

ORIGINAL

CASE NO. 2006-2029

In the Supreme Court of Ohio

Donna J. Stewart, et al.,

Plaintiffs-Appellees

v.

The Lake County Historical Society, Inc., et al

Defendant-Appellant.

On Discretionary Appeal from the
Court of Appeals, Eleventh Appellate District
Lake County, Ohio
Case No. 2004-L-164

BRIEF OF APPELLEES
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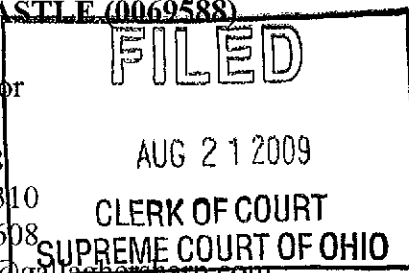
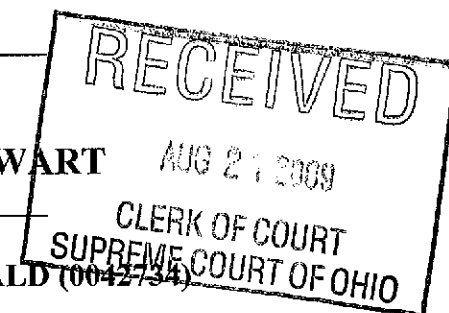


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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellee Donna J. Stewart (“Mrs. Stewart”) was injured when she slipped and fell on a ramp outside the historic schoolhouse at which she volunteered. She slipped because the ramp was improperly constructed, in violation of the Ohio Basic Building Code (the “OBBC”) as it incorporated the Americans with Disabilities Act of 1990 (the “ADA”). Her injuries were serious and she sought redress in the Lake County Common Pleas Court, bringing suit under a general negligence theory against the organization for which she volunteered, which was the same organization that owned and controlled the schoolhouse, Appellant The Lake County Historical Society, Inc. (the “Historical Society”).

Before this Court is the question of “duty,” and the Historical Society’s dogged determination to avoid one that it owed to Mrs. Stewart. Despite constructing the ramp on which she fell, controlling the premises and failing to present evidence it ever inspected the ramp after construction, the Historical Society claims it is entitled to judgment as a matter of law because its admitted failure to construct the ramp in compliance with the applicable OBBC and ADA regulations does not constitute evidence of negligence. The basis, claims the Historical Society, is that Mrs. Stewart is not among those persons to whom any duty is owed under the ADA as it is incorporated into the OBBC.

Mrs. Stewart concedes she is not “disabled” as defined by the ADA and she is not claiming that violation of the administrative regulations regarding ramp construction results in strict liability or negligence *per se*. Consistent with Ohio law, she presents the violation simply as evidence of negligence in the context of opposing a summary judgment motion filed by the Historical Society.

The flaw in the Historical Society's argument that Mrs. Stewart is not disabled and therefore not protected nor owed any duty by the Historical Society is that it ignores the administrative regulations' incorporation into the Ohio Basic Building Code. The ADA requires that consideration be given to accommodating people with disabilities. If no ramp were ever built, a disabled person could take action on the basis that he or she was being discriminated against contrary to the stated intention and purpose of the ADA. Mrs. Stewart could not take such action, because she is not disabled. In that situation, the Historical Society's reasoning would stand. However, the ramp *was* built and it was built under the OBBC. The OBBC does not apply solely to individuals with disabilities nor was access to this ramp limited only to disabled individuals.

In relation to the Historical Society's duty to Mrs. Stewart as a lawful, foreseeable and, in fact, intended user of the ramp (she was there regularly, access was not restricted and she kept it free of leaves and debris), there is the question of the open and obvious doctrine's application to this case. After the ruling in *Lang v. Holly Hill, Inc.*, Slip Opinion No. 2009-Ohio-2495, it is understood the open and obvious doctrine may be used as a defense in cases involving a violation of the OBBC. As the ADA regulation in question is one adopted into the OBBC, Mrs. Stewart recognizes the availability of the doctrine as a *potential* defense. However, both the Trial and Appellate Courts determined the open and obvious doctrine was not applicable – not because the Historical Society was legally barred from arguing it, but because the facts did not support a finding that the dangerous slope was, in fact, open and obvious. Remembering the stepping-off point for this entire appeal was a motion for summary judgment, and recognizing the burden placed upon the Historical Society in such proceedings, it is inconceivable that any

court could rule the dangerous nature of the slope was, as a matter of law, open and obvious to Mrs. Stewart.

