

Report on the Department of Housing and Urban Development Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code

I. Purpose

The purpose of this draft report is to present the results of and seek public comment on the U. S. Department of Housing and Urban Development's (HUD or the Department) review of certain accessibility provisions of the International Building Code, 2003 edition ("2003 IBC"), published by the International Code Council.¹ The Department conducted this review in response to a request from the International Code Council (ICC). ICC requested that the Department review the accessibility provisions of the 2003 IBC to determine whether those provisions are consistent with the accessibility requirements of the Fair Housing Act, the regulations implementing the 1988 Amendments to the Act, and the Fair Housing Accessibility Guidelines, so that the 2003 IBC may be recognized by the Department as a safe harbor for compliance with the law.

II. Background

The Fair Housing Act Accessibility Provisions

Title VIII of the Civil Rights Act (the Fair Housing Act), 42 U.S.C. 3601 et seq., prohibits discrimination in housing and housing related transactions based on race, color, religion, national origin, sex, family status, and disability.²

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² The Fair Housing Act refers to people with "handicaps." Subsequently, in the Americans with Disabilities Act of 1990 and other legislation, Congress adopted the term "persons with disabilities," or "disability," which is the preferred usage. Accordingly, this Report hereinafter uses the terms "persons with disabilities," "disability," or "disabled."

In response to the serious lack of accessible housing in the United States, Congress provided that all covered multifamily dwellings built for first occupancy after March 13, 1991 shall be designed and constructed so that: (1) The public and common use portions of such dwellings are readily accessible to and usable by persons with disabilities; (2) All the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by disabled persons in wheelchairs; and (3) All premises within such dwellings contain the following features of adaptive design: (a) An accessible route into and through the dwelling; (b) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) Reinforcements in bathroom walls to allow later installation of grab bars; and (d) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space. 42 U.S.C. 3604(f)(3)(C). These basic accessibility requirements are known as the Fair Housing Act's (the Act) design and construction requirements.

The Act's design and construction requirements apply to "covered multifamily dwellings," which means "buildings consisting of 4 or more units if such buildings have one or more elevators; and ground floor units in other buildings consisting of 4 or more units." 42 U.S.C. 3604(f)(7). The Act's requirements apply irrespective of type of ownership, covering both rental and for sale units, as long as there are four or more units in the building. The Act's requirements do not apply to buildings that are altered or renovated, or to detached single-family houses. In addition, in most cases, multistory

townhouses are not covered. However, multistory townhouses are covered if they have elevators, or if they are located in a building with one or more elevators.

The Act does not set forth specific technical design criteria that have to be followed in order to comply with the design and construction requirements. It does provide, however, that compliance with the appropriate requirements of the American National Standards Institute for Buildings and Facilities – Providing Accessibility and Usability for Physically Handicapped People, commonly referred to as ANSI A117.1, satisfies the Act's design and construction requirements for the interiors of dwelling units. 42 U.S.C. 3604(f)(4).

In 1989, the Department issued its regulations implementing the design and construction requirements of the Act. 24 CFR 100.205. In the regulations, the Department specifically stated that compliance with the appropriate requirements of ANSI A117.1-1986 satisfies the technical requirements of the Act relating to interiors of dwelling units. 24 CFR 100.205(e). In addition, the Department's regulations reference the requirements of ANSI A117.1-1986 as a means of compliance with respect to the following features of covered multifamily dwellings: (a) public and common use areas, (b) accessible routes, and (c) building entrances on an accessible route. 24 CFR 100.201.

The Act states that Congress did not intend the Department to *require* states and units of local government to include the Act's accessibility requirements in their state and local procedures for the review and approval of newly constructed covered multifamily

dwellings. 42 U.S.C. Sec. 3604(f)(5)(C). However, Congress authorized the Department to encourage the inclusion of these requirements into their state and local procedures. Id.

The Act also makes it clear that it does not invalidate or limit any other state or federal laws that require dwellings to be designed or constructed in a manner that affords persons with disabilities greater access than that required under the Act. 42 U.S.C. 3604(f)(8). Further, federally funded facilities and dwelling units covered by section 504 of the Rehabilitation Act of 1973 (Section 504), the Architectural Barriers Act (ABA), the Uniform Federal Accessibility Standard, or the Americans with Disabilities Act (ADA), must comply with the regulatory requirements of those laws in addition to the requirements of the Act, when applicable. For Section 504, regulatory requirements may be found at 24 CFR part 8; for the ABA, 24 CFR part 40; and for the ADA, 28 CFR parts 35 and/or 36, as applicable.

Congress directed the Secretary of HUD to “provide technical assistance to states and units of local government and other persons to implement [the design and construction requirements].” 42 U.S.C. 3604(f)(5)(C). Over the last 13 years, the Department has undertaken numerous activities to provide technical guidance and has published several technical guidance documents. For example, on March 6, 1991, the Department published the “Final Fair Housing Accessibility Guidelines” (the Guidelines), at 56 FR 9472-9515. The Guidelines set forth specific technical guidance for designing covered multifamily dwellings to be consistent with the Act. Section I of

the Guidelines states: “These guidelines are intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act.” 56 FR at 9499.

On June 24, 1994, the Department published its “Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines,” at 59 FR 33362-33368. The Department published a Fair Housing Act Design Manual (Design Manual) in 1996 that was reissued in 1998 with minor changes. The Design Manual is also a safe harbor for compliance with the Act.

