



Department of Justice Adopts ADAAG 2004

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Mary S Smith
Senior Vice President
Walker Parking Consultants



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The following article is intended to provide important information for the benefit of the parking industry and is the author's best but personal interpretation of the revisions to ADAAG. No warranty or guarantee is offered or implied, by the International Parking Institute, Walker Parking Consultants/Engineers Inc, or the author. Use of this information shall be at reader's sole risk. It is not to be regarded as providing opinion or advice for any individual situation facing the reader. If legal or other expert assistance is required, the service of a competent professional should be sought.

On July 23, 2010, just a few days before the twentieth anniversary of the passage of the Americans with Disabilities Act (ADA), Attorney General Eric Holder signed final regulations adopting ADAAG 2004 for the design and construction of accessible buildings and facilities. The following is a summary of the information provided on the Department of Justice (DOJ) website¹. It should be noted that the regulations also include other requirements beyond simply adopting ADAAG 2004; thus the DOJ calls the overall regulation the 2010 ADA Standards for Accessible Design (2010 Standards). In order to be technically correct, where we are specifically talking about elements in ADAAG 2004 as issued by the access board, we will use that name; where we are talking about something in the DOJ regulation we will use the term 2010 Standards. The additional elements in the 2010 Standards (which DOJ terms "supplemental requirements") appear to be in response to the most common lawsuits and otherwise contentious areas of enforcement since ADA first became effective. For example, there are updated regulations related to requiring property owners/managers to allow service animals, wheel chairs and other mobility aids such as Segways in buildings, as well as updated requirements regarding communication aids, interpreters etc. There are clarifications/ changes to the requirements for accessible seating and ticketing at movie and live performance theaters, stadiums and arenas, etc. There are also substantial materials related to clarification of the requirements for transient lodging and residential facilities for situations such as time shares and condos that are individually owned but offered for short term lodging to third parties through an agency, and also all residential units at

¹ <http://www.ada.gov/regs2010/ADAregs2010.htm>

places of education. This summary will not address anything other than issues affecting parking facilities.

It must first be noted that there are some differences between the requirements for Title II – State and Local Governments and Title III – Private Entities. Among other things, Title II entities were allowed to choose to comply with UFAS or ADAAG 91. Because few chose UFAS, we will refer only to ADAAG 91. However, if an entity choose UFAS, substitute that for any general reference herein to ADAAG 91. Of course, there are differences in the technical requirements.

The 2010 Standards will take effect six months from publication of the regulations in Federal Register, which has not yet occurred as of the second week of August; therefore we do not know the exact date for compliance. Compliance with ADAAG 2004 for new construction and alterations is not required until 18 months from publication, or perhaps February or March, 2012. The specific “trigger” for conformance to ADAAG 2004 is defined as:

“the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, the date when the last application for a building permit or permit extension is received by the State, county, or local government) or if no permit is required, the start of physical construction or alterations.... For the purposes of this section, ‘start of physical construction or alterations’ does not mean ceremonial groundbreaking or razing of structures prior to site preparation.”

Note that it is not the issue of the permit, but rather, the date of submittal of application.

The rule states that new construction or alterations with a trigger date **before** the date of publication in the Federal Register (ie, permitted in early August, 2010) should comply with ADAAG 91 as amended, and those with a trigger date during the 18 months **between** publication and the compliance date have a choice of complying with ADAAG 2004 or ADAAG 1991. However, the entity cannot pick and choose individual requirements...it must choose either 1991 or 2004. Given that ADAAG 2004 has been “harmonized” with IBC 2003 and later which is generally enforced in most of the United States, it seems likely most will simply choose to follow ADAAG 2004.

The biggest concern of many property owners, whether public or private entities, is whether construction that now meets ADAAG 91 must be modified to meet ADAAG 2004. It is important to note that there are three separate sets of rules related to construction under ADA. Therefore we will address the conformance issues by those categories:

- **All new construction:** after the trigger date after Feb/March 2012 must meet ADAAG 2004.
- **All alterations to existing facilities:** Alterations includes restoration as commonly defined in parking circles, as well as resurfacing of parking lots and any change to parking layout that occurs during resealing and restriping. These requirements have two parts: The actually planned restoration work aka “the alteration”, and the path of travel to the area being altered.
 - If the alteration occurs after the trigger date, the alteration work must meet ADAAG 2004, even if it now meets 1991. A good way to think of alterations is: anything taken out must be put back meeting the ADAAG requirements, which will be ADAAG 2004 after the trigger date. The example commonly used by the DOJ, that a light switch that is now 54” above floor per ADAAG 91 would have to be lowered to 2004 if it is otherwise being relocated. For a parking example, when parking lots are **resurfaced and/or reconfigured** after the trigger date, the parking layout has to be modified to meet the new requirement for 1 in 6 van stalls rather than the 91 requirement for 1 in 8 van stalls, unless it is structurally impracticable to do so. But even then the requirements should be met to the degree possible. For example, it would be structurally impracticable to provide the required 8’2” vehicular clearance for van stalls in a facility that does not now have that clearance. However 1 in 6 van stalls must still be provided, even without the required clearance. The reasoning is that many vehicles with side lifts requiring the larger stalls do not require the 8’2” clearance.
 - Path of Travel: ADA regulations require that improvements must also be made to the path of travel to the area being altered. For example, if the top level of the parking deck is being restored, there is an obligation to bring the path of travel to the top level up to ADAAG (1991 or 2004 according to the trigger date.) The limitation on how much must be spent on the path of travel is 20% of the cost of the alteration. For example, if the alteration is expected to cost \$1,000,000, then up to \$200,000 must be spent improving the path of travel. If there is no elevator service to the top level, it must be provided (even if there is no accessible parking on the floor), if it can be done within the 20% limitation. It is also important to note that one cannot count phased improvements as separate alterations; the DOJ uses a three year time frame. That is, if \$1,000,000 is spent in each of three consecutive years to restore different parts of a structure, the amount that must be spent on the path of travel is \$3million x 20% = \$600,000. An elevator might then have to be added to serve all floors, if one does not now exist.²

² ADAAG 91 and 2004 both require that an elevator serve **all** floors of a parking facility owned by a private entity if there are three or more floors, even if there are not any accessible parking stalls on the floor not served by an elevator. If the parking facility is owned by a public entity the trigger is two or more floors.

- Safe Harbor: If the path of travel fully met the 1991 Standards before the trigger date, the “entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.” In other words, no further improvements to the path of travel would be required if it met ADAAG 1991 before Feb/March 2012. Note that the alteration itself still has to meet ADAAG 2004 if it is after the trigger date. For example, a light switch being relocated in the alteration has to be lowered to 48”; however if it is in the path of travel, it would not have to be lowered from 54” above the floor. Conversely, if the construction did not actually fully meet ADAAG 1991, perhaps because of difficulty interpreting ADAAG, the entity might be then be required by DOJ to bring it up to 2004 ADAAG if/when it becomes aware of the deficiency. Thus if the light switch in the path of travel is more than 54” above the floor, it would have to be lowered to 48” after the trigger date. See also the discussion of the rules regarding existing facilities.
- Conversely, “alteration” DOES NOT INCLUDE MODIFICATIONS SOLELY TO IMPROVE ACCESSIBILITY. For example, if the entity decides that it is now readily achievable to put in a curb ramp in an area of a parking facility not otherwise being altered, that is not an alteration triggering the path of travel requirements to the curb ramp area. In the above example of alterations to the top level, one might decide it is a good time to fix a curb ramp at the second level. It would cost a lot less to get it done as part of the overall project; technically it is a removal of a barrier in an existing facility not an alteration. The cost of fixing the curb ramp would not be included in the alteration cost for the purposes of calculating the 20% limit, nor would improvements need to be made to the path of travel to the curb ramp area (unless also in the path of travel to the alteration area.)
- Existing Facilities: ADA requires that property owners improve the areas of facilities where the public goes to receive goods and facilities³ that were constructed prior to January, 1993 to remove physical barriers. There is a different standard of care under the regulations for public entities (state and local governments and associated agencies) and private entities, under Titles II and III of the ADA, respectively. We will use the language for private entities herein: the entity is required to remove barriers to accessibility where readily achievable. Public entities would substitute “unless an undue burden” for “where readily achievable” in the following discussion; also it must be noted that public entities’ requirement is program based, rather than building design based. It is also important to note that the obligation for both public and private entities to remove barriers is continuing....forever. It may not have been readily achievable to fix the curb ramp at level two in the above example until the alteration project is undertaken. At that point it may be relatively easy and less expensive to fix the curb

³ Areas used only by employees do not have to be improved until and unless an employee needs the improvement.

ramp and thus it would be considered required by DOJ. The Department of Justice has stated in several forums that it considers it readily achievable to fix parking layouts to include van stalls, and use the correct dimensions and layout when a parking facility is resealed and/or restriped. If an owner never fixed its parking layout to meet ADAAG 1991, after the trigger date it would have to meet ADAAG 2004. However, the regulations include a “safe harbor” that if an element now meets ADAAG 91, it does not have to be improved to meet 2004 until it is otherwise altered. For example, if a parking lot was restriped to add 1 in 8 van stalls to meet 1991, it does not now have to be redone to add more van stalls to meet the 2004 requirement of 1 in 6, unless of course the owner so chooses. If van stalls were never added, technically, one could put 1 in 8 in now and avoid having to go to 1 in 6 if it is done in 2012. Another note is that the safe harbor is element by element.... An owner could have made a good faith effort to make everything comply with 1991, but might have missed one or more things. If deficiencies are ever noted by DOJ, the owner of the property would still have to fix those things to meet 2004.