For these reasons, the ruling of the Eleventh District Court of Appeals must be affirmed.

II. STATEMENT OF THE FACTS AND OF THE CASE

Pursuant to SCt R VI, Section 3, and because the parties are in general agreement on the substantive facts, Appellees will forego their own Statement of Facts.

With respect to the Statement of the Case, there are two consistencies in the Trial and Appellate Court opinions that are worth mentioning: (1) Both determined the failure to build the ramp in accordance with the ADA standards incorporated into the OBBC regulations could be presented by Mrs. Stewart as evidence in support of her general negligence theory; and, (2) both determined the open and obvious doctrine was not applicable for *factual, not legal reasons*. Where the courts diverged was on the question of whether the Historical Society was considered to have notice or knowledge of the defect. That is significant in light of this Court's decision to accept Propositions of Law I and III, but not Proposition of Law II. Proposition of Law II dealt directly with the issue of an owner's or occupier's obligation to inspect for a defect. As that particular question is not before this Court, the Appellate Court's determination that genuine issues of material fact remain with respect to the Historical Society's constructive knowledge of the ramp's defect and its potential negligence and breach of duty in constructing or inspecting the ramp effectively stand unappealed.

III. ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

APPELLEES' RESPONSE TO PROPOSITION OF LAW NO. I: Violation of an administrative rule does not constitute negligence per se; rather, such a violation may be admissible as evidence of negligence.

A. The concept of "foreseeability" in establishing duty.

In order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. *Meniffee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The existence of a duty depends on the foreseeability of the injury. *Id.* The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 320-321.

"Foreseeability" is important to this case because it begs the question of who would use the ramp. The ramp did not have a restricted access sign. It was open to use by the general public. There is no indication in the record that it was to be used only by individuals fitting the definition of "disabled" under the ADA. In fact, its very existence would regularly require its use by non-disabled individuals, e.g. individuals (1) assisting a wheelchair bound relative; (2) steadying a friend; (3) providing caregiving or companionship services to the disabled. Moreover, common experience indicates ramps are going to be used by any number of non-disabled children and adults and Mrs. Stewart's experience with this ramp bore this out: She swept it regularly; she used it for access; and children regularly ran down the ramp after the program. In actuality, the ramp afforded a convenient and common access to the schoolhouse because, in Mrs. Stewart's words "the path where it comes up, that's a direct line" and one could go right up to the schoolhouse.

This issue of “foreseeability” makes sense when considering the incorporation of the ADA standards into the OBBC regulations. The OBBC does not profess to benefit any one particular class of individuals, disabled or otherwise, to the exclusion of another. The stated intent of the OBBC is:

101.3 Intent. The purpose of this code is to *establish uniform minimum requirements* for the erection, construction, repair, alteration, and maintenance of buildings, including construction of industrialized units. Such requirements shall relate to the conservation of energy, *safety*, and sanitation *of buildings for their intended use and occupancy* with consideration for the following:

1. Performance. * * *
2. Extent of Use. * * *
3. Standardization. * * *

OBBC, Section 101.3, Intent. (Emphasis added).

Yes, it must be built in the first place because of the ADA, but it must be safe for everyone.

B. The fact that the ADA requires action to be taken on behalf of a particular class of individuals does not preclude the possibility that the failure to take such action may be negligence at common law toward other classes of persons.

In its effort to avoid responsibility, the Historical Society refers to what it calls “basic hornbook law.” See Amended Merit Brief of Appellant, p.12. The hornbook they refer to is the Restatement of the Law 2d, Torts, 1965, and two of the sections they refer to are Sections 286(a) and comment *f.* thereto, and Section 288(d). The particular proposition they advance is that before an administrative rule or regulation can be found to be admissible as evidence of the standard of care in a negligence action, it must be found that the rule or regulation was imposed for the benefit of the person alleging the injury.