The International Building Code

The International Building Code (IBC) represents an effort to bring national uniformity to building codes. Representatives of three national model code bodies developed drafts of the proposed code under the auspices of the International Code Council (ICC), an umbrella organization created in 1994 to assist common code development. The three national model code groups were Building Officials and Code Administrators International, Inc. (BOCA); International Conference of Building Officials (ICBO); and Southern Building Code Congress International, Inc. (SBCCI). The IBC includes provisions for accessibility intended to reflect the intent of the Act, the regulations and the Guidelines.

Unlike the Act, the IBC is a model building code and not a law. It provides minimum standards for public safety, health and welfare as they are affected by building construction. Compliance with the IBC or any other model code is not required unless

adopted by a state or local jurisdiction's governing body. A jurisdiction may adopt a model building code in its entirety or with modifications.

The 2000 International Building Code, 2001 IBC Supplement and the Code Requirements for Housing Accessibility

In 1999, at the request of the model code organizations, the Department reviewed the three existing model building codes and the draft 2000 International Building Code (2000 IBC) for the purpose of determining if these codes met the design and construction requirements in the Act, HUD's Fair Housing Act regulations, and HUD's Fair Housing Accessibility Guidelines. In the Department's regulations implementing the design and construction requirements of the Act (24 CFR 100.205), the Department had stated its intent to review and, if appropriate, to reference future editions of the ANSI A117.1 standard as they were published. Therefore, in conjunction with its review of the model building codes, the Department also reviewed the 1992 and 1998 editions of ANSI A117.1 (CABO/ANSI A117.1-1992 and ICC/ANSI A117.1-1998).

On March 23, 2000, the Department published its *Final Report of HUD Review of Model Building Codes* in the Federal Register. 65 FR 15740 (March 23, 2000). This report concluded that with revisions, the 2000 IBC could be made consistent with the Act's design and construction requirements. In this report, the Department also stated that it reviewed the 1992 CABO/ANSI A117.1 and the 1998 ICC/ANSI A117.1, and believes that CABO/ANSI A117.1-1992 and ICC/ANSI A117.1-1998 are consistent with

the Act and are additional safe harbors for compliance with the Act's technical accessibility requirements. It is important to note, however, that ANSI A117.1 contains only technical criteria, whereas the Fair Housing Act, the implementing regulations, and the Guidelines contain both “scoping” and technical criteria. Scoping criteria define when a building element or space must be accessible; technical criteria provide the technical specifications on how to make an element accessible. Therefore, designers and builders relying on ANSI A117.1 also need to consult the Act, the Department's regulations, and the Guidelines for the scoping criteria.

Following publication of this report, at the request of a group of representatives from ICC, major building industry groups and disability advocacy groups, the Department provided technical assistance to ICC in developing code text changes to address HUD's concerns with the accessibility provisions in the code. The resulting code text changes were incorporated into the IBC in the 2001 Supplement to the International Codes. In addition, at the request of this same group of representatives, HUD provided technical assistance to ICC in the review of a document that compiled all of the housing-related accessibility provisions in the 2000 IBC as amended by the 2001 Supplement in a separate, stand-alone document, called *Code Requirements for Housing Accessibility* (CRHA), published by ICC in October 2000.³

³ The ICC has issued an errata sheet to the CRHA. This errata sheet includes corrections that are reflected in the 2001 IBC Supplement.

Based upon HUD's review, the 2000 IBC, as amended by the 2001 IBC Supplement, and the CRHA have been deemed by the Department to constitute additional safe harbors for compliance with the design and construction requirements of the Act.

HUD-Recognized Safe Harbors for Compliance with the Fair Housing Act's Design and Construction Requirements

As a result of the review and subsequent actions outlined above, the Department currently recognizes seven documents as safe harbors for compliance with the Act's design and construction requirements. These documents are:

1. Fair Housing Accessibility Guidelines, March 6, 1991, in conjunction with the June 28, 1994 Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines;
2. Fair Housing Act Design Manual, published by HUD in 1996, updated in 1998;
3. ANSI A117.1-1986, Accessible and Usable Buildings and Facilities, in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
4. CABO/ANSI A117.1-1992, Accessible and Usable Buildings and Facilities, in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;

5. ICC/ANSI A117.1-1998, Accessible and Usable Buildings and Facilities, in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
6. 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000; and
7. 2000 International Building Code (IBC), as amended by the 2001 Supplement to the International Building Code.

The above documents represent safe harbors for compliance with the Act's design and construction requirements. If a state or locality has adopted one of the above documents, a covered residential building will be deemed compliant provided the covered residential buildings are designed and constructed in accordance with plans and specifications approved during the building permitting process and the building code official does not waive or incorrectly interpret or apply one or more of those requirements. See HUD Policy Statement, 65 FR 15756 (March 23, 2000).

The 2003 International Building Code

The International Building Code is updated on a regular basis by means of a code development process. Under this process, any interested person may submit proposed changes to the code and participate in the proceedings under which proposed changes are considered for adoption. At present, ICC is utilizing an 18-month development cycle. Changes approved during the 2003/2004 code development cycle will appear in the 2004 Supplement; followed by another 18-month cycle that will result in the 2006 IBC.

ICC contacted HUD in 2003 to request that HUD review the accessibility requirements contained in the 2003 IBC to make a determination as to whether the 2003 IBC would also be deemed a safe harbor for compliance with the Fair Housing Act design and construction requirements. The Department convened a Task Force that consisted of representatives of HUD's Offices of Fair Housing and Equal Opportunity and General Counsel, and the Department of Justice's (DOJ) Housing and Civil Enforcement Division, to review the changes to the 2003 IBC from the 2000 IBC as amended by the 2001 Supplement to ascertain whether, with those changes, the 2003 IBC meets the accessibility requirements of the Fair Housing Act. This report is the product of that Task Force. If changes were deemed to have a negative impact on safe harbor designation, the Task Force has provided recommendations on how the change or changes could be resolved consistent with the requirements of the Act and the Guidelines.

