



U. S. Department of Housing and Urban Development Public and Indian Housing

Special Attention of:
ONAP Administrators;
Tribes; and Tribally
Designated Housing Entities

Notice PIH 2009-5 (TDHE)

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Cross Reference(s):

24 CFR Part(s) 1000, 8

Native American Housing Assistance and Self
Determination Act 1996

Section 504 Rehabilitation Act of 1973

Fair Housing Amendments Act of 1988

Uniform Federal Accessibility Standards

PIH Notice(s) 2008-6, 2006-38, 2005-21, 2003-26, 2002-01

Subject:

Reinstatement – PIH Notice 2006-38 - Accessibility Requirements for Native American Programs: Section 504 of the Rehabilitation Act of 1973; Americans with Disabilities Act of 1990; Architectural Barriers Act of 1968; and Fair Housing Amendments Act of 1988.

- 1. Purpose:** The purpose of this Notice is to remind tribes and tribally designated housing entities (TDHEs) who are recipients of federal funds of their obligation to comply with pertinent laws and implementing regulations that provide for non-discrimination and accessibility in federally funded housing and non-housing programs for people with disabilities. Additionally, this Notice clarifies certain information in Notice PIH 2002-01 (HA), Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968; and the Fair Housing Act of 1988, as it applies to HUD's Native American programs specifically. Both PIH 2002-01(HA) and this Notice are equivalent in their instructions; however, this Notice outlines the provisions of PIH 2002-01 that apply only to HUD's Native American Programs.

This Notice also provides information on key compliance elements of the relevant regulations and examples and resources to enhance recipients' compliance efforts. Note that specific regulations must be reviewed in their entirety for full compliance.

- 2. Applicability:** This Notice applies to the following programs and activities under the jurisdiction of the Office of Native American Programs (ONAP):
 - a. Indian Housing Block Grant (IHBG)
 - b. Indian Community Development Block Grant (ICDBG)
 - c. Other programs and activities funded previously, now or in the future by ONAP including:
 - Family Self-Sufficiency
 - Crime Prevention
 - Drug Elimination Programs

- Lead-Based Paint Hazard Control Program
- Youthbuild
- Tenant Opportunities Program (TOP), Economic Development and Supportive Services (EDSS)
- Resident Opportunity and Self-Sufficiency (ROSS)
- Rural Housing and Economic Development (RHED)

3. **Notification:** Recipients of Federal funds, including tribes and TDHEs, are responsible for providing this Notice to all current and future contractors and agents participating in covered programs/activities or performing work on behalf of recipients, including resident management corporations, consultants, etc. that are covered under the above subject legislation and implementing regulations.
4. **Definitions:** See 24 CFR Part 8.3 for the definition of terms referred to in Section 504 of the Rehabilitation Act of 1973. It is important to review the definitions of these terms, as they may be defined differently in other federal, state, or local laws and building codes.
5. **Statutory/Regulatory Requirements:** Where there may be conflicting statutory, regulatory, and code provisions, the most stringent provision applies. This includes any applicable tribal, state, or local laws/regulations/codes, which may be more stringent than federal requirements.

6. **Accessibility Requirements for Native American Programs:**

- a. Before the enactment of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), most housing for Native Americans was funded under assistance to Indian housing authorities pursuant to the U.S. Housing Act of 1937. This housing was subject to the requirements of Section 504 of the Rehabilitation Act of 1973 and implementing regulations in 24 CFR Part 8.

The development and modernization of low-rent housing was subject to the requirements in 24 CFR Part 8 for new construction, substantial rehabilitation, or other alterations. Indian housing under the Mutual Help Homeownership Opportunity Program was subject to the requirements for homeownership programs in 24 CFR Part 8.29. Section 502 of NAHASDA states that this housing is no longer subject to the requirements of the U.S. Housing Act of 1937 or annual contributions contract but shall be considered and maintained as affordable housing for purposes of NAHASDA.

- b. Under NAHASDA, IHBG funds are allocated by formula to Indian tribes who can choose to administer the program or to designate a TDHE to do so. IHBG funds are federal financial assistance and are subject to the requirements of 24 CFR Part 8. IHBG funds may be used for a wide range of housing activities, including the construction or rehabilitation of rental or homeownership housing and tenant-based rental assistance. Eligible rehabilitation includes alterations to make housing accessible for persons with disabilities. Accordingly, the applicable sections of 24 CFR Part 8, Subpart C-Program Accessibility, will depend on the type of activities funded by the IHBG recipient. Model activities under 202(6) of NAHASDA, such as community buildings or centers, day care centers, and housing office building and warehouses, would fall under this requirement.
- c. Title II of the Americans with Disabilities Act of 1990 (ADA) and implementing regulations in 28 CFR Part 35 do not apply to Indian tribes and their TDHEs. However, tribes or TDHEs that are agencies or instrumentalities of a State, e.g., State-created Indian housing authorities, are covered by the ADA and implementing regulations.