This is where “foreseeability” must be considered. Yes, the *existence* of the ramp owes its genesis to the ADA; however, building it safely requires the consideration of a far broader class of foreseeable users. An omitted portion of the very same “basic hornbook law” cited by the Historical Society leads down a different path to this same conclusion: Comment *f.* to Section 286 of the Restatement of the Law 2d, Torts, states:

When purpose is to protect particular class. A statute, ordinance, or administrative regulation may, because of its title, preamble, detailed provisions, history, or other reasons, be found to be intended for the protection of the interests of only a particular class of persons. If so, a violation of the provision will be held to be negligence toward persons who are included within the particular class, but not toward those who do not fall within it.

This comment is eagerly referenced in the Historical Society’s brief. Notably absent is the Illustration to comment *f.* and the related comment *g.* and its Illustration. Those items follow:

Illustration [to comment *f.*]:

1. A Factory Act, the title and detailed provisions of which show that its purpose is only to prevent injuries to employees, requires that all factory elevators be provided with a certain safety device. A, an employee in B’s factory, and C, a business visitor to the factory, are injured when the elevator falls because of lack of the safety device. The statute will be taken to establish a standard of conduct as to A, but not as to C.

Comment:

- g.* The fact that a legislative enactment requires a particular act to be done for the protection of the interests of a particular class of individuals does not preclude the possibility that the failure to do such an act may be negligence at common law toward other classes of persons. It also does not preclude the possibility that, in a proper case, the requirements of the statute may be considered as evidence bearing on the reasonableness of the actor’s conduct. (See §288B, Comment *d.*)

Illustration:

2. Under the circumstances stated in Illustration 1, the absence of the safety device will be negligence toward C at common law, if it is found that without it the elevator cannot be operated with reasonable safety.

Restatement of the Law 2d, Torts (1965), Section 286, Comments *f.* and *g.* with Illustrations. (Bracketed commentary added).

In the same way Illustration 2 poses the question of whether the elevator could be operated with reasonable safety in the absence of the safety device, Mrs. Stewart used the admitted violation of the ramp slope requirements incorporated into the OBBC as evidence the ramp was not reasonably safe.

C. Consideration of the Historical Society's admitted violation of an administrative regulation as evidence of negligence is consistent with established Ohio case law.

In *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 1998-Ohio-184 – the very first case cited by the Historical Society – this Court held that the violation of an administrative rule does not constitute negligence *per se*; rather, such a violation may be admissible as evidence of negligence. The Historical Society attempts to distinguish *Chambers* by claiming this Court only considered a violation of the OBBC, not a violation of the ADA *as incorporated into the OBBC*.

Chambers does not support, discuss or even briefly refer to any such distinction. *Chambers* talks about one distinction and one distinction only when considering what violations constitute negligence *per se* and which ones constitute only evidence of negligence, i.e. the difference between statutes and administrative rules. In writing for the majority, Justice Lundberg Stratton wrote:

In *Eisenhuth [v. Moneyhon]* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440], this court held that a violation of a “legislative enactment” was negligence *per se*. *Chambers* asks us to extend the doctrine of negligence *per se* to violations of the OBBC, which constitutes administrative rules. In order to make such a decision, we must first determine whether there are any material differences between statutes and administrative rules which would preclude us from

extending the application of negligence *per se* to violations of administrative rules.

Chambers, supra, 82 Ohio St.3d at 566.

Throughout the opinion, that one distinction – statutes versus administrative rules – is the consistent subject of discussion. The legislative process and its accountability are referred to as “cornerstones of the democratic process which justify the General Assembly’s role as a lawmaker.” *Id.* at p.567. On the contrary, administrative rulemaking is recognized as being limited to facilitating the placing into effect of policies created by the General Assembly. *Id.* Deeper in the opinion, there is recognition of the constraints on rulemaking, but a clear statement that such constraints “do not elevate rulemaking to the status of lawmaking for purposes of applying negligence *per se* to violations of administrative rules. *Id.*

Nowhere in the *Chambers* opinion does this Court suggest that consideration is to be given to further parsing the question into which particular administrative rules ought to be admissible as evidence of negligence. To the contrary, the Court specifically states that it must view the issue in a broader context:

The specific issue before this court is whether a violation of the OBBC is negligence *per se*. However, our comparison of the legislative process and the rulemaking process dictate that we examine the issue in the broader context of whether violations of any administrative rules should require the application of negligence *per se*.