III. Methodology

The analysis by the Task Force consisted of:

- A review of the Fair Housing Act, 42 U.S.C. 3604(f)(3)(C); the regulations, 24 CFR 100.201 and 205; the Fair Housing Accessibility Guidelines, 56 FR 9472-9515 (March 6, 1991); the Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 FR 33362-33368 (June 28, 1994); the Fair Housing Act Design Manual; the Final Report of HUD Review of Model Building Codes, 65 FR 15740-15794 (March 23, 2000); and the Code Requirements for Housing Accessibility (CRHA) with errata sheet, ICC, October 2000.

- A comparison of the accessibility provision changes between the 2000 IBC, as amended by the 2001 Supplement, and the 2003 IBC, as identified in a matrix prepared by the ICC.⁴ HUD conducted an initial review by comparing the IBC 2000 and the 2001 Supplement with the information contained in the matrix and identified variances in the 2003 IBC.
- A review of relevant portions of the 2003 IBC Update Resource Handbook and the 2003 IBC Commentary, Vol. I.
- A review of certain changes to the 2003 IBC that have been approved for the 2004 IBC Supplement that were brought to HUD's attention as having a possible impact upon fair housing accessibility requirements.

Following this initial review:

- Members of the Task Force asked representatives of the ICC for clarification or additional information regarding some of the changes reflected in the 2003 IBC.
- The Task Force identified, analyzed, discussed and classified each variance between the 2000 IBC/2001 IBC Supplement and the 2003 IBC in one of three categories:
 - a. Non-substantive.
 - b. Substantive, but continues to meet the accessibility requirements of the Fair Housing Act.
 - c. Substantive, and the changes may not meet the accessibility requirements of the Fair Housing Act.

⁴ The matrix consists of a side-by-side comparison of the 2000 IBC with the 2001 Supplement and the 2003 IBC along with ICC's comments on changes made to provisions in the 2003 IBC.

This draft report discusses only those provisions contained in the 2003 IBC that HUD believes do not meet or may not meet the design and construction requirements of the Fair Housing Act.

The Department also invites public comment on any areas of the 2003 IBC, as that code relates to the Fair Housing Act accessible design and construction requirements, that the public wishes to bring to the Department's attention.

The Department will consider all comments received by **close of business (6:00 p.m. EDT) on September 7, 2004**, and will then publish its final report in the Federal Register. See the August 6, 2004 Notice in the Federal Register for information on where to submit comments.

IV. Analysis

GENERAL

Accessible Units, Type A Units, Type B Units

The 2003 IBC contains criteria for three types of dwelling units: Accessible Units, Type A Units, and Type B Units. The definition for Accessible Unit was added by the 2001 Supplement to the IBC. The 2001 Supplement also revised the definitions for Type A Dwelling Unit and Type B Dwelling Unit. The Department wishes to point out that it is the requirements for Type B Dwelling Units that are intended to reflect the design and construction requirements of the Fair Housing Act, the Act's implementing regulations and the Guidelines. In conducting its review of the 2003 IBC, the

Department compared the requirement in the code for Type B Dwelling Units with the requirements in the Act, HUD's implementing regulations and the Guidelines.

For clarity, the IBC definitions for all three types of accessible units are listed below:

“Accessible Unit. A dwelling unit or sleeping unit that complies with this code and Chapters 1 through 9 of ICC A117.1.”

“Dwelling Unit or Sleeping Unit, Type A. A dwelling unit or sleeping unit designed and constructed for accessibility in accordance with ICC/ANSI A117.1.”

“Dwelling Unit or Sleeping Unit, Type B. A dwelling unit or sleeping unit designed and constructed for accessibility in accordance with ICC/ANSI A117.1, consistent with the design and construction requirements of the federal Fair Housing Act.”

The ICC/ANSI A117.1-1998, Chapter 10 includes technical criteria for Type A Dwelling Units and Type B Dwelling Units. Although there is not a specific definition included in the ICC/ANSI A117.1-1998 for an “accessible unit,” Chapters 1 through 9 of ICC/ANSI A117.1 provide technical criteria for an “accessible” dwelling unit.

ADAAG Coordination

The Department understands that a number of the changes made in the 2003 IBC were for the purpose of coordinating with the draft final rule for the Americans with Disabilities Act Accessibility Guidelines (ADAAG). The U. S. Access Board placed the

ADAAG draft final rule on the public docket on April 2, 2002. The Access Board's accompanying notice explained that it placed the document on the docket for public inspection to promote harmonization of the Board's guidelines with the International Code Council (ICC)/American National Standards Institute (ANSI) A117.1 standard on Accessible and Usable Buildings and Facilities and the International Building Code. The Access Board further explained that if it did not take this step, an important opportunity to harmonize the Board's guidelines with those of the private sector would be missed.

The Department understands and supports the importance of taking steps to harmonize the Federal Government's requirements for facilities that are subject to the ADA with accessibility provisions of the private sector. However, as the Department will discuss in its analysis below, there are a few instances in which it appears that this effort to coordinate with the ADAAG may have produced a revision to the IBC that does not meet the accessible design and construction requirements of the Fair Housing Act.

