# Statement Regarding Enforcement of the Design and Construction Requirements of the Fair Housing Act

**Testimony By:** Theresa L. Kitay, Partner Coughlin & Kitay, P.C **Date:** October 28, 1999
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Chairman Canady, Ranking Member Watt, and Members of the Subcommittee:

I am Theresa Kitay, a member of the National Multi Housing Council and a partner with the law firm of Coughlin and Kitay, P.C. It is my pleasure to testify on the Justice in Fair Housing Enforcement Act, HR 2437, introduced by Representative Walter Jones.

My area of practice includes accessible design and construction litigation. In that capacity I have represented properties around the country involved in accessible design litigation with the Department of Housing and Urban Development (HUD), the Department of Justice (DOJ), private enforcement entities funded by HUD, state attorneys general, and private parties. Previously, I was a regional counsel in HUD's Atlanta field office with responsibility for accessible design cases, so I believe I have a unique position from which to view the evolution of accessible design enforcement. Accompanying me is Jay Harris, Vice President of Property Management with the National Multi Housing Council/ National Apartment Association/American Seniors Housing Association Joint Legislative Staff.

I am here today on behalf of three principal trade associations representing the private apartment and seniors housing industry: the National Multi Housing Council, the National Apartment Association, and the American Seniors Housing Association. NMHC/ASHA represent the nation's leading firms participating in the multifamily rental and seniors housing industry. Our combined memberships are engaged in all aspects of the development and operation of apartments and seniors housing, including ownership, construction, finance, and management. The National Apartment Association is the largest national federation of state and local associations of apartment industry professionals including developers, owners, investors and property managers. NAA is comprised of 150 affiliates and represents more than 26,000 professionals who own and/or manage more than 3.3 million apartments. NMHC/NAA/ASHA jointly operate a federal legislative program and provide a unified voice for the private apartment and seniors housing industries.

NMHC/NAA/ASHA believe that accessible design is not just the right thing to do - it is good business, too. Let me give you one example. NAA created the National Accessible Apartment Clearinghouse (NAAC), a free, national apartment locator service for disabled individuals seeking rental apartment housing. Anyone can call an 800 number - 800-421-1221 - to find out about the availability of accessible apartments in more than 150 markets nationwide, with detailed information about accessibility features at those properties. NAAC maintains a wide range of information about the residence, including its proximity to public transportation, whether grab bars are provided in the bathroom, kitchen and bathroom specs, and parking availability. NAAC receives over 100 calls a

week from individuals with disabilities looking for accessible housing and there is never a fee for its services. NAAC is a public service program sponsored by the National Apartment Association, National Multi Housing Council, American Computer Software, Fannie Mae Foundation, and For Rent magazine. The Clearinghouse can be reached on the Web at www.nmhc.org or www.aptsforrent.com/naac.

The U.S. apartment industry provides homes for approximately 15 million families and individuals nationwide, representing the full spectrum of America's population. Apartments (i.e., construction of five or more units) account for about 15 percent of the entire housing stock. Rental revenues from apartments total more than $75 billion annually, and management and operation of apartments are responsible for approximately 400,000 jobs. Construction of apartment communities has added roughly 200,000 new apartment homes in each of the past two years. The value of the new construction has averaged more than $16 billion annually, providing jobs to more than 200,000 workers. Among the owners of apartment communities are individuals, partnerships, real estate investment trusts, corporations, and nonprofit organizations.

I have three points to make today in my testimony on HR 2437:

1. HUD's enforcement policy is at odds with its own design and construction guidance.
2. HUD is more interested in bringing enforcement actions than reducing uncertainty during a property's design phase.
3. HR 2437 raises significant issues worthy of discussion and should be pursued, but HUD can move in the right direction without legislation.

