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Rehabilitation Guidelines 1986

4 Guideline for Managing Official Liability Associated with Building Rehabilitation



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THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT
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This volume on managing the official liability associated with building rehabilitation is the fourth in a series of eight guidelines on rehabilitation. Some are addressed to local policymakers, code officials, and citizens' groups; others are addressed to code officials, engineers, and architects. All were developed to make the rehabilitation of existing buildings less expensive, less arduous, and less frustrating.

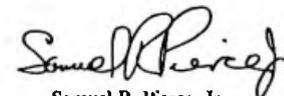
In the main, the problems do not arise from the physical process of rehabilitation; they come from the need to meet the requirements imposed by building codes developed primarily to regulate new construction. However necessary and desirable the codes, their provisions are often inappropriate for rehabilitation projects.

The answer to inappropriateness is not to ignore the codes but to modify them and to apply them with discretion. And yet it is easy enough to appreciate that, in an age of litigation, responsible officials may hesitate to seek new solutions to code requirements. What if modifying the codes leads to a tenant's being injured?

Obviously safety and soundness is all-important. Then does it follow that code officials must apply the regulations rigidly, without regard for the differences between buildings constructed today and those built from other materials and in other ways fifty years ago?

This guideline discusses the liability problems of code administration and offers realistic recommendations for their solution.

The quality of this guideline and the seven others in the series is the result of the invaluable efforts of Robert Kapsch, program manager for HUD's Office of Policy Development and Research; William Brenner, project manager for the National Institute of Building Sciences; and David Hattis, consultant from Building Technology, Inc.


Samuel R. Pierce, Jr.
Secretary

The Rehabilitation Guideline Series

The *Rehabilitation Guidelines* were prepared by the National Institute of Building Sciences for the Department of Housing and Urban Development in response to the requirements of Section 903 of the Housing and Community Development Amendments of 1978.

As Congress intended, the *Rehabilitation Guidelines* are not a code, nor are they written in code language. Rather, they are designed for voluntary adoption and use by States and communities as a means to upgrade and preserve the nation's building stock, while maintaining reasonable standards for health and safety. The term "rehabilitation", as used in the guidelines, includes any set of activities related to the general view of existing buildings as a resource to be conserved, rehabilitated, or reused.

This initial edition of the *Rehabilitation Guidelines* is published in eight separate volumes. The first four guidelines are designed for use by building officials, members of the executive and legislative branches of government, and related commissions and organizations involved in developing or implementing building regulations. These guidelines cover the following topics:

- 1 The *Guideline for Setting and Adopting Standards for Building Rehabilitation* provides an introduction and background to the building regulations that affect rehabilitation. It describes methods for identifying regulatory problems in a community, and recommends ways to amend, modify, or supplement existing regulations to encourage rehabilitation.
- 2 The *Guideline for Municipal Approval of Building Rehabilitation* examines the inherent differences between regulating new construction and regulating rehabilitation, and presents specific recommendations for dealing with rehabilitation within municipal building departments.
- 3 The *Statutory Guideline for Building Rehabilitation* contains enabling legislation that can be directly adopted by communities to provide the legal basis for promoting rehabilitation through more effective regulation.
- 4 The *Guideline for Managing Official Liability Associated with Building Rehabilitation* addresses the liability of code officials

involved with the administration and enforcement of rehabilitation, and provides recommendations for minimizing liability problems.

The remaining four guidelines are technical in nature, and are intended for use by code officials, inspectors, designers, and builders. They cover the following topics:

- 5 The *Egress Guideline for Residential Rehabilitation* lists design alternatives for the components of egress that are regulated by current codes such as number and arrangement of exits, corridors, and stairs, travel distance, dead-end travel, and exit capacity and width.
- 6 The *Electrical Guideline for Residential Rehabilitation* outlines procedures for conducting inspections of electrical systems in existing buildings, and presents solutions to common problems associated with electrical rehabilitation such as eliminating hazardous conditions, grounding, undersized service, number of receptacle outlets, and incompatible materials.
- 7 The *Plumbing DWV Guideline for Residential Rehabilitation* presents criteria and methods for inspecting and testing existing drain, waste, and vent (DWV) systems, relocating fixtures, adding new fixtures to existing DWV systems, extending existing DWV systems, and installing new DWV systems in existing buildings.
- 8 The *Guideline on Fire Ratings of Archaic Materials and Assemblies* contains the fire ratings of building materials and assemblies that are no longer listed in current building codes or related reference standards. Introductory material discusses flame spread, the effects of penetrations, and methods for determining the ratings of assemblies not listed in the guideline.