- d. The Architectural Barriers Act (ABA) and implementing regulations in 24 CFR Part 41 does not apply to Indian tribes and their TDHEs.
- e. The Federal Fair Housing Act and implementing regulations in 24 CFR Part 100 do not apply to Indian tribes and the TDHEs of those tribes engaged in NAHASDA-funded activities.

7. Section 504 Accessibility Requirements:

- a. New Construction [24 CFR Part 8.22 (a) and (b)]. A minimum of 5 percent or at least one unit (whichever is greater) in a housing project is required for mobility-impaired persons. An additional minimum of 2 percent or at least one unit (whichever is greater) is required for people with hearing or vision impairments. In circumstances where greater need is shown, HUD may prescribe higher percentages than those listed above. [See 24 CFR Part 8.22(c).] Also, see visitability recommendations in this Notice.
 - i) A project is defined as the whole or one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by single contracts for Federal financial assistance or application for assistance, or are treated as a whole for processing purposes, whether or not located on a common site.
- b. Substantial Alteration [24 CFR Part 8.23(a)]. If alterations are undertaken to a project that has 15 or more units, and the cost of the alterations is 75 percent or more of the replacement cost of the completed facility, then the provisions of 24 CFR Part 8.22(a) and (b) for new construction apply. Also, see visitability recommendations in Section III of this Notice.
- c. Other Alterations [24 CFR Part 8.23(b)]. When other alterations are undertaken, including (but not limited to) modernization, such alterations are required to be accessible to the maximum extent feasible until at least 5 percent of the units in a project are accessible, unless HUD prescribes a higher number or percentage pursuant to 24 CFR Part 8.23(b)(2). If alterations of single elements or spaces of a dwelling unit, when considered together, amount to an alteration of a dwelling unit, the entire dwelling unit shall be made accessible. Once 5 percent of the dwelling units in a project are readily accessible to and usable by individuals with mobility impairments, no additional elements of dwelling units, or entire dwelling units, are required to be accessible under this paragraph.

Alterations to common areas or parts of facilities that affect accessibility of existing housing facilities shall, to the maximum extent feasible, be made accessible to and usable by individuals with disabilities. For purposes of this paragraph, the phrase “to the maximum extent feasible” shall not be interpreted as requiring that a recipient make a dwelling unit, common area, facility, or element thereof accessible if doing so would impose undue financial and administrative burdens on the operation of the multifamily housing project. And pursuant to 24 CFR Part 8.32(c), building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member are not required. However, these exceptions do not relieve the recipient from compliance utilizing other units/buildings or other methods to achieve accessibility.

- d. Reasonable Accommodations [24 CFR Part 8.4(b)(i), 8.24 and 8.33]. When a family member requires an accessible feature(s) or policy modification to accommodate a disability, such feature(s) or policy modification must be provided, unless doing so would result in a fundamental alteration in the nature of its program or an undue financial and administrative burden. If providing such feature(s) would result in a financial and administrative burden, any other action must be taken that would not result in an undue burden. Recipients of federal financial assistance are required to make reasonable adjustments to their rules, policies, practices, and procedures in order to enable an applicant or resident with a disability to have an equal opportunity to use and enjoy the unit and the common areas of the dwelling or participate in or access other activities conducted/sponsored by the recipient.

For example, a recipient of federal financial assistance that does not allow residents to have pets must modify its policies and allow a tenant with a disability to have an assistive animal, if the animal is needed as a reasonable accommodation. If the recipient provides transportation to functions or activities, or if transportation is necessary for a disabled person to participate in such functions or activities, a recipient must ensure that accessible transportation is provided to accommodate persons with disabilities and their aides, including the reasonable accompaniment of the relative(s) or acquaintance(s).

Recipients of federal financial assistance are required to make and pay for structural modifications to dwelling units and common areas when needed as a reasonable accommodation for tenants or applicants with disabilities, unless the accommodation would cause an undue financial and administrative burden or would alter the fundamental nature of the program. For example, a recipient may be required to install a ramp to allow a tenant in a wheelchair access to a dwelling unit or transfer a family to an available accessible unit or one that can be modified without causing an undue financial and administrative burden or alteration in the nature of a program rather than modifying an existing unit. If providing a requested accommodation would result in a fundamental alteration in the nature of the program or an undue financial and administrative burden, then the recipient need not provide that accommodation. However, the recipient is required to provide another accommodation that would not result in an undue financial and administrative burden or fundamental alteration of the program. If an action would result in such an alteration or such burdens,

the recipient shall take any action that would not result in such an alteration or such burdens but would ensure that individuals with disabilities receive the benefits and services of the program or activity.