USE OF THE TERM ICC/ANSI A117.1-1998 - RECOMMENDATION

The 2003 IBC does not use the full acronym "ICC/ANSI A117.1-1998" throughout the code, and instead uses "ICC A117.1." However, the Department notes that the 2003 IBC references ICC/ANSI A117.1-1998 in Chapter 35, Referenced Standards, page 591. The Department recommends that the next edition of the IBC be revised to include "ANSI" in the abbreviation that is used in the text throughout various chapters of the code, i.e., "ICC/ANSI A117.1," to reflect the full name of the standards of

the American National Standards Institute, as abbreviated. This will also promote consistency with the Fair Housing Act, which references the “ANSI” Standard.

IBC 2003 PROVISIONS THAT MAY NOT MEET ACCESSIBILITY REQUIREMENTS.

1. Chapter 10: Means of Egress; Section 1008.1.4, Floor Elevation: Exception 3

The Act requires that covered multifamily housing be designed and constructed with accessible public and common use areas and an accessible route into and through the unit. 42 U.S.C. 3604(f)(3)(C)(i) & (iii) (I). Guidelines Requirement 1 specifies that each covered unit must have an accessible entrance on an accessible route. Guidelines Requirement 2 mandates accessible and usable public and common use areas.

Section 1008.1.4 of the IBC 2003, entitled “Floor elevation”, sets out the general requirement that there shall be a level landing on each side of a door, except for exterior landings which may have a slope of 2% or less. Exception 3, which is a new exception to section 1008.1.4, provides that Group R-3 occupancies need not have a level landing and instead may have a step down to the landing of up to 7 ¾”.

Group R-3 occupancies are single-family or two-family detached homes and townhouses of 3 or more stories. See IBC 2003 section 310.1; Commentary. This exception would appear to permit a step of up to 7 ¾” at the exterior doors to structures with 4 or more units, including a townhouse that has an interior elevator (and which, by

virtue of that elevator is a covered multifamily dwelling), or a group home that does not operate as a single-family residence. The Commentary notes that this exception does not apply to the primary entrance door for Type B sleeping or dwelling units. (Commentary, Page10-39). The exception itself, however, does not contain such limiting language. The Commentary indicates further that Exception 3 does not apply to exterior doors that open to decks, patios or balconies in Type B dwelling or sleeping units, and that instead exception 5 mandates that there may be no more than a 4" step at such doors when the exterior landing is impervious. Read without the commentary however, Exception 3 is not clear on this point. Thus, it is the Department's opinion that Exception 3 may allow for confusion and inaccessibility.

Conclusion

The Department concludes that Section 1008.1.4, Exception 3, does not meet the accessibility requirements of the Act and the Guidelines.

Recommendation

The Department recommends that Section 1008.1.4, Exception 3, be revised to add the clarifying language that appears in the Commentary.

2. Section 1008.1.6, Thresholds: Exception

The Act requires that covered multifamily housing be designed and constructed with accessible public and common use areas and an accessible route into and through the unit. 42 U.S.C. 3604(f)(3)(C)(i) & (iii) (I). Guidelines Requirement 1 specifies that each

covered unit must have an accessible entrance on an accessible route. Guidelines Requirement 2 mandates accessible and usable public and common use areas.

Section 1008.1.6 sets forth the general requirement that a doorway threshold can be no higher than $\frac{3}{4}$ " for a sliding glass door and $\frac{1}{2}$ " for other doors. A new exception has been added, which allows for a threshold of $7\frac{3}{4}$ " in Group R-2 and Group R-3 housing if the door is an exterior door that is not a component of the required means of egress and is not on an accessible route. The "means of egress" and "accessible route" limitations would appear to ensure that the $7\frac{3}{4}$ " threshold is not acceptable in covered Group R-2 and Group R-3 housing. The Commentary specifies that the exception permits the $7\frac{3}{4}$ " step only at dwelling units that are not required to be Type B units, inter alia. Although this exception may provide greater clarity than Section 1008.1.4, Exception 3, discussed above, because of the conditional language regarding means of egress and accessible route, it may lead to confusion regarding patio doors and other exterior doors that are not a means of egress.

Conclusion

It is the Department's conclusion that the Exception to Section 1008.1.6 does not meet the requirements of the Act and the Guidelines.

Recommendation

The Department recommends that the Exception under 1008.1.6 be clarified in accordance with the explanation in the Commentary to ensure compliance with the design and construction requirements of the Act and the Guidelines.

3. Chapter 11: ACCESSIBILITY: Section 1104.1, Site arrival points:

Exception

A new exception has been added to 1104.1, Site Arrival points. Section 1104.1 and the exception read as follows:

1104.1 Site arrival points. Accessible routes within the site shall be provided from public transportation stops, accessible parking and accessible passenger loading zones and public streets or sidewalks to the accessible building entrance served.

Exception: An accessible route shall not be required between site arrival points and the building or facility entrance if the only means of access between them is a vehicular way not providing for pedestrian access.

