

From: Eric McSwain <eric@accessibleroute.com>
Sent: Monday, April 24, 2023 2:11 PM
To: CBSC@DGS
Cc: Clair, Ida@DGS
Subject: RE: PUBLIC COMMENT on PROPOSED BUILDING STANDARDS - Eric McSwain

Follow Up Flag: Follow up
Flag Status: Flagged

CAUTION: This email originated from a NON-State email address. Do not click links or open attachments unless you are certain of the sender's authenticity.

To whom it may concern,
I would like to submit the following comments regarding proposed changes to CBC Section 11B-233.3.1

Proposed Building Standard
Title 24 Part #: Part 2
Section #: (ET Item 11) 11B-233.3.1
Proposing State Agency: DSA-AC
This comment is intended for review during: 45-Day Comment Period

Your recommendation based on the criteria of Health and Safety Code Section 18930(a):
Approve as Amended

9 Point Criteria Info:
18930(A) 2

This is a rather lengthy email, so I have written **the main points in large bold text.**

The Chapter 11A requirements for adaptable dwelling units apply only to newly-constructed covered multi-family dwelling units and additions to existing buildings where the addition alone meets the definition of a covered multi-family dwelling. Please see Section 1128A.1, Note; Section 1101A.1, Items 1 and 3; and the Chapter 2 definition of NEWLY CONSTRUCTED below. I have bolded the text that is most relevant to this discussion.

SECTION 1128A

COVERED DWELLING UNITS

1128A.1 General. *Covered multifamily dwelling units shall be adaptable and accessible into and throughout the dwelling unit as provided in this division.*

Note: See Sections 1101A “Application” and 1102A “Building Accessibility” for dwelling units required to comply with this division.

SECTION 1101A

APPLICATION

1101A.1 Scope. *The application and authority of this chapter are identified and referenced in Sections 1.8.2.1.2 and 1102A for the Department of Housing and Community Development. Applicable sections are identified in the Matrix Adoption Tables of this code under the abbreviation HCD 1-AC. The provisions of this chapter shall apply to the following:*

- 1. All newly-constructed covered multifamily dwellings.*
- 2. New common use areas serving existing covered multifamily dwellings.*
- 3. Additions to existing buildings, where the addition alone meets the definition of a covered multifamily dwelling.*
- 4. New common-use areas serving new covered multifamily dwellings.*
- 5. Where any portion of a building’s exterior is preserved, but the interior of the building is removed, including all structural portions of floors and ceilings, the building is considered a new building for determining the application of this chapter.*

Chapter 11A generally does not apply to public accommodations such as hotels and motels and public housing. Public use areas, public accommodations and public housing as defined in Chapter 2 of this code are subject to provisions of the Division of the State Architect (DSA-AC) in Chapter 11B, and are referenced in Section 1.9.1.

Newly constructed covered multifamily dwellings, which can also be defined as public housing, shall be subject to the requirements of Chapter 11A and Chapter 11B.

NEWLY CONSTRUCTED. *[HCD 1-AC] A building that has never before been used or occupied for any purpose.*

The main point that I would like to get across here is that, per 1101A.1 and the definition above, unless required by the standards that were in effect at the time the building or facility was built, dwelling units are not required to be made adaptable in an existing building or facility, regardless of its original, current, or proposed use.

The applicable federal standards agree with this. Per the Fair Housing Act (24 CFR §100.205(a & c)) covered multifamily dwellings (constructed) for first occupancy after March 13, 1991 shall be designed and constructed to provide a number of basic accessible features. The key for this discussion is the (24 CFR §100.201) definition of the term *first occupancy*, which is:

First occupancy means a building that has never before been used for any purpose.

Regarding 24 CFR Chapter 1, HUD published a document titled *Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and answers about the Guidelines*. It may be found at the following link:

https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/fhefhasp

Question and answer 9 speak to the applicability of the FHA requirements to pre-3/13/91 buildings that were later converted to multifamily dwellings.

9. Converted Buildings

Q. If a building was used previously for a nonresidential purpose, such as a warehouse, office building, or converted to a multifamily dwelling, must the building meet the requirements of the Fair Housing Act?

A. No, the Fair Housing Act applies to covered multifamily dwellings for first occupancy after March 13, 1991. The Fair Housing Act regulation defines first occupancy as a building that has never before been used for any purpose. See 24 CFR 100.201, for the definition of first occupancy, and also 24 CFR Ch. I, Subch. A, App. I.)

In 2013 HUD and the DOJ published a Joint Statement titled *Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act* (attached). Regarding alterations and renovations, question and answer 16 gave a similar response.

16. Do the Fair Housing Act's design and construction requirements apply to the alteration or renovation of nonresidential buildings into residential buildings?

No. First occupancy means a "building that has never before been used for any purpose." The conversion of a nonresidential building into a residential building through alteration or renovation does not cause the building to become a covered multifamily dwelling. This is true even if the original nonresidential building was built after March 13, 1991. This situation needs to be distinguished, however, from additions of covered multifamily dwellings (*see* questions 12, 13 and 14, above). *See* 24 C.F.R. § 100.201; Questions and Answers, Q. 4, 8 and 9, 59 Fed. Reg. at 33,364-65.

Example: A warehouse built in 1994 is being rehabilitated into a small condominium residential building with two stories and a total of 12 dwelling units. This conversion of this building is not covered because at the time of its first occupancy it was not designed and constructed as a covered multifamily dwelling.

Note that in Answer 16, HUD and the DOJ go so far as to clarify that the converted building would not be required to comply with the requirements even if it was built after 3/13/91.

11B-233.3.1.1 begins by speaking of "**Newly constructed** facilities with residential dwelling units..." and 11B-233.3.4.3 states that "*The building standards for residential dwelling units with adaptable features do not apply to the alteration, repair, rehabilitation or maintenance of residential dwelling units*

*constructed for **first occupancy** on or prior to March 13, 1991.*”. However, DSA-AC has not adopted the Chapter 2 definition of NEWLY CONSTRUCTED, and “first occupancy” is not defined in Chapter 2.

I have consulted on projects where, for example, a hotel built in the 60’s was converted to public housing. Because the existing hotel rooms were to become “new” dwelling units, the building official, understandably but incorrectly, interpreted 11B-233.3.1.2 and 11B-233.3.4.3 to say that all of the “new” dwelling units (that did not meet the requirements for mobility units) had to meet the requirements for adaptable units.

As the need for housing throughout the state remains high, and folks look to repurpose existing nonresidential facilities to meet that need, this will remain and will likely become more of an issue.

Please consider adopting the [HCD-1 AC] definition of NEWLY CONSTRUCTED or defining “first occupancy” (as 24 CFR §100.201 does), possibly restricting the applicability of the definition(s) to 11B-233.3.1 and/or 11B-233.3.4.3, respectively.

Thank you,
Eric

Eric McSwain, RA, CASp
ACCESS COMPLIANCE CONSULTANTS, INC.
811 El Capitan Way, Suite 230, SLO, CA 93401
c: (805) 550-5997 p: (805) 541-2745