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ATTORNEY GENERAL OPINION NO. 92-106

Robert J. Watson
City Attorney
City Hall
8500 Santa Fe Drive
Overland Park, Kansas 66212

Re: Personal and Real Property -- Public Buildings -- Architectural Accessibility Standards Act

Synopsis: Renovations, alterations or construction of government buildings may be accomplished by using either uniform federal accessibility standards (UFAS) or Americans with disabilities act accessibility guidelines (ADAAG) standards. The reference to 28 C.F.R. part 36 in section 7 of 1992 House Bill No. 2602 as the only standard was a technical error. Local building code officials are not required to investigate complaints about accessibility in public buildings. The enforcement authority of the local building code officials is limited to denying the application for a building permit for the construction or alteration of a building. Since 1992 House Bill No. 2602 states that all public buildings and facilities shall conform to federal regulations (28 C.F.R. part 36) and no state regulations have been drafted regarding the design and occupancy standard, we must infer that the legislature meant for the federal regulations and interpretations to apply in determining whether a facility is subject to the

new construction standards. Unless the landlord-tenant contract provides otherwise, the tenant is not responsible for making other areas included in the path of travel accessible if such is not within the tenant's control. Cited herein: K.S.A. 58-1301, as amended by L. 1992, ch. 208, § 1; K.S.A. 1991 Supp. 58-1305, as amended by L. 1992, ch. 208 § 7; 28 C.F.R. parts 35, 36.

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Dear Mr. Watson:

As Overland Park city attorney you request our opinion on several issues regarding 1992 House Bill No. 2602, which became effective on July 1,1992. L. 1992, ch. 208.

I. "Does state law preclude using the Uniform Federal Accessibility Standards (UFAS) as the standard for accessibility for new construction and alteration for governmental buildings?"

The question stems from the confusion surrounding L. 1992, ch. 208, § 7 which in subsection (b) specifically states that design, construction and alteration of public buildings shall conform with 28 C.F.R. part 36 (ADAAG standards), whereas, design, construction and alteration of governmental buildings shall conform with 28 C.F.R. part 35 (ADAAG or UFAS standards). Subsection 7(d) then states that the "design, construction or alteration of public and governmental buildings or facilities shall be done in conformance with . . . Appendix A to 28 C.F.R. part 36, except that the elevator exemption at section 4.1.3(5) and section 4.1.6(i)(j) shall not apply to governmental buildings or facilities." (Emphasis added). The statement in subsection (d) seems to say that governmental buildings cannot use UFAS even though subsection (b) specifically allows use of such standards.

The original language of 1992 House Bill No. 2602 did not contain subsection (d); this provision was added when the senate committee requested that the bill be amended so as to include an elevator exemption for public buildings. "In construing statutes, the legislative intent is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every

part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible." State v. Adee, 21 Kan. 825, 829 (1987). Based on this general rule of statutory construction, it is our belief that since the original parts of 1992 House Bill No. 2602 allowed governmental buildings to use UFAS or ADAAG, that should be considered the standard and that subsection (d) was mainly intended to incorporate the elevator exemption for public buildings.

However, it should be noted that the Architectural and Transportation Barriers Compliance Board (ATBCB) is currently drafting regulations for Title II entities. The Department of Justice anticipates amending this rule after the regulations have been published, and adopting standards in line with ATBCB's regulations. Therefore, the choice of following UFAS or ADAAG seems to be a short-lived option.

II. "Does K.S.A. 58-1304, as amended, impose any duty upon local public officials to investigate a complaint regarding barriers in 'public buildings' which deny accessibility to individuals with disabilities if no one has made application for a permit for any alteration or construction of the building?"

Local public building code officials are not required to investigate complaints or do random checks on buildings to see that they are accessible. Even though they are responsible for the enforcement of the provisions found at K.S.A. 58-1301 through 58-1309, their only means of enforcement is to deny an application for a building permit for the construction or renovation of the building.

III. "Does the local official responsible for enforcement of K.S.A. 58-1301 et seq. have a duty to ensure that building permits and occupancy permits are issued for construction of new "public buildings" only if the building is designed and constructed in accordance with ADAAG standards for first occupancy after January 26 1993?"

You argue that since L. 1992, ch. 208, § 1 requires all public buildings and facilities in this state to conform with federal regulations (28 C.F.R. part 36) that the same time requirements set out in the federal regulations apply in Kansas.

Because the legislature did not set out any specific standards, we must infer that they meant for the federal regulations and interpretations to be applicable to the state. Based on this analysis we agree with your conclusion and therefore local code officials should follow what the United States department of justice has set forth for determining when a facility is subject to the new construction standards:

> "(1) if the last application for a building permit or permit extension for the facility is certified to be complete (or, in some jurisdictions, received) by a state, county, or local government after January 26, 1992, and (2) if the first occupancy is issued after January 26, 1993." 28 C.F.R. part 36, p. 35575 (7-26-91).

IV. "Should the local official issue a building permit to a tenant who is making alterations on the premises under the tenant's control although other areas in the path of travel which are not under the tenant's control need to be altered to make the path of travel readily accessible to and usable by individuals with disabilities?"

28 C.F.R. part 36.201(b) states the general rule regarding landlord and tenant responsibilities in places of public accommodation.

> "Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract."

28 C.F.R. part 36.403(d) discusses path of travel alterations and landlord/tenant responsibilities:

> "If a tenant is making alterations as defined in § 36.402 that would trigger the

> requirements of this section, those alterations by the tenant in areas that only the tenant occupies do not trigger a path of travel obligation upon the landlord with respect to areas of the facility under the landlord's authority, if those areas are not otherwise being altered."
>
> "This paragraph was contained in the landlord/tenant section of the proposed rule, § 36.201(b). If the tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the path of travel requirement), and the landlord is not making alterations to other parts of the facility, then the alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered. The legislative history makes clear that the path of travel requirement applies only to the entity that is already making the alteration, and thus the Department has not changed the final rule despite numerous comments suggesting that the tenant be required to provide a path of travel." 28 C.F.R. part 36, p. 35582 (7-26-91). (Emphasis added).

Therefore, unless there is some contract provision to the contrary, we are of the opinion that the tenant is not responsible for making the other areas included in the path of travel accessible if such areas are not under his or her control.

In conclusion, the renovations, alterations or construction of government buildings may be done either by UFAS or ADAAG standards and the reference only to 28 C.F.R. part 36 in subsection 7(d) of 1992 House Bill No. 2602 was a technical error. Local building code officials are not required to investigate complaints about accessibility in public

buildings. The enforcement authority of the local building code officials is limited to denying an application for a permit for the construction or alteration of a building. Since 1992 House Bill No. 2602 states that all public buildings and facilities shall conform to federal regulations (28 C.F.R. part 36) and no state regulations have been drafted regarding the design and occupancy standard, we must infer that the legislature meant for the federal regulations and interpretations to apply in determining whether a facility is subject to the new construction standards. Unless the landlord-tenant contract provides otherwise, the tenant is not responsible for making other areas included in the path of travel accessible if such is not within the tenant's control.

Very truly yours,

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