**I. HUD's enforcement policy is at odds with its own design and construction guidance**

When it passed the Fair Housing Amendments Act in 1988, Congress intended to place "modest accessibility requirements on covered multifamily dwellings."1 In implementing that instruction, HUD promulgated the Fair Housing Accessibility Guidelines in 1991, making clear that the Act, not the Guidelines, set the minimum accessibility requirements. HUD wrote at length that the Guidelines were non-mandatory:

"The Department has not categorized the final Guidelines as either performance standards or minimum requirements. The minimum accessibility requirements are contained in the Act. The Guidelines adopted by the Department provide one way in which a builder or developer may achieve compliance with the Act's accessibility requirements....Builders and developers should be free to use any reasonable design that obtains a result consistent with the Act's requirements."2

HUD reiterated its policy that the Guidelines are not minimum standards in the 1998 release of its revised Design Manual. There, the agency stated that the Guidelines "are not mandatory, but are intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act."3

But in my experience, I can tell you that policy is not being followed by HUD and its enforcement agents. Instead, the Guidelines (or the American National Standards Institute 117.1 (ANSI) provisions, another non-mandatory safe harbor) are being applied as minimum standards. On a regular basis, the architects and developers that are my clients are asked to justify the smallest variance from the Guidelines or ANSI. Let me give you some of the more egregious examples of how the accessible design requirements of the Fair Housing Act are being enforced today:

- HUD and DOJ officials have insisted that any client who did not use the Guidelines or ANSI standards would have the burden of proof that some other standard of accessibility was consulted during construction. This position is well beyond the statutory language and is an incorrect statement of the law.
- My clients have repeatedly been cited by HUD, HUD-funded enforcement agents, and DOJ for fair housing "violations" stemming from the absence of optional standards for centering bathroom and kitchen fixtures that were raised for the first time in the Design Manual released by HUD in 1996. Obviously, this includes properties constructed well before 1996.
- In conciliation discussions on numerous cases, HUD has insisted on strict ANSI compliance with regard to slopes, despite its own regulatory definition of an "accessible route" as "a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a

person with severe disability using a wheelchair and that is also safe and usable by people with other disabilities."4 To my mind, there is a vast difference between this definition of an accessible route, which focuses on "usability," and ANSI's strict and precise sloping requirements. In other words, it should be "reasonable" for a walkway to be a compliant "accessible route" under the language of the Act without precisely conforming to the 8.33% slope found in ANSI.

- Walkways built to meet the same local code standards that HUD or DOJ would contend do not comply with the Fair Housing Act - because they do not meet ANSI standards - are found on comparable, contemporaneously constructed properties built with HUD funds, and presumably designed and constructed under HUD's supervision. In fact, some of my clients who build these HUD-funded properties have had those properties be the subject of HUD investigations, despite the fact that the client relied on the approval from the HUD architect supervising the project!

**II. HUD is more interested in bringing enforcement actions than reducing uncertainty during a property's design phase**

HUD has defined success in its accessible design activities largely on the number of enforcement actions brought under the Act, instead of meeting an objective everyone can agree on: reducing confusion during the design phase and thereby providing greater accessibility in multifamily housing. HUD should be devoting more attention to the letter and the spirit of its mandate under the Fair Housing Act to obtain the industry's advice and counsel about the design and construction requirements.[5] Moreover, since more than 95% of the country's apartment operators are small businesses, accessible design is an area that cries out for HUD to meet its obligation under the Small Business Regulatory Enforcement Fairness Act (SBREFA) to provide "informal small entity guidance" by "answer[ing] inquiries by small entities concerning information on, and advice about, compliance with such statutes and regulations, [and] interpreting and applying the law to specific sets of facts supplied by the small entity."[6]

One story may illustrate what developers faced when trying to understand the requirements in the mid-90s. One developer client of mine and his architect began studying what was available in 1990 but still had questions after the Guidelines were released that needed to be resolved before construction began on a new property. In calling HUD, the professional was referred to four different HUD offices, all of which told him they had no details about the design and construction standards, but were more than happy to help him file a fair housing complaint! Eventually, HUD referred this client to the Pacific Disability and Business Technical Assistance Center, which told the client they had been hired by HUD to publicize the details of the "accessibility laws." By 1994, all this client had received from this HUD-funded group was a copy of the Code of Federal Regulations concerning the Architectural and Transportation Barriers Compliance Board, which has nothing to say about the Fair Housing Act. In short, developers building for much of the 1990s really had to fashion their own solutions, because HUD had not taken seriously its responsibility to educate and provide technical assistance directly to the industry on design and construction requirements, apparently concentrating on funding testing activities of advocacy groups instead. By recognizing that confusion and the frustration of developers trying to comply with the law as it now exists, HR 2437 is an important step in the right direction.

