

## **N.D.A.G. Letter to Dykshoorn (Jan. 16, 1992)**

January 16, 1992

Ms. Shirley R. Dykshoorn  
Director  
Office of Intergovernmental  
Assistance  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

RE: Handicapped Access

Dear Ms. Dykshoorn:

Thank you for your July 26, 1991, letter concerning a complaint from a handicapped individual about a large scale remodeling project that did not provide for handicapped accessibility to restrooms. You believe N.D.C.C. § 23-13-13 requires handicapped access. You advise that a city building inspector's office took the position that unless toilet facilities were included in the application for the building permit for remodeling, the office had no responsibility for inspecting to determine whether N.D.C.C. § 23-13-13 was followed. I apologize for the delay in responding to your request.

With respect to N.D.C.C. § 23-13-13 you specifically inquire (1) whether compliance is required even though toilet facilities are not a part of a remodeling project; and (2) whether the statute is enforceable. N.D.C.C. § 23-13-13 provides, in pertinent part:

To promote the health and safety of all physically handicapped persons and to make all buildings and facilities used by the public which are constructed or remodeled after July 1, 1975, accessible to, and functional for, the physically handicapped, toilet rooms in all public buildings and facilities and in all buildings and facilities held open to the public which shall be constructed or remodeled after July 1, 1975, shall have toilet rooms that shall have sufficient space to allow traffic of individuals in wheelchairs.

Distilled to its essence, the statute provides that "toilet rooms in all public buildings . . . and in all buildings and facilities held open to the public which shall be constructed or remodeled after July 1, 1975, . . . shall have sufficient space to allow traffic of individuals in wheelchairs." Taken as a whole, however, the statute is ambiguous.

When a statute is ambiguous or of doubtful meaning, reference can be made to extrinsic aids for interpretation. N.D.C.C. § 1-02-39. The legislative history and the circumstances surrounding the statute's enactment are helpful in determining the legislative intent. N.D.C.C. § 1-02-39(2),(3).

N.D.C.C. § 12-13-13 was enacted in 1975 following the enactment in 1973 of N.D.C.C. § 48-02-19 in recognition of a national trend to provide handicap accessibility to all public buildings. N.D.C.C. § 48-02-19 requires that all public building "must be accessible to, and usable by, the physically disabled." Until amended in 1991, compliance with the requirement of N.D.C.C. § 48-02-19 was measured by the "American standard specifications (A117.1 1961) [promulgated] by the American standards association . . . ." later known as the American National Standards Institute (ANSI). Compare 1973 N.D. Sess. Laws ch. 376, § 1 with 1991 N.D. Sess. Laws ch. 210, § 3.

As introduced in 1975 S. Bill No. 2224, codified in part as N.D.C.C. § 23-13-13, required that toilet rooms "have sufficient space to allow traffic of individuals in wheelchairs in accordance with rule 5.6.1 of the American standard specifications (A117.1 - 1961) . . . ." This was in accord with a request from the bill's sponsor, Senator Kent Jones, to the Legislative Council that the bill draft "[r]equire toilet facilities in all facilities be in accordance with 5.6.1 [of the American Standard Specifications (A117.1 - 1961)]." Legislative Council drafting request dated 7/25/74. Section 5.6.1 provided that "[t]oilet rooms shall have space to allow traffic of individuals in wheelchairs . . . ." This is the basis of a provision of the State Plumbing Code requiring that "[t]oilet rooms shall have space to allow traffic of individuals in wheelchairs." N.D. Admin. Code § 62-03-07-25(3). Although the reference to section 5.6.1 was deleted by the 1975 Legislature before enacting N.D.C.C. § 23-13-13, the essential language was retained. Thus, ANSI standards respecting access by the disabled provided the underpinning for both N.D.C.C. §§ 23-13-13 and 48-02-19.

The State Building Code is the most recently published (1991) Uniform Building Code (U.B.C.). N.D.C.C. § 54-21.3-03(1). The alteration of an existing building must comply with the requirements of the U.B.C. U.B.C. § 104(b) (1991). The 1991 U.B.C. requires that buildings or portions of buildings and building facilities be accessible, that is, approachable and usable, to persons with disabilities. The building facilities are required to be accessible as specified in U.B.C. Standard No. 31-1. This standard incorporates the ANSI standards for access and use of buildings by physically handicapped persons (A117.1-1986) requiring that toilet rooms provide adequate space for persons in wheelchairs. U.B.C. §§ 3101, 3102, 3103(a)(1), 3103(b)(1), 3105(a), 3105(b)(2) (1991).