It is the Department's understanding that the above new exception has been added in an effort to harmonize with the provisions of the ADAAG. However, the exception conflicts with the Act's requirements for an accessible entrance on an accessible route, and accessible and usable public and common use areas. These requirements are addressed in HUD's Guidelines under Requirements 1 and 2. Under Requirement 1, covered multifamily dwellings must be designed and constructed to provide an accessible

entrance on an accessible route to covered buildings and dwelling units, unless the site is impractical due to extreme terrain or unusual site characteristics. The Guidelines address the conditions to be met for site impracticality. Under Requirement 2 an accessible route is required, within the boundary of the site, from public transportation stops, accessible parking spaces, accessible passenger loading zones, and public streets or sidewalks. The Guidelines' site impracticality provision at Requirement 1, paragraph (5) permits a vehicular route only under certain limited circumstances that are beyond the owner's control. It states:

(5) Accessible route. An accessible route that complies with ANSI 4.3 would meet section 100.205(a). If the slope of the finished grade between covered multifamily dwellings and a public or common use facility (including parking) exceeds 8.33%, or where other physical barriers (natural or manmade) or legal restrictions, all of which are outside the control of the owner, prevent the installation of an accessible pedestrian route, an acceptable alternative is to provide access via a vehicular route, so long as necessary site provisions such as parking spaces and curb ramps are provided at the public or common use facility. 56 FR 9504 (March 6, 1991).

Under both Requirements 1 and 2, the accessible route is intended to be a continuous and unobstructed path that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by persons with other disabilities. See the Guidelines' definition of "accessible route." Moreover, the exception to providing an accessible pedestrian route is permissible only in the rare

instance where it is beyond the owner's control to provide a pedestrian route with a running slope of 8.33% or less because of site conditions, other physical barriers or legal constraints.

The 2003 IBC (as well as the 2001 Supplement) contains language at Section 1107.4 that is similar (although not identical) to the above provision in the Guidelines, and which we understand was added in an effort to meet this provision in the Guidelines. However, the new Exception at 1104.1 apparently would allow a choice to provide only a driveway or road from the public street or sidewalk outside the complex to the covered dwellings, rather than an accessible pedestrian route from such areas to the covered dwellings, on sites that do not have site impracticality or without any showing that it was beyond the owner's control to build an accessible pedestrian route.

The IBC Resource Handbook (page 441 of 2002 documentation) indicates that the new exception at Section 1104.1 is intended to correlate with Section 1104.2 (which allows a vehicular route exception between buildings on a site) and to extend this latter exception to routes between public streets and sidewalks and the buildings on the site. This is inappropriate because the Guidelines do not permit such an exception. Moreover, it is our understanding that Section 1104.2 does not apply to sites having dwelling units or sleeping units that are subject to Section 1107, i.e., covered dwelling units under the Act. Rather, the accessible route between buildings on a site is addressed at 1107.4, which provides an exception for a vehicular route only under limited circumstances similar to the Guidelines' provision for a vehicular route on impractical sites, and

requires a showing that accessible pedestrian routes could not be built. However, because Section 1107 does not include a provision for an accessible route from site arrival points to the entrances of the dwelling units, similar to Section 1104.1, it would appear that Section 1104.1, along with the new Exception, could be read to apply to such sites, permitting an exception for a vehicular route that is not allowed under the Guidelines.

The 2003 IBC Commentary for 1104.1 explains that the new Exception applies to situations such as a bus stop near an industrial complex where the only route up to the complex is a long driveway, and refers users of the code to the commentary for sections 1107.3 and 1109.14 for special considerations on residential developments with recreational facilities. IBC Commentary Pages 11-9; 11-17; 11-50. However, reference to these sections is misleading because they deal only with spaces on the site, not the route up to where the buildings are located from the entry point to the site.

Conclusion

The new exception to 1104.1, Site arrival points, does not meet the requirements in the Act for an accessible entrance on an accessible route, or for accessible routes within the boundary of the site, such as routes from public transportation stops (where applicable), and public streets and sidewalks.

Recommendation

The IBC should be amended to include a new provision under Section 1107 to address site arrival points for Group I and Group R occupancies that are required to provide Type B dwelling units. This new provision should be similar to Section 1104.1 but without the Exception, and should read as follows:

1107.X Site arrival points. Accessible routes within the site shall be provided from public transportation stops, accessible parking and accessible passenger loading zones, and public streets and sidewalks to the accessible building entrance(s) for each building containing Type B dwelling units.

In addition, text needs to be added to Section 1104.1 that makes it clear that the Exception to Section 1104.1 does not apply to sites that are subject to Section 1107.

4. Section 1104.2 Within a site

Section 1104.2, entitled “Within a site,” states, “At least one accessible route shall connect accessible buildings, accessible facilities, accessible elements and accessible spaces that are on the same site.” The Exception to Section 1104.2 has been revised from the 2000 IBC to the 2003 IBC. This exception, as revised, states:

“Exception: An accessible route is not required between accessible buildings, accessible facilities, accessible elements and accessible spaces that have, as the only means of access between them, a vehicular way not providing for pedestrian access.”

It is the Department's understanding that the revised wording is intended for consistency with ADAAG and clarification based on the revised definition of "facility." In addition, was the Department's understanding, based on its prior review of the 2000 IBC and the subsequent revisions made in the 2001 Supplement, that Section 1104.2 does not apply to sites with dwelling units or sleeping units that are subject to Section 1107, and that instead, Section 1107.4 would apply to such sites.

However, some users of the IBC are interpreting the code to mean that Section 1104.2 does, in fact, apply to sites having dwelling units and sleeping units and which are subject to the Fair Housing Act's design and construction requirements. This has resulted in situations where the builder did not provide an accessible pedestrian route between the covered units and public and common use areas on the site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by persons with other disabilities. Instead, the builder only provided for a vehicular route from the covered buildings to the public and common use facilities, without regard to site conditions. Such an interpretation conflicts with the narrow exception at Section 1107.4, which states:

1107.4 Accessible route. At least one accessible route shall connect accessible building or facility entrances with the primary entrance of each Accessible unit, Type A unit and Type B unit within the building or facility and with those exterior and interior spaces and facilities that serve the units.