- e. Existing Housing Programs [24 CFR Part 8.24]. A recipient shall operate each existing housing program or activity receiving federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

24 CFR Part 8.24 does not necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with disabilities. It also does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the recipient shall take any action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

Pursuant to 24 CFR Part 8.24(b), a recipient may reassign services to accessible buildings and may offer 1) assignment of aides to beneficiaries, 2) provision of housing or related services at alternate accessible sites, 3) alteration of existing facilities and construction of new facilities, or 4) any other methods that result in making programs or activities readily accessible to and usable by individuals with disabilities. A recipient is not required to make structural changes in existing housing facilities where other methods are effective in achieving compliance with 24 CFR Part 8.24 or to provide supportive services that are not part of the program. In choosing among available methods for meeting the requirements of 24 CFR Part 8.24, the recipient shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

Once a recipient has made its programs accessible in compliance with 24 CFR Part 8.23(b) and 8.25, there is no requirement to make structural changes to existing housing facilities where other methods are effective in achieving compliance.

- f. Distribution of Accessible Dwelling Units [24 CFR Part 8.26]. Required accessible dwelling units shall, to the maximum extent feasible and subject to reasonable health and safety requirements, be distributed throughout projects and sites and shall be available in a sufficient range of sizes and amenities so that people with disabilities have choices of living arrangements comparable to that of other families eligible for assistance under the same program. This provision shall not be construed to require provision of an elevator in any multifamily housing project solely for the purpose of permitting location of accessible units above or below the accessible grade level. Regardless of whether a building includes an elevator, the general obligation of recipients under 24 CFR Part 8.4(d) is to administer programs and activities receiving federal financial assistance in the most integrated setting appropriate to qualified individuals with disabilities, which includes offering units in different sizes and amenities to individuals with disabilities.

- g. Occupancy of Accessible Dwelling Units [24 CFR Part 8.27]. Recipients shall adopt suitable means to assure that information regarding the availability of accessible units reaches people with disabilities. Recipients shall also take reasonable nondiscriminatory steps to maximize the utilization of accessible units by eligible individuals whose disability requires the accessibility features of the particular unit. To this end, when an accessible unit becomes vacant, before offering such units to a non-disabled applicant, the recipient shall:
- i) First, offer the unit to a current occupant of another unit who requires the accessibility features of the vacant unit (if the current occupant does not have such accessibility features in their current unit). Or, if no such occupant exists,
 - ii) Second, offer the accessible unit to a qualified applicant on the waiting list who requires the accessibility features.
 - iii) Note: A recipient may not prohibit an eligible disabled family from accepting a non-accessible unit for which the family is eligible and that may become available before an accessible unit. The recipient is required to modify such a non-accessible unit as needed, unless the modification would result in an undue financial and administrative burden. Pursuant to 24 CFR Part 8.27(b), when offering an accessible unit to applicants without disabilities, the recipient may require such applicants to agree to move to a non-accessible unit when available or when a disabled family needs the accessible unit. Such an agreement may be incorporated into the lease.
- h. Non-housing Facilities [24 CFR Part 8.21]. Newly constructed non-housing facilities shall be designed to be readily accessible to, and usable by, people with disabilities. Examples of such facilities include community centers and recreation buildings that are shared by tenants of a project. Alterations to existing facilities shall be accessible to the maximum extent feasible, defined as not imposing an undue financial and administrative burden on the operations of the recipient's program or activity. For existing non-housing facilities, recipients shall operate each program or activity receiving federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

Pursuant to 24 CFR Part 8.21(c)(2), methods that may be used to accomplish accessibility in existing non-housing programs and activities include 1) locating programs or services to accessible facilities or accessible portions of facilities, 2) assignment of aides to beneficiaries, 3) home visits, 4) the addition or redesign of equipment (e.g., appliances or furnishings), 5) changes in management policies or procedures, 6) acquisition or construction of additional facilities, 7) alterations to existing facilities on a selective basis, and 8) any other methods that result in making its programs or activities accessible to individuals with disabilities. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. In choosing among available methods for meeting the requirements of this section, the recipient shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

In historic preservation programs or activities, a recipient shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because such alteration would result in a substantial impairment of

significant historic features of an historic property, or would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens, alternative methods of achieving program accessibility include 1) using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible, 2) assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible, or 3) adopting other innovative methods.