There is further one rather ominous statement in the DOJ rules: “The element-by-element safe harbor adopted in this final rule is a narrow one. The Department recognizes that this safe harbor will delay, in some cases, the increased accessibility that the incremental changes would provide and that for some individuals with disabilities the impact may be significant. This safe harbor, however, is not a blanket exemption for every element in existing facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each existing facility....The Department emphasizes that public accommodations wishing to benefit from the element-by-element safe harbor must demonstrate their safe harbor eligibility. The Department encourages public accommodations to take appropriate steps to confirm and document the compliance of existing elements with the 1991 Standards. Finally, while the Department has decided not to adopt in this rulemaking the suggestion by some commenters to make the protection afforded by the element-by-element safe harbor temporary, the Department believes this proposal merits further consideration. The Department, therefore, will continue to evaluate the efficacy and appropriateness of a safe harbor expiration or sunset provision.” In other words, if a complaint or other enforcement action is ever initiated, the DOJ will make facility owners prove that they met 1991 **prior to the trigger date** for enforcement of ADAAG 2004. Further, the DOJ may at some time modify the safe harbor and require owners to improve properties to either ADAAG 2004 or some future standard. While construction documents for new construction or restoration that were submitted for building permit purposes will likely be considered reasonable proof of the date when the element met ADAAG 91, if those documents are no longer in the possession of the owner there could be a problem. Further, if there was no building permit obtained for restriping, it would be difficult to prove that the restriping to have adequate van stalls for 1991 was completed before the trigger date.

We should also note that experience has shown that when the DOJ comes to look at accessibility of a facility they will note every little deviation they see and require the owner to prove why it may not need to be corrected. For example, it would have to **prove** that the curb ramp at level 2 in our example was built prior to January 1993, and fixing it was not readily achievable at any time in the last 17 years. They will look at the entire resources of the entity and what other physical improvements (ie, building a new building rather than fixing the existing accessibility problems) were made since ADA became effective. Our experience is that most entities simply acquiesce and fix nearly everything noted. Public entities are particularly vulnerable because DOJ has a program called Project Civic Access where it will come and inspect every facility owned by a local government entity, even though no complaint has been filed. Since establishing Project Civic Access in 1999, the DOJ has reached 182 settlement agreements with 168 localities in all 50 states, the District of Columbia, and Puerto Rico.

Finally, there is an excellent discussion of the difference between ADAAG 2004 and ADAAG 1991 posted on the DOJ website.⁴ A number of those who submitted comments to the DOJ during the rulemaking process tried to convince the DOJ to make further changes to ADAAG 2004, which it declined to do. In this document, “Appendix B to Part 36, Analysis and Commentary on the 2010 ADA Standards for Accessible Design”, the DOJ provided specific reasons why it did not make any modifications to ADAAG 2004. One in particular is extremely interesting to the parking community, as it addresses the need for separate walkways from accessible stalls to destinations in parking facilities, particularly structures:

“Commenters questioned why the 2010 Standards would permit an accessible route used by individuals with disabilities to coincide with the path of moving vehicles. The Department believes that the 2010 Standards appropriately recognize that not all parking facilities provide separate pedestrian routes. Section 502.3 of the 2010 Standards provides the flexibility necessary to permit designers and others to determine the most appropriate location of the accessible route to the accessible entrances. If all pedestrians using the parking facility are expected to share the vehicular lanes, then the ADA permits covered entities to use the vehicular lanes as part of the accessible route. The advisory note in section 502.3 of the 2010 Standards, however, calls attention to the fact that this practice, while permitted, is not ideal. Accessible parking spaces must be located on the shortest accessible route of travel to an accessible entrance. Accessible

⁴ http://www.ada.gov/regs2010/titleIII_2010/reg3_2010_appendix_b.htm

parking spaces and the required accessible route should be located where individuals with disabilities do not have to cross vehicular lanes or pass behind parked vehicles to have access to an accessible entrance. If it is necessary to cross a vehicular lane because, for example, local fire engine access requirements prohibit parking immediately adjacent to a building, then a marked crossing running perpendicular to the vehicular route should be included as part of the accessible route to an accessible entrance.”

This document also discusses why the exception for valet parking in 1991 ADAAG has been dropped from ADAAG 2004.

One of the things we have stressed through the years is that these “commentaries” made in the rulemaking process are extremely important in interpreting ADAAG. You can not treat it like a building code (which is that if it doesn’t say it you don’t have to do it.) With ADAAG, the ultimate test is the opinion of DOJ and a Federal Judge re: whether what was done discriminated against someone with disabilities. Most settlements seem to go beyond the minimum requirements of ADAAG; they are negotiated to achieve maximum accessibility.