Exceptions:

1. If the slope of the finished ground level between accessible facilities and buildings exceeds one unit vertical in 12 units horizontal (1:12), or where physical barriers prevent the installation of an accessible route, a vehicular route with parking that complies with Section 110 at each public or common use facility or building is permitted in place of the accessible route.
2. Exterior decks, patios or balconies that are part of Type B units and have impervious surfaces, and that are not more than 4 inches (102 mm) below the finished floor level of the adjacent interior space of the unit.

Some users of the code are misinterpreting Exception 1 of Section 1107.4 so as to entitle them to an exemption from the obligation to build accessible pedestrian routes by merely planning for or constructing routes with running slopes in excess of 8.33%. This is an improper interpretation of the exception. HUD has made clear that an inaccessible pedestrian route may be constructed only if factors beyond the owner's control prevent an accessible pedestrian route. See 56 Fed. Reg. at 9485. As the burden of establishing entitlement to the exemption is with the designer or builder, 24 C.F.R. §100.205(a), that burden would be improperly shifted away from that entity upon a mere showing that the route was inaccessibly constructed.

The Department seeks comment on how to revise this provision to ensure consistency with HUD's Guidelines. Specifically, the Department seeks comment on how 2003 IBC Section 1104.2 may be revised to make clear that it does not apply to

covered residential buildings and how IBC Section 1107.4, Exception 1, as revised in the 2001 Supplement, may be further clarified so that those who use it understand that entitlement to the vehicular exception requires a showing that constructing an accessible route(s) is beyond the control of the designer, builder, or owner.

5. Section 1104.3, Connected spaces, and Section 1104.4, Multilevel buildings and facilities

Two new exceptions have been added to “Section 1104.3 Connected spaces.”

New Exception 2 states:

Exception 2: Accessible routes shall not be required to mezzanines provided that the building or facility has no more than one story, or where multiple stories are not connected by an accessible route as permitted by Section 1104.4.

The Department believes new Exception 2 under 1104.3 is problematic as follows: The first clause of this exception does not reference Section 1104.4, as does the second clause. Therefore, it appears that the first clause of this exception would allow a one-story clubhouse with a mezzanine to be built on a site with Type B dwelling units, in which a common use element, such as an exercise area, could be placed in the mezzanine, without there being a similar exercise area on the accessible level. This would conflict with the Fair Housing Act’s requirements for accessible and usable public and common use facilities, which would not permit the only exercise area available to residents to be placed in a mezzanine of a one-story clubhouse.

The second clause of Exception 2 to Section 1104.3 states, “Accessible routes shall not be required . . . where multiple stories are not connected by an accessible route as permitted by Section 1104.4.” Section 1104.4 Multilevel buildings and facilities, requires at least one accessible route to connect each accessible level in multilevel buildings and facilities, including mezzanines, but provides several exceptions.

Exception 1 under 1104.4 provides an exception for stories above or below the accessible level that have an aggregate area of not more than 3,000 square feet, and lists certain situations that do not qualify for the Exception, none of which refer to Group I and Group R dwelling units or sleeping units. Therefore, it would appear that Group I and Group R occupancies, including those required to provide Type B dwelling units, may be permitted to qualify for Exception 1. This could result in the design of a two-story clubhouse with no accessible route to the second story if the second story has an aggregate area of not more than 3,000 square feet where the inaccessible second story provides a common use element that is not also found on the accessible first story, e.g., provision of a laundry area, lounge, media room or exercise room on the second story without provision of at least one of the same type of common use area on the accessible first story.

Exception 2 under 1104.4 does refer to Group I and Group R occupancies, and exempts from the requirement for an accessible route levels that do not contain accessible elements or other spaces required by Sections 1107 or 1108 to be served by an accessible route from an accessible level. Section 1107.3, entitled “Accessible spaces,” states:

“Rooms and spaces available to the general public or available for use by residents and serving Accessible units, Type A units or Type B units shall be accessible. Accessible spaces shall include toilet and bathing rooms, kitchen, living and dining areas and any exterior spaces, including patios, terraces and balconies.” Thus, Section 1107.3 appears to address some of the kinds of public and common use spaces found on residential sites that would be required to provide Type B dwelling units, but does not refer to many of the more common types of public and common use elements and spaces such as mailboxes and common use laundry rooms. In addition, Section 1107.3 has an exception for recreational facilities, which refers to Section 1109.14. It appears the exception related to recreational facilities is included simply to ensure that users of the code follow Section 1109.14 rather than 1107.3 with respect to recreational facilities. However, the Department believes it may not be clear from the text of Section 1107.3 whether Section 1107.3 is intended to encompass the full range of public and common use facilities that may be provided on sites having Group I and Group R Type B dwelling units or sleeping units, resulting in confusion and inaccessibility of some common use elements that are required to be accessible under the Act and the Guidelines.

Finally, Exception 4 states, “Where a two-story building or facility has one story with an occupant load of five or fewer persons that does not contain public use space, that story shall not be required to be connected by an accessible route to the story above or below.” This exception refers to “public use space” but not “common use” space, which is space available for shared use by two or more people, including, for example, residents and their guests. Since the exception excludes public use space, but not common use

space, it appears this exception might permit one story of a 2-story building to include a common use element, e.g., a storage area, which is an element that is not for public use and is provided only for residents on a site with Type B dwelling units, on the inaccessible story. For example, if a storage area is provided on the inaccessible story and it is the only such storage area provided for the residents, the lack of an accessible storage area would violate the Fair Housing Act's requirements for accessible and usable public and common use spaces.

