

January 12, 1994

Mr. Fritz A. Wonderlich  
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: 1992 House Bill No. 754

Dear Mr. Wonderlich:

This letter is in response to your inquiry concerning 1992 House Bill No. 754. House Bill No. 754 was approved by the 1992 legislature. The bill amended the Idaho Building Code Advisory Act, Idaho Code § 39-4101, *et seq.* Your specific inquiry is whether the amendments to the act require the City of Twin Falls to adopt and enforce the Americans with Disabilities Act Part III (appendix A to Part 36--Standards for Accessible Design), Accessibility Guidelines for Buildings and Facilities and subsequent editions, and the Americans with Disabilities Act Part II, Accessibility Guidelines for Buildings and Facilities, and Transportation Facilities (the "ADA"). I will address your inquiry and also discuss the possible sanctions that may be imposed against the City of Twin Falls if it fails to adopt and enforce the ADA.

House Bill 754 amended, inter alia, sections 39-4109(3) and (8) of the act by deleting the 1961 ANSI accessibility standards and adding (substituting) the ADA's standards. Idaho Code §§ 39-4116(3) and (8) now read as follows:

The following codes are hereby adopted for the state of Idaho:

(3) Americans with Disabilities Act (ADA) Part III, (Appendix A to Part 36-Standards for Accessible Design), Accessibility Guidelines for Buildings and Facilities as published in the Federal Register Volume 56 No. 144, Friday, July 26, 1991, and subsequent editions and this shall also be known as UBC Standard 31-1;

(8) Americans with Disabilities Act (ADA) Part II, Accessibility Guidelines for Buildings and Facilities, and Transportation Facilities as

published in the Federal Register Volume 56 No. 173, Friday, September 6, 1991.

House Bill 754 amended section 39-4116(2) of the act to require local governments to adopt the ADA even if they choose not to comply with the remaining provisions of the act. Section 39-4116(2) now reads as follows:

(2) Regardless of whether or not a local government opts to comply with the other sections of this act, they shall adopt the Americans with Disabilities Act (ADA) Part III, (Appendix A to Part 36-Standards for Accessible Design), Accessibility Guidelines for Buildings and Facilities as published in the Federal Register Volume 56 No. 144 Friday, July 26, 1991 and subsequent editions and this shall also be known as UBC Standard 31-1 and the Americans with Disabilities Act (ADA) Part II, Accessibility Guidelines for Buildings and Facilities, and Transportation Facilities as published in the Federal Register Volume 56 No. 173, Friday, September 6, 1991.

(Emphasis added.)

House Bill 754 was introduced in order to replace chapter 31-1 of the Uniform Building Code (UBC) with the ADA's new accessibility guidelines and to require local governments to adopt those guidelines in order to ensure statewide construction uniformity and ADA compliance. House Bill 754's statement of purpose reads as follows:

1. Section 39-4109 is amended to adopt the latest addition [*sic*] of the Uniform Building Code, as adopted by the Idaho Building Code Advisory Board for the State of Idaho.
2. To replace Chapter 31-1 of the UBC with the Americans with Disabilities Act Part III Standards and subsequent revisions which is the Federal Accessibility Law as the reference standard regarding new and existing buildings.
3. Add the Americans with Disabilities Act, Part II Standards as the accessibility guidelines for transportation facilities.
4. Section 39-4116 sub-section II is added to mandate for local governments Americans with Disabilities Act Accessibility Guidelines Part III (replaces Chapter 31-1 of UBC) and Americans with Disabilities Act Part II as the accessibility guidelines for transportation facilities.

In summary, this legislation will serve to provide improved uniformity for compliance with the Federal Accessibility Laws and bring them into the Uniform Building Code for the State of Idaho.

(Emphasis added.) Second Regular Session of the 51st Idaho Legislature of 1992, House Bill No. 754, Statement of Purpose/Fiscal Impact.

The fact that House Bill 754 was intended to ensure statewide compliance with the ADA is illustrated by the testimony of Representative Ruby Stone before the Senate Local Government and Taxation Committee:

Representative Ruby Stone simply went through the changes in House Bill 754. The changes deal primarily with revisions to the Idaho Building Code Advisory Act (Title 39, Chapter 41). The changes bring the Idaho laws into compliance with the Americans with Disabilities Act Part III (Standards) . . . . This is a very comprehensive and complex law. We need to use the same standards throughout the state for accessibility for the disabled.

(Emphasis added.) Idaho Senate Local Government and Taxation Committee Minutes, March 11, 1992, at p. 2.