* * *

For all the aforementioned reasons, we hold that the violation of an administrative rule does not constitute negligence *per se*; however, such a violation of an administrative rule may be admissible as evidence of negligence. [citations omitted].

Id. at pp.567, 568.

Like its analysis of *Chambers*, the Historical Society's suggested interpretations of additional Ohio case law are incorrect. For instance, *Community Ins. Co. v. Hambden Twp.* (Sept. 30, 1998), 11th Dist. No. 97-G-2092, 1998 WL 682385, was not – as suggested by the Historical Society -- decided on the basis that non-disabled individuals cannot rely on violations of ADA-related regulations in premises liability cases. The Court did say that membership in the protected class would be a prerequisite to negligence *per se*, but made no mention of such a prerequisite to the presentation of the violation as evidence of negligence generally. Furthermore, the *Community Insurance* case was decided on grounds unrelated to the instant case, i.e. that although the Board of Elections exercised control over the town hall on the date of the accident, it “did not exercise a substantial right of control of the type necessary to establish a duty to appellant.” *Id.* at p.4 of 6.

The Eleventh District Court of Appeals' decision in *Scheetz v. Kentwood, Inc.*, 152 Ohio App.3d 20, 2003-Ohio-1209, is likewise consistent with its decision in this case and does not stand for the proposition suggested by the Historical Society. The Historical Society suggests the Eleventh District gave a succinct opinion that “appellants cannot recover for a violation of the ADA because Mrs. Scheetz has made no showing that she suffers from a covered disability.” See Amended Merit Brief of Appellant at p.21, citing *Scheetz* at para.11. In fact, the appellants could not recover under a theory of negligence *per se*; however, the Eleventh District specifically stated: “Nevertheless, a showing that appellee violated an administrative rule may be admissible as evidence of general negligence.” *Scheetz*, *supra*, 152 Ohio App.3d at 23.

Souther v. Preble Cty. Dist. Library, West Elkton Branch, 12th Dist. No. CA 2005-04-006, 2006-Ohio-1893 – also cited in the brief filed by the Historical Society – actually restates the flat rule adopted in *Chambers* that violation of an administrative rule may be admissible as

evidence of negligence. *Id.* at p.6 of 8. Beyond that, it has no applicability in this case because the appellants were seeking to assert liability on the basis of negligence *per se*. The simple use of the violation as evidence of negligence was not available to them because the appellee was a political subdivision and without negligence *per se*, the appellants would not qualify under any exceptions to the immunity statute.

In *Dunfee v. Oberlin City School Dist.* (March 29, 2007), N.D. Ohio, Eastern District, No. 1:05cv2648, 2007 U.S. Dist. Lexis 22930, the last Ohio case cited on this issue by the Historical Society, the issue is not negligence, it is discriminatory denial of access. Not only are the facts in the *Dunfee* opinion very limited making any attempt at analogizing the case impossible, the theory of liability is completely different. If this case involved the complete absence of a ramp, we concede that Mrs. Stewart could not sue under the ADA on the basis of discriminatory denial of access. However, the *Dunfee* case simply provides no guidance in the fact situation before this Court.

Permitting the violation of an administrative rule to be admitted as evidence of negligence, even where it does not constitute strict liability or negligence *per se*, is the current and clearly-stated status of the law in Ohio. The Historical Society cannot demonstrate otherwise and has failed to set forth any argument that would justify the radical departure from that law proposed in its Proposition of Law No. I. For these reasons, the Eleventh District Court of Appeal's decision must be affirmed.

D. Whether noncompliance with an ADA Regulation governing the slope of ramps installed on a premises creates an unreasonably unsafe condition for a person not protected by the ADA, is not an issue before this Court.