Based on the above analysis, the Department is concerned that it is not clear from these sections of the code to what extent common use facilities for residents on a site with Type B dwelling units may be located in a mezzanine or a story to which accessibility is not required, even though these exceptions may be appropriate and consistent with the effort to coordinate with ADAAG. In addition, the Department believes that Sections 1107 and 1108 may not capture the full range of common use areas and elements that may be found on a site required to provide Type B dwelling units, including, for example, mailboxes, exercise rooms, kitchenettes, lounges, corridors, media rooms, mini car washes designed for residential use, and the like. Further, because Section 1107.3 does not use the term "common use," which is defined at the beginning of Chapter 11, and only lists some examples of public or common use areas, but not others, it is not clear to what extent Section 1107.3 addresses all types of public and common use areas that would be covered by the Act and the Guidelines.

Conclusion

The Department concludes that 2003 IBC Sections 1104.3 and 1104.4 do not appear to meet the requirements of the Act and the Guidelines for accessible public and common use areas.

Recommendation

IBC Sections 1104.3 and 1104.4 should be clarified to ensure compliance with the design and construction requirements of the Act and the Guidelines. The first clause of Exception 2 under Section 1104.3 should be clarified to ensure that a one-story building on a residential site required to have Type B dwelling units does not provide a common use facility in a mezzanine that is not also provided on the accessible level. This may be achieved by inserting a clear reference to Section 1104.4 in this clause, provided that the concerns with Section 1104.4 are addressed. Exception 1 under Section 1104.4 should be clarified to make it clear that this exception does not apply to sites having Type B Dwelling Units. Since Exception 2 under Section 1104.4 refers to “Sections 1107 or 1108,” Section 1107.3 should be clarified to include a broader list of the kinds of common use spaces found on sites required to provide Type B Dwelling Units. Exception 4 under 1104.4 should be clarified by adding a reference to “common use” areas.

6. Section 1105 ACCESSIBLE ENTRANCES: Section 1105.1.3, Restricted entrances

The 2003 IBC Section 1105 has been revised in its entirety. 2003 IBC “Section 1105.1 Public entrances,” states: “In addition to accessible entrances required by Sections 1105.1 through 1105.1.6, at least 50 percent of all public entrances shall be accessible.” This is a change from the language of the 2001 IBC Supplement Section 1105.1. The 2003 IBC Section 1105 deletes “Section 1105.2 Multiple accessible entrances,” found in the 2000 IBC. The 2003 IBC Section 1105.1 adds six new subsections. It is the Department’s understanding that all of these changes were intended to attain consistency with the requirements of the new ADAAG.

New 2003 IBC Sections 1105.1.1 Parking garage entrances, 1105.1.4 Entrances for inmates or detainees, 1105.1.5 Service entrances, and 1105.1.6 Tenant spaces, dwelling units and sleeping units, do not appear to represent substantive changes to the 2000 IBC or 2001 IBC Supplement. The deletion of former 2000 IBC Section 1105.2 does not appear to decrease the accessibility requirements of the IBC, as our analysis indicated that all of the types of facilities and arrival points listed in the former section are covered in other sections of the 2003 IBC Chapter 11. However, Exception 1105.1.3 dealing with restricted entrances does not meet the design and construction requirements of the Act and the Guidelines with respect to common areas.

A “public entrance” is defined in 2003 IBC Section 1102.1 as “[A]n entrance that is not a service entrance or a restricted entrance.” This is a change from the 2000 IBC, which defined a “public entrance” as “An entrance that is not a service entrance.” The term “restricted entrance” is not contained in the 2000 International Building Code or the

2001 Supplement. “Restricted entrance” is defined in Section 1102.1 as: “An entrance that is made available for common use on a controlled basis but not public use, and that is not a service entrance.” The 2003 IBC contains a definition of “Common use” that is not included in either the 2000 IBC or the 2001 IBC Supplement. The new definition is: “Interior or exterior circulation paths, rooms, spaces or elements that are not for public use and are made available for the shared use of two or more people.” A “public use area” is defined in the 2003 IBC as “Interior or exterior rooms or spaces that are made available to the general public.” There is no change in this definition from the 2000 IBC or the 2001 IBC Supplement.

The 2003 IBC Commentary describes a restricted entrance that “has a controlled access or some type of limiting basis.” Examples are entrances for jurors at a courthouse, visitors at a jail, or employees at a factory. However, residential uses also have restricted entrances. Many apartment and condominium buildings, for example, can be entered only with the use of a key or security card. Other multifamily buildings may have one entrance that is open to the public, with varying degrees of security or screening at that entrance, and the remaining entrances are controlled only for access by or with the permission of the resident. The requirement in 2003 IBC 1105.1 that 50% of all public entrances be accessible therefore would not apply to these entrances.

The Department’s Regulations at 24 CFR Section 100.205(a) and Requirement 1 of the Guidelines state that covered multifamily dwellings shall be designed and constructed to have at least one building entrance on an accessible route, unless it is

impractical to do so because of terrain or unusual characteristics of the site. The Guidelines define an “entrance” as “any exterior access point to a building or portion of a building used by residents for the purpose of entering.”