Single editions of the *Rehabilitation Guidelines*—or copies of specific guidelines—are available at no charge, as long as supplies last, from HUD USER, P.O. Box 280, Germantown, Maryland 20767. Phone (301) 251-5154

The *Rehabilitation Guidelines* are also available from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. 20402.

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Overall management and production of the *Rehabilitation Guidelines* was directed by William Brenner of the Institute, with David Hattis of Building Technology, Inc. the principal technical consultant. Guideline cover graphics and layouts were designed by the Design Communication Collaborative.

Introduction

The successful rehabilitation of buildings requires a regulatory approach that achieves code purposes (such as adequate ventilation) within the restraints imposed by the architectural characteristics (such as existing windows) that make the structure worth rehabilitating. Even where the law grants to governments and their officials the authority to act with discretion and to seek new solutions to code requirements, the fear of liability for decisions that may result in the death or injury of an occupant of a rehabilitated building chills the willingness of those governments and officials to apply building codes with latitude sufficient to permit successful rehabilitation. Although courts have only rarely imposed liability upon code enforcement agencies or their officials for conduct related to building code enforcement, the scope of governmental liability to private citizens has generally increased, creating uncertainty and anxiety among individual code officials. In light of this trend of increasing liability, the mere *threat* of litigation, and the time, expense and injury to professional reputation that accompanies even a groundless suit, inhibit needed creativity in code interpretation and enforcement. The following pages state the key problems posed by the perceived risk of liability, discuss their relationship to building rehabilitation, and provide a variety of approaches to solve the problems or, at least, to manage them.

1 General Immunities for Governmental Employees

Problem: The liability of state and municipal employees is unclear in many states, and undue conservatism in code enforcement results from the code official's uncertainty of the legal status.

Discussion: In approximately half the states of the United States the liability of state and/or municipal employees is unclear. Often, state statutes abrogating governmental immunities overlook the personal liability of governmental employees. When such an omission occurs, courts presented with the issue must guess the legislature's intent, and the results have been inconsistent. In many jurisdictions without relevant statutes, there are no court decisions of recent enough vintage to provide guidance to the individual employee.

To fill this vacuum, statutes should be enacted addressing government employee liability (or immunity) for negligent actions. They can be drafted to provide protection for a wide range of public employees, which would implicitly provide protection for code enforcement functions pertinent to rehabilitation. This approach makes it unnecessary to treat the liability of code enforcement personnel differently than that of other public employees.

Recommendations

1.1 States should grant state and municipal employees immunity from liability for negligence arising from all activities within the scope of their authority or from discretionary activities within the scope of their authority.

1.1.1 The following language, based on Conn. Gen. Stat. Ann. 4-165, immunizes public employees from liability for all negligent acts within the scope of their authority. The second sentence is appropriate only in those jurisdictions that have waived governmental immunity:

"No (state/municipal) officer or employee shall be personally liable for damage or injury, not wanton or willful, caused in the performance of his duties and within the scope of his employment. Any person having a complaint for such damage or injury shall present it as a claim against the (state/municipality) under the provisions of (applicable state or municipal law)."

1.1.2 The following language, based on Cal. Gov. Code §820.2, immunizes public employees from liability for all discretionary acts within the scope of their authority. The phrase "except as otherwise provided by statute" allows for specific exceptions, such as absolute immunity for high-ranking officials:

"Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

1.2 In the absence of state action, municipalities should enact provisions granting the same immunities. In each case, the municipality must first ascertain that it has the legal authority to immunize its employees from state tort law. An example of

such an enactment is the following Wilmington, Del. ordinance, 2 Wilm. C. §34-7:

"No member, officer or agent of the Department of Licenses and Inspections shall be sued or held to liability for any act done or omitted in good faith and with ordinary discretion on behalf of or under such Department, or pursuant to the Charter of the City, or any statutes, ordinances or rules and regulations under which such Department has authority to act."