The 1991 Legislative Assembly amended N.D.C.C. § 48-02-19 to require that all public buildings "must be accessible to, and usable by, the physically disabled" in accordance with the Uniform Federal Accessibilities Standards (UFAS) (Appendix A to 41 C.F.R. subpt. 101-19.6 (1991)). 1991 N.D. Sess. Laws ch. 210, § 3. The UFAS standards require that if there is a substantial alteration to a building, the altered building must contain at least one toilet facility which provides adequate turning space for persons in wheelchairs. An alteration is deemed substantial if the total cost of all alterations in any 12-month period amounts to 50 percent or more of the assessed value or replacement cost or fair market value of the building. Sections 4.1.6, 4.2.3 of Appendix A to 41 C.F.R. subpt. 101-19.6 (1991). This is consistent with a 1991 U.B.C. definition of substantial alteration. U.B.C. Appendix 3110 (1991) (total cost of all alterations for a building or facility within any 12-month period amounting to 50 percent or more of the assessed value).

The State Building Code was adopted to "[p]rovide the citizens of this state with nationally recognized standards and requirements for construction" and "to adequately protect the health, safety and welfare of the people of the state." N.D.C.C. § 54-21.3-01(1),(3). This is similar to the legislative purpose in enacting N.D.C.C. § 23-13-13.

A statute "[is] to be construed liberally with a view to effecting its objects and to promoting justice." N.D.C.C. § 1-02-01.

In view of the purpose of N.D.C.C. § 23-13-13, it is my opinion that public buildings or buildings open to the public that are constructed or substantially remodeled after July 1, 1975, must have toilet rooms which are accessible to persons with disabilities which means they must allow for traffic of individuals in wheelchairs.

The applicability of N.D.C.C. § 23-13-13 may become academic when regulations under the Americans With Disabilities Act of 1990 (ADA) go into effect January 26, 1992.

The ADA regulations which respect to alterations require that alterations be made so as to ensure that "the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 56 Fed. Reg. 35600 (1991) (to be codified at 28 C.F.R. § 36.402(a)(1) (with respect to private commercial facilities); 56 Fed. Reg. 35720 (1991) (to be codified at 28 C.F.R. § 35.151(b) (with respect to state and local governments). With respect to private commercial facilities, "[a]n alteration that affects . . . the usability of or access to [a major activity in a building] shall be made so as to ensure that . . . the restrooms . . . serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs . . . ." 56 Fed. Reg. 35600 (1991) (to be codified at 28 C.F.R. § 36.403(a)). See also § 4.1.6(2) ADAAG, *infra*, 56 Fed. Reg. 35618 (1991) (to be codified as Appendix A to 28 C.F.R. pt. 36 (§4.1.6(2))). Alterations with respect to private commercial facilities are to comply with the Americans With Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to 28 C.F.R. pt. 36). 56 Fed. Reg. 35602 (1991) (to be codified at 28 C.F.R. § 36-406.) State and local governments have the option of complying with ADAAG or UFAS. 56 Fed. Reg. 35720 (1991) (to be codified at 28 C.R.F. § 35.151).

The Legislature provided no penalty in the event of noncompliance with N.D.C.C. § 23-13-13. Hearing on S. 2224 Before the House Comm. on Social Welfare, 44th N.D. Leg. (March 6, 1975) (Statement of Senator Jones). There is otherwise no internal enforcement mechanism.

Such legislative timidity may have figured in Congress's finding of widespread discrimination with respect to persons with disabilities in employment and access to services, facilities, transportation and telecommunications. To address that discrimination, exemplified by the lack of access by disabled persons to restrooms, Congress enacted the Americans With Disabilities Act of 1990.

Hopefully, the next Legislature will address issues raised by the ADA, clarify N.D.C.C. § 23-13-13 and provide a more specific mechanism for its enforcement.

While courts may hold statutes inoperative where they are so imperfect and incomplete that it is impossible to carry out the intention of the Legislature, nevertheless,

[a]n act will not be declared inoperative and ineffectual on the ground that it furnishes no adequate means to secure the purpose for which it is passed, if \* \* \* common sense and reason can devise and provide the means, and all the instrumentalities necessary for its execution are within the reach of those intrusted therewith.

Sayre & Fisher Brick Co. v. Dearden, 93 A.2d 52, 56 (N.J. Super. Ct. 1953).

The Legislature does not perform idle acts. Koch Hydrocarbon Co. v. Board of Equalization, 454 N.W.2d 508, 512 N.D. 1990). Under the circumstances you describe, N.D.C.C. § 23-13-13 could be enforced by writ of mandamus. N.D.C.C. §§ 32-34-01, 32-34-02.

Thus, a writ of mandamus would be an appropriate way for an individual denied wheelchair access to toilet rooms in public buildings or those open to the public that have been substantially remodeled or constructed after July 1, 1975, to enforce compliance with N.D.C.C. § 23-13-13.

Sincerely,

Nicholas J. Spaeth

jfl

cc: State Plumbing Board