2003 IBC Section 1105.1.3, Restricted entrances, states: “Where restricted entrances are provided to a building or facility, at least one restricted entrance to the building or facility shall be accessible.” With respect to entrances to covered dwelling units, this requirement for at least one accessible restricted entrance to a building does not appear to conflict with Requirement 1 of the Guidelines. The requirement for accessible entrances to Type B dwelling units also is captured in the new 2003 IBC Section 1105.1.6, which provides that at least one accessible entrance shall be provided to Type B units.

However, covered multifamily buildings and structures also frequently have common use areas to which there is controlled access. There may be controlled access to a weight room, a clubhouse, a laundry room, mailboxes and the like in one building. The controlled entrances to common use spaces may be internal to a building or external. For example, there may be a multipurpose common use building that serves Type B dwelling units, with no connectivity among the several types of common uses (e.g., a mail room, a laundry room, a recreational room, and a clubhouse) and the external entrance to each of these common use types is restricted. In another example, a building with Type B units may contain separate common use areas with restricted entrances (e.g., a pool, a laundry room, a storage room).

The Department's regulations at 24 CFR Section 100.205, and Requirement 2 of the Guidelines require that the public and common use areas that serve covered multifamily dwelling units must be readily accessible to and usable by persons with disabilities. The language of 2003 IBC Section 1105.1.3 can be interpreted to require that only one of the common use areas with controlled access in a building with Type B dwelling units must be accessible. On the other hand, 2003 IBC Section 1107.3 requires that rooms and spaces available to the general public or available for use by residents and serving Type B units shall be accessible. 2003 IBC Section 1107.4 provides that at least one accessible route must connect the primary entrance of the Type B units within a building or facility "and with those exterior and interior spaces and facilities that serve the units."

Conclusion

The Department believes 2003 IBC Section 1105.1.3 does not meet the design and construction requirements of the Act and the Guidelines with respect to common use areas serving Type B dwelling units.

Recommendation

The Department recommends that IBC Section 1105.1.3 be amended to read: "Where restricted entrances are provided to a building or facility, at least one *of each type of restricted entrance* to the building shall be accessible." We believe that this recommendation is consistent with the intent of the Code. We note that the 2003 IBC

Commentary to this new section states: “Where access to a specific entrance is restricted, such as an employees-only entrance, then at least one of that type of entrance must be accessible.”

The Department invites comments on this suggested revision and suggestions on alternate language that will ensure consistency with the design and construction requirements of the Act and the Guidelines.

7. Section 1107.7.5, Design Flood Elevation

Requirement 1(2)(b) of the Guidelines states:

Site impracticality due to unusual characteristics. Unusual characteristics include sites located in a federally-designated floodplain or coastal high-hazard area and sites subject to other similar requirements of law or code that the lowest floor or the lowest structural member of the lowest floor must be raised to a specified level at or above the base flood elevation. An accessible route to a building entrance is impractical due to unusual characteristics of the site when:

- i. the unusual site characteristics result in a difference in finished grade elevation exceeding 30 inches and 10 percent measured between an entrance and all vehicular or pedestrian arrival points within 50 feet of the planned entrance; or
- ii. if there are no vehicular or pedestrian arrival points within 50 feet of the planned entrance, the unusual characteristics result in a difference in finished grade elevation exceeding 30 inches

and 10 percent measured between an entrance and the closest vehicular or pedestrian arrival point.

The 2003 IBC includes a change to the IBC 2001 Supplement 1107.7.5 (CRHA 406.7.5).

That change is as follows (changes underlined):

Design flood elevation. The required number of Type A and Type B units shall not apply to a site where the lowest floor or the lowest structural building members of non-elevator buildings are required to be at or above the design flood elevation resulting in:

1. A difference in elevation between the minimum required floor elevation at the primary entrances and vehicular and pedestrian arrival points within 50 feet exceeding 30 inches, and
2. A slope exceeding 10 percent between the minimum required floor elevation at the primary entrances and vehicular and pedestrian arrival points within 50 feet.

Where no such arrival points are within 50 feet of the primary entrances, the closest arrival point shall be used.

The 2003 IBC Commentary does not address this change. The 2003 International Building Code Update Resource Handbook page 451 explains: “As defined and used in Section 1612 and other provisions related to flood resistance design and construction, the

IBC uses the term “design” flood elevation. This code change is editorial in nature and achieves consistency.”

According to the definitions in Section 1612, the “Design Flood” is the greater of two areas, the Base Flood or the flood area designated by a local authority having jurisdiction. The definition of Design Flood Elevation changed as follows:

“Design Flood Elevation. The elevation of the “design flood,” including wave height, relative to the datum specified on the community’s legally designated flood hazard map. In areas designated as Zone AO, the design flood elevation shall be the elevation of the highest existing grade of the building’s perimeter plus the depth number (in feet) specified on the flood hazard map. In areas designated as Zone AO where a depth number is not specified on the map, the depth number shall be taken as being equal to 2 feet.”

Zone AO on FEMA’s maps is the base flood elevation. With FEMA’s encouragement, communities require developers to build a minimum height above the base flood plain. This height is the Design Flood Elevation.

The Guidelines acknowledge this additional height: “Unusual characteristics include sites located in a federally-designated floodplain or coastal high-hazard area and sites subject to other similar requirements of law or code that the lowest floor . . . must be

raised to a specified level at or above the base flood elevation.” Requirement 1, Guideline 2(b). See 56 Fed. Reg. 9504, March 6, 1991.

Although the Guidelines do not use the term “design flood elevation”, they do determine site impracticality due to unusual characteristics using the design flood elevation concept. However, in almost all cases, the design flood elevation is higher than the base flood elevation. Therefore, it appears that the 2003 IBC permits more site impracticality due