1.3 States and local jurisdictions should consider indemnifying their employees for the expenses of defending against lawsuits arising out of their work, and for the payment of judgments handed down against them in such lawsuits. The following clause would provide indemnification for state and local employees:

"All officers and employees of (the state, or local jurisdiction, as applicable) charged with enforcement of (state or municipal law generally, or, specifically enumerated laws such as building codes) shall be relieved of all personal liability for all damage that may accrue to persons or property, and for all costs, including attorney's fees, reasonably necessary to defend against litigation resulting from any act required or permitted in the discharge of official duties and exercised in good faith without malice or intentional wrongdoing. Pursuant to this section, the (jurisdiction) may purchase insurance to indemnify itself, its officers, and its employees, from legal liability and defense costs. If insurance is not purchased or available, a suit instituted against an officer or employee for conduct arising out of the lawful discharge of official duties shall be defended by the (legal representative of the jurisdiction, e.g., city attorney) until the final termination of the proceedings, and the (jurisdiction) shall be liable for all costs reasonably necessary to defend such action and for all resulting judgments against the officers and employees based on the good faith discharge of said official duties."

1.4 States or local jurisdictions that indemnify their employees usually purchase insurance for that purpose. In a small number of states, such purchases of insurance operate as a waiver of immunity. Therefore, the effect of purchasing insurance should be thoroughly investigated by appropriate legal counsel prior to its purchase.

1.5 States and local jurisdictions should avoid placing their employees in the position where the employee's liability is greater than that of the government for which he works. In such cases, the employee will be the sole target of any lawsuit, and the inhibiting effect of that exposure may be excessive and damaging to rehabilitation.

2 Specific Immunities for Code Enforcement Activities

Problem: Traditional forms of protection given to code enforcement officials for negligent code enforcement activities are eroding, and in many jurisdictions it is difficult to determine if they remain.

Discussion: A large number of states, perhaps the majority, may retain the common law rule known as the Public Duty Doctrine, which has generally prevented liability from being imposed on officials for any code enforcement function. But recent statutory abrogations of immunities in many states have left the vitality of the court-made doctrine in question. The doctrine itself, which provides immunity for acts performed in the course of a duty owed only to the public generally (rather than to a specific individual), is highly unpredictable in its effect on specific cases. Courts in Washington and Oregon have found exceptions to the rule and have imposed liability for negligent code enforcement; Alaska rejected the rule altogether for code enforcement.

Similarly, the legal doctrine—sometimes judicial, sometimes statutory—that provides immunity for all "governmental functions" has been held to immunize code enforcement officers. But it, too, is waning, and has been discarded in a number of jurisdictions.

A more stable and predictable means of immunizing code officials is needed.

Recommendation

2.1 States (and those municipalities with the legal authority to do so) should consider fully immunizing themselves, their sub-

divisions, and all public employees from liability for negligence in code enforcement functions. The immunization would take the form of a specific statutory reservation of immunity for negligent inspection, negligent failure to inspect, negligent failure to enforce discovered violations, and negligent issuance or denial of permits.

Nine states have enacted such specific reservations of immunity, with some variation in their scope. They are California, Illinois, Indiana, Maine, Nevada, New Jersey, Oklahoma, Tennessee, and Utah. None of these statutes has been declared invalid in court, but the issuance of a permit to an applicant who had failed to obtain the insurance required by statute created liability in California and in Oregon, despite the existence of immunizing statutes in both states.

The following language is based on Cal. Gov. Code §§818.2, 818.4, and 818.6 (2.1.1, 2.1.2 and 2.1.3, respectively—governmental immunity); §§821, 821.2 and 821.4 (2.1.4, 2.1.5 and 2.1.6, respectively—personal immunity):

2.1.1 *"A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law."*

2.1.2 *"A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."*

2.1.3 *"A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (refer to statutory definition, if any), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety."*

2.1.4 *"A public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce an enactment."*

2.1.5 "A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."