HUD's emphasis on enforcement is well known:

- HUD has a stated performance goal for fair housing enforcement: to double the number of fair housing enforcement actions brought in the second term of the Clinton Administration.7 Evaluating performance based on goals or quotas is exactly the sort of standard that Congress criticized and outlawed last year for the IRS8 and OSHA.9 HUD knows it. s wrong - that's why the agency recently agreed to the industry's request to stop awarding FHIP funds based on a quota or goal of how many suits the grantee brings.10 But enforcement quotas still drive the Office of Fair Housing and Equal Opportunity's performance objectives.
- From 1996 to 1998, HUD explicitly reserved the right to sue design and construction professionals who followed the agency's own advice in its Design Manual. On the front cover of the Manual was the following disclaimer: "[N]o guarantee of the accuracy or completeness of the information or acceptability for compliance with any mandatory requirement of any code, law, or regulation is either offered or implied."11 Only after Congress became involved did HUD withdraw, revise, and re-release a new manual - without the disclaimer.
- The use of testers applying the wrong standard has been an example of the agency's overreaching enforcement. In my experience, HUD spent $139,000 to fund a private group to bring 27 accessible design

lawsuits in the Atlanta area in 1996. The majority of the complaints were dismissed because the group applied the wrong standard, testing apartments above the ground floor that are not covered by the Act, or alleging violations in areas not within the scope of the Act's accessibility requirements.12 Respondents incurred many thousands of dollars to defend against these frivolous claims.

**III. HR 2437 raises significant issues worthy of discussion and should be pursued, but HUD can move in the right direction without legislation**

The Justice in Fair Housing Enforcement Act (HR 2437) is an important step toward fully recognizing that the quality of information available today about federal accessibility requirements is much better than the information available through most of the . 90s. The bill recognizes that the many accessibility provisions of state and local building codes - not only the Guidelines - can be "reasonable design" that meets the language of the Act. The bill focuses HUD enforcement activities on properties built after the disclaimer-free 1998 Manual was released, an improvement over the current enforcement that appears to evaluate compliance regardless of the quality of information available at the time. With appropriate modifications, HR 2437 is a bill NMHC/NAA could support. We would be happy to work with staff to further develop this legislation.

Additional steps can be taken to improve the scope of accessibility and availability of covered multifamily properties.

- HUD should synchronize its enforcement activities with the standards of the International Building Code (IBC 2000) and current state and local building codes that provide a wide range of accessibility features. The IBC 2000, the first uniform building code, contains accessibility features that reflect the work of thousands of building professionals and advocates over many years. Yet code bodies. attempt to provide a uniform standard for construction in the IBC 2000 is compromised by HUD's insistence on its own interpretation of the accessibility features in the Fair Housing Act. Were HUD to interpret its "reasonable design" policy to reflect the accessibility features found in state and local building codes, the agency could remove design-phase uncertainty and gain the benefit of the review of thousands of code officials in its enforcement process using a standard that conforms to the language of the Act. Rather than stand alone insisting on a unique interpretation of accessibility requirements, HUD should synchronize its enforcement activities with the IBC 2000 and existing state and local codes. HUD's release this week of its long-awaited model building code analysis may, upon review, prove to be a positive step to demonstrate the agency's good faith in synchronizing its policy of "reasonable design" with the building codes that guide design and construction around the country.
- Implementing the agency's stated reasonable design policy, HUD should instruct agency and agency-funded enforcement personnel to specifically demonstrate that a respondent's design solution was not a reasonable interpretation of the requirements in the language of the Act before filing a complaint. Neither the Guidelines nor ANSI should be referenced as a minimum standard of performance. Enforcement actions should take into account the nature of interpretive guidance available from HUD at the time of design and construction of the particular building, and the extent of accessibility features that were provided in the property.
- Meeting its SBREFA mandate, the agency should provide timely and reliable technical assistance in response to specific questions from design and construction professionals seeking to build or voluntarily retrofit their properties. Also, the agency has been instructed in the HUD FY 2000 Appropriations Act (P.L. 106-74) to directly educate code officials, architects, and covered professionals about the requirements of the Act. A model might be DOJ's program for providing the public with technical assistance for compliance with the ADA.
- Explore with the industry incentives that can increase accessibility on properties built in the 1990s. Structured with proper industry input, these voluntary incentives can be a more cost-effective way to increase property accessibility than the current slow enforcement-focused approach.

Thank you Chairman Canady, Congressman Watt, and Members of the Subcommittee for this opportunity to communicate our views on this important issue.

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