- i. Accessibility Standards [24 CFR Part 8.32]. The design, construction or alteration of buildings in conformance with the Uniform Federal Accessibility Standards (UFAS) is deemed to comply with accessibility requirements of 24 CFR Part 8.21, 8.22, 8.23 and 8.25 with respect to those buildings. The following UFAS notes also apply to activities conducted under 24 CFR Part 8.

UFAS Notes:

- The exception for bathrooms found at UFAS 4.22.3 cannot be used for dwelling unit bathrooms.
- Figure 47(a) in UFAS does not permit the water closet to encroach on the clear (unobstructed per UFAS 3.5) floor space required to provide an unobstructed turning radius of 60 inches [see UFAS 4.34.2(2)].
- UFAS includes a definition of structural impracticability that does not require changes if such changes would result in the removal or alteration of a load-bearing structural member and/or an increased cost of 50 percent or more of the value of the element of the building or facility (see UFAS 3.5). This does not alleviate the recipient's responsibility for making its programs and units accessible to people with disabilities.
- 24 CFR Part 8.4(b)(1)(ii) prohibits recipients from providing housing that is not equal to that afforded others and (iii) prohibits recipients from providing qualified individuals with disabilities housing that is not as effective in affording the individual an equal opportunity to obtain the same benefit, or to reach the same level of achievement as that provided to others. In light of these regulatory provisions, PIH has determined that the following departures from UFAS are warranted in its housing programs. In addition to the UFAS standard at 4.34(15)(c), all sleeping areas must be on an accessible route. (The UFAS standard permits the possibility of inaccessible sleeping spaces in otherwise accessible housing units.) For new construction and substantially rehabilitated accessible units, when more than one bathroom is provided, additional bathrooms must be accessible.

8. Visitability:

- a. Visitability Concept. Although not a requirement, it is recommended that all design, construction, and alterations incorporate, whenever practical, the concept of visitability in addition to the requirements under Section 504. Visitability is a design concept that, for very little or no additional cost, enhances the ability of people with disabilities to interact with their neighbors, friends and associates in the community by visiting their homes and community areas.

- b. Design Considerations. Visitability design incorporates the following in all construction or alterations in addition to the requirements whenever practical and possible for as many units as possible within a development.
 - i) Provide a 32-inch clear opening in all bathrooms and interior doorways. Note: Clear opening is measured between the face of the door and the opposing stop when the door is open 90 degrees.
 - ii) Provide at least one accessible means of egress/ingress for each unit.
- c. Benefits of Visitability. Visitability also expands the availability of housing options for individuals who may not require full accessibility, assists in making reasonable accommodations, and allows, in some cases, individuals who may become disabled to remain in their homes, reducing the need to relocate to a home environment that can support their changing needs. Visitability will also improve the marketability of units.

9. Universal Design

Universal Design Concept. Although not a requirement, it is recommended that all design, construction and alterations incorporate, wherever practical the concept of Universal Design in addition to existing accessibility requirements applicable to tribes and tribally designated housing entities.

Universal Design is a design concept that encourages the construction or rehabilitation of housing and elements of the living environment in a manner that makes them usable by all people, regardless of ability, without the need for adaptation or specialized design. The intent of universal design is to simplify life for everyone by making products and the built environment more usable to as many people as possible at little or no extra cost. Universal design should strive for social integration and avoidance of discrimination, stigma, and dependency. By designing housing that is accessible to all there will be an increase in the availability of affordable housing for all, regardless of age or ability.

10. Additional Funding Sources for Accessibility Projects:

State or local Community Development Block Grant funds, Indian Housing Block Grant Program, Indian Community Development Block Grant, state and local HOME Program funds, corporate donations, non-profit contributions from organizations such as Rotary Clubs, Lions Clubs, etc. may be used for accessibility projects.

For further information about this Notice, please contact the nearest HUD Office of Native American Programs listed below. Locations of these offices are also available on HUD's Internet site at www.HUD.gov/offices/PIH/IH/codetalk.

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Washington Office
451 Seventh Street, SW, Room 4126
Washington, D.C. 20410
Phone: (202) 401-7914
FAX: (202) 401-7909

Office of Native American Programs
Outstationed - Denver Office
1670 Broadway, 23rd Floor
Denver, CO 80202
(303) 675-1600 or 1-800-561-5913
FAX: (303) 675-1660

Alaska Office of Native American Programs
3000 C Street, Suite 401
Anchorage, AK 99503
(907) 677-9836
FAX: (907) 677-9807

Eastern/Woodlands Office of Native American Programs
Metcalf Federal Building
77 West Jackson Boulevard, Room 2400
Chicago, IL 60604-3507
1-800-735-3239
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Northern Plains Office of Native American Programs
UMB Plaza
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