2.1.6 "A public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than the property of the public entity employing the public employee (with reference to statutory definition of such property, if such definition exists), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety."

3 Immunities for Elements of Code Enforcement Requiring the Exercise of Discretion

Problem: In jurisdictions granting immunity only for activities requiring the exercise of discretion, the extent to which code officials are liable is unclear, and liability may be unjustly imposed.

Discussion: A number of jurisdictions that have made their employees liable for negligence have nevertheless preserved employee immunity for functions that require the exercise of discretion. Of course, every act requires some discretion, and the courts have attempted to lend predictability to their decisions by drawing distinctions between the "planning" and "operational" levels, between "policy making" and "execution", and between "high" and "low" officers. The treatment the courts have given to various code enforcement functions has been mixed, and none of the foregoing approaches has decreased the level of uncertainty that is the source of the code official's fears.

The code enforcement activities most important to successful rehabilitation all involve the weighing of alternatives and the balancing of competing policies. The recommendations in this section attempt to relieve the uncertainty of code officials by

ensuring that their discretionary activities will be treated as such in jurisdictions in which those functions are immune from liability.

Recommendations

3.1 Building-related codes should include provisions emphasizing the elements of code enforcement that require the exercise of discretion. Such should include:

3.1.1 Provisions spelling out the need for code officials to select from among competing compliance alternatives, including provision for the use of technical guidelines such as *Egress Guideline for Residential Rehabilitation*, *Electrical Guideline for Residential Rehabilitation*, and *Plumbing DWV Guideline for Residential Rehabilitation*;

3.1.2 Use of the word "discretion" in appropriate provisions, even though "waiver", "variance", and modification implicitly connote discretion; and

3.1.3 Statements of purpose emphasizing that rehabilitation is a goal of the code enforcement system, noting that discretion by code officials is required if that goal is to be achieved.*

3.2 In consultation with appropriate state or municipal counsel, code enforcement agencies should develop recordkeeping systems that will demonstrate to judges and juries the degree and reasonableness of discretion exercised in code enforcement activities, particularly in the inspection and approval of rehabilitated buildings. Where practical, the records should show the manner in which competing interests are weighed in order to reach decisions in specific cases.

4 Reducing the Fear of Liability by Improving Agency Practices

Problem: Operating procedures of code enforcement agencies may not provide the level of support services necessary to permit

* See *Statutory Guideline for Building Rehabilitation*, Recommendation 1.1

officials to deal confidently with the special problems of rehabilitation, thereby heightening individual fears of the liability that may result from a mistake in judgment.

Discussion: Even in jurisdictions where code enforcement officials are liable for their negligence, that liability—and fear of it—can be substantially reduced by agency practices that prevent the official from acting negligently.

Such practices could include more thorough training and better field guidance. Experts could be made available to the official for advice in novel situations. Improved agency recordkeeping practices can protect against lapses in memory, personnel turnover in the agency, and the temptation of a court to substitute its judgment for that of agency personnel. The very existence of improved management practices can to a great degree prevent the filing of weak or frivolous lawsuits.

In reducing the potential for negligent conduct, the government can also reduce the number of people injured by official negligence. By doing so, it can give code officials a new confidence that their activities are not—and will not be found—negligent, thereby encouraging latitude in official acceptance of novel solutions to the special code enforcement problems posed by rehabilitation.

Recommendations

4.1 Develop, distribute, and require the use of detailed manuals for field personnel.*

4.2 Improve the training of field personnel, particularly with respect to rehabilitation.*

4.3 Improve the supervision of field personnel, not only from the standpoint of greater discipline, but also by making supervisors available to assist in approaching the problems of rehabilitation. This may in turn require continuing training and education for supervisors to increase their sophistication in dealing with rehabilitation.*

4.4 Establish administrative safeguards to prevent failure to enforce discovered violations.

* See *Statutory Guideline for Building Rehabilitation*, Recommendation 3.1