The testimony of Dave Hand before the same committee further demonstrates that House Bill 754 was intended to require (Idaho) state and local governments to adopt the ADA's accessibility standards for purposes of construction uniformity:

Dave Hand, Innkeeper's Association, spoke in support of House Bill 754. Right now there are seven hotels that are under construction or in the planning stages. Previous to this time, the hotels have been in compliance with the ANSI standards, the ADA standards are more stringent than the ANSI standards. The planners have been confused with the differences in the two standards. This bill will help to clarify the requirements that they should go by in the construction, as well as the inspectors and all others that are involved. He reiterated that the changes to be made must be readily achievable and without undue hardship.

(Emphasis added.) *Id.* at p. 3.

Title II of the Americans with Disabilities Act of 1990 prohibits discrimination on the basis of disability in "all services, programs, and activities of public entities." 42 U.S.C. §§ 12131 through 12134. Title II regulations describe the scope of Title II as including "all services, programs, and activities provided or made available by state and

local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance." 28 C.F.R. part 35, appendix A (Section-by-Section Analysis). Title II "applies to anything a public entity does." *Id.* All governmental activities of public entities are covered "even if they are carried out by contractors." *Id.*

The City of Twin Falls would violate Title II if its building department approved for construction a building designed in violation of the ADA. 28 C.F.R. § 35.130. Section 35.130 provides, inter alia, as follows:

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability--

. . . (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit or service to beneficiaries of the public entity's program; . . .

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; . . . (or)

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability . . . (or)

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

The City of Twin Falls may not, without violating Section 35.130, aid, benefit, or assist through the administration or carrying out of its programs, services, or activities any person or entity that discriminates on the basis of disability. Accordingly, the city would violate Section 35.130 if it licensed or certified a building for construction that was designed or constructed in violation of the ADA.<sup>1</sup> *Id.* Since the city may not

approve for construction a building designed in violation of the ADA, it must, in essence, enforce compliance with the ADA through its building program.<sup>2</sup>

In summary, Title II of the ADA and Idaho Code § 39-4116(2) require the City of Twin Falls to adopt and enforce the ADA.

There are many potential federal, state and private sanctions for violations of the ADA. Section 203 of the ADA provides that the remedies, procedures, and rights set forth in Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, for enforcement of Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap, shall be the remedies, procedures and rights for enforcement of Title II. 28 C.F.R. part 35, Appendix A; 42 U.S.C. § 12133; and 28 C.F.R. part 35, subpart F (Compliance Procedures). Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d.) 28 C.F.R. part 35, Appendix A.

28 C.F.R. § 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. Complaints may be filed with a federal agency with jurisdiction or the United States Department of Justice. *Id.* The complaint is processed by the designated federal agency. 28 C.F.R. § 35.172. If the complaint is not resolved by the agency, it is referred to the Department of Justice for administrative resolution or a lawsuit. 28 C.F.R. § 35.173. Title II regulations do not require complainants to exhaust administrative remedies before filing a private lawsuit. 28 C.F.R. part 35, Appendix A (Analysis of Section 35.172).

As previously stated, the remedies available under the Rehabilitation Act of 1973 are also available to Title II litigants. Depending upon the case, declaratory, injunctive, and/or monetary relief may be available. See, *e.g.*, Smith v. Barton, 914 F.2d 1330 (9th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2825, 115 L. Ed. 2d 995 (1991). Finally, attorneys' fees and costs may be awarded to the prevailing party, unless the United States is the prevailing party. 28 C.F.R. § 35.175.

In addition to federal and private actions, the Idaho Department of Labor and Industrial Services has the authority to bring ADA enforcement actions. Idaho Code § 39-4104. The department may seek an injunction to prevent the construction of a building that does not conform to the requirements of the Idaho Building Code Advisory Act. Idaho Code § 39-4125. Also, any person who willfully violates any provision of the Act or the rules promulgated pursuant thereto may be "guilty of a misdemeanor, and upon conviction, shall be fined not more than three hundred dollars (\$300), or imprisoned for not more than ninety (90) days or by both fine and imprisonment." Idaho Code § 39-4126.

In conclusion, failure to adopt and enforce the ADA as required by Idaho Code § 39-4116(2) and Title II of the ADA may subject Twin Falls to federal, state, and private compliance actions.

Very truly yours,

THOMAS B. DOMINICK  
Deputy Attorney General  
Department of Labor and Industrial Services

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<sup>1</sup> Title II also incorporates those provisions of Titles I (discrimination in employment) and III (public accommodations) of the ADA that are not inconsistent with the regulations implementing Title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 790-94). 28 C.F.R. part 35, Appendix A (Analysis of Section 35.103).

<sup>2</sup> Title II does not preempt Idaho Code § 39-4116(2). Section 39-4116(2) requires adoption of the ADA and does not conflict with it. Congress never intended the ADA to displace noncontradictory federal or state laws. 28 C.F.R. part 35, Appendix A (Analysis of Section 35.103).