this section, applies to the occasional case where the nature of the existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of

the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

¹⁴ Normal maintenance, re-roofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

¹⁵ Under Section 36.304, titled *Barrier Removal*, Section 36.304(d) states that measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in Section 36.402, which, according to Section 36.402(a)(1), apply after January 26, 1992.

¹⁶ While it should rarely be necessary, Section 36.304(d)(2) states, “if, as a result of compliance with the alterations requirements specified in paragraph (d)(1) of this section, the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily achievable measures to remove the barrier that do not fully comply with the specified requirements. However, no measure shall be taken that poses a significant risk to the health or safety of individuals with disabilities or others.”

Reference

United States Department of Justice, 28 CFR Part 36, “Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,” 1994.