Section D of the Historical Society's argument on Proposition of Law No. I appears to be an effort to slip in a separate proposition of law for the Court's consideration. This Court

accepted a concise issue, i.e. whether a plaintiff that is not disabled under the ADA definitions can present evidence of a violation of the ADA standards as they are incorporated into the OBBC as evidence of negligence. This Court did not nor should it accept a fact finding determination at this point. Proposition of Law No. I addresses a threshold legal determination and goes to whether the violation can be presented as evidence, *not* whether that evidence is sufficient. Furthermore, contrary to the Historical Society's representation, the Appellate Court did not rely solely on evidence of the violation, it relied on deposition testimony, too, and did not overstate its position when it concluded that such evidence should be construed in Mrs. Stewart's favor and created a genuine issue of material fact. For these reasons, the Court should disregard Appellant's Section D entirely.

APPELLEES' RESPONSE TO PROPOSITION OF LAW NO. III: Recognizing the holding in *Lang v. Holly Hill Motel, Inc.*, Slip Opinion No. 2009-Ohio-2495, and the resulting availability of the open and obvious doctrine as a *potential* defense generally, the facts of this case do not merit its application.

Preliminarily, the Stewarts understand the net effect of this Court's ruling in *Lang v. Holly Hill Motel, Inc.* and will concede that as a result there is no legal bar to the open and obvious doctrine as a *potential* defense for the Historical Society. In doing so, they would point out that for the first time the Historical Society concedes a significant point, i.e. that "[J]ust like in *Lang*, the Stewarts' claim of liability *arises from an alleged violation of the OBBC.*" See Amended Merit Brief of Appellant, p.31. (Emphasis added). The effort to somehow distinguish between different portions of the OBBC's administrative regulations ceased in the Historical Society's presentation of this Proposition of Law.

- A. Although it is legally available as a *potential* defense, the open and obvious doctrine does not relieve the Historical Society of its duty of care to Mrs. Stewart.**

The Appellate Court never suggested the open and obvious defense could not be presented in this case. Nowhere in any opinion below is it written that the violation of an administrative regulation prohibited the defense from claiming the defect was open and obvious. To the contrary, the Court of Appeals considered the issue head on and simply determined “the hazard created by the defective ramp could not be observed by Donna.” See Opinion of the Eleventh Appellate District, Lake County, Ohio, journalized on September 18, 2006, at Apx. p.5 of the Merit Brief of Appellant, at p.12, para.24. Considering the ramp's very existence would suggest a considered means of safe passage, the Court of Appeals’ determination makes sense; Mrs. Stewart knew it was a ramp, but it would not be so apparently unsafe on simple observation to constitute an open and obvious danger.

Again, there is a question of what issues are before this Court. Proposition of Law No. III requests the resolution of a legal issue. That issue is resolved, the open and obvious doctrine is available as a *potential* defense. However, the open and obvious doctrine was applied and considered before, it was simply applied unsuccessfully in the context of a motion for summary judgment.

IV. CONCLUSION

Two points of law were accepted for review in this matter. The first, regarding the violation of an administrative regulation being admitted as evidence of negligence is the subject of well-established case law in the State of Ohio and the Historical Society has not presented a compelling reason why that law should be changed. The second, regarding the application of the open and obvious doctrine as a potential defense in matters involving violations of administrative regulations, is already decided but is really of no consequence to the outcome in this case.

The Eleventh District Court of Appeals must be affirmed.

Respectfully submitted,



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I certify that a copy of the foregoing Brief of Appellees was mailed by regular U.S. mail, postage prepaid, to Timothy J. Fitzgerald, Gallagher Sharp, Counsel of Record for Defendant-Appellant, at Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, Ohio 44115-2108, this 21st day of August, 2009.



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APPENDIX

Chapter 4101:1-1 Administration

4101:1-1-01 Administration.

Section 101

General

101.1 Title. Chapters 4101:1-1 to 4101:1-35 of the Administrative Code shall be designated as the "Ohio Building Code" for which the designation "OBC" may be substituted. The "International Building Code 2006, first printing, Chapters 1 to 35," as published by the "International Code Council, Inc." is used as the basis of this document and is incorporated fully except as modified herein. References in these chapters to "this code" or to the "building code" in other sections of the Administrative Code shall mean the "Ohio Building Code."

101.2 Scope. The provisions of the "Ohio Building Code", the "Ohio Mechanical Code", and the "Ohio Plumbing Code" shall apply to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures. As provided in division (B) of section 3791.04 of the Revised Code, no plans or specifications shall be approved or inspection approval given unless the building represented by those plans or specifications would, if constructed, repaired, erected, or equipped according to those plans or specifications, comply with Chapters 3781. and 3791. of the Revised Code and any rules adopted by the board. An owner may exceed the requirements of the "Ohio Building Code" in compliance with section 102.9.

Exceptions:

- 1.** This code applies to detached one-, two-, and three-family dwellings and structures accessory to those dwellings, only to the extent indicated in section 310 of this code;
- 2.** Buildings owned by and used for a function of the United States government;
- 3.** Buildings or structures which are incident to the use for agricultural purposes of the land on which said buildings or structures are located, provided such buildings or structures are not used in the business of retail trade; for the purposes of this section, a building or structure is not considered used in the business of retail trade if fifty per cent or more of the gross income received from sales of products in the building or structure by the owner or operator is from sales of products produced or raised in a normal crop year on farms owned or operated by the seller (see sections 3781.06 and 3781.061 of the Revised Code);
- 4.** Agricultural labor camps;
- 5.** Type A or Type B family day-care homes;
- 6.** Buildings or structures which are designed, constructed, and maintained in accordance with federal standards and regulations and are used primarily for federal and state military purposes where the U.S. secretary of defense, pursuant to 10 U.S.C. Sections 18233(A)(1) and 18237, has acquired by purchase, lease, or transfer, and constructs, expands, rehabilitates, or corrects and equips, such buildings or structures as he determines to be necessary to carry out the purposes of Chapter 1803 of

the U.S.C.

7. *Manufactured homes constructed under "24 CFR Part 3280," "Manufactured Home Construction and Safety Standards" and within the scope of the rules adopted by the Ohio Manufactured Home Commission.*

8. *Sewerage systems, treatment works, and disposal systems (including the tanks, piping, and process equipment associated with these systems) regulated by the legislative authority of a municipal corporation or the governing board of a county or special district owning or operating a publicly owned treatment works or sewerage system as stated in division (A) of section 6111.032 of the Revised Code.*

9. *Building sewer piping.*

10. *Portable electric generators and wiring supplying carnival and amusement park rides regulated by the Ohio Department of Agriculture.*

11. *Structures directly related to the operation of a generating plant or major utility facilities regulated by the power siting board.*

101.2.1 Appendices. *The content of the appendices to the Administrative Code is not adopted material, but is approved by the board of building standards (BBS) and provided as a reference for code users.*

101.3 Intent. *The purpose of this code is to establish uniform minimum requirements for the erection, construction, repair, alteration, and maintenance of buildings, including construction of industrialized units. Such requirements shall relate to the conservation of energy, safety, and sanitation of buildings for their intended use and occupancy with consideration for the following:*

1. Performance. *Establish such requirements, in terms of performance objectives for the use intended.*

2. Extent of use. *Permit to the fullest extent feasible, the use of materials and technical methods, devices, and improvements which tend to reduce the cost of construction without affecting minimum requirements for the health, safety, and security of the occupants of buildings without preferential treatment of types or classes of materials or products or methods of construction.*

3. Standardization. *To encourage, so far as may be practicable, the standardization of construction practices, methods, equipment, material and techniques, including methods employed to produce industrialized units.*

The rules of the board and proceedings shall be liberally construed in order to promote its purpose. When the building official finds that the proposed design is a reasonable interpretation of the provisions of this code, it shall be approved. Materials, equipment and devices approved by the building official pursuant to section 114 shall be constructed and installed in accordance with such approval.

101.4 Referenced codes. *The other codes listed in sections 101.4.1 to 101.4.7 and referenced elsewhere in this code shall be considered part of the requirements of this code to the prescribed extent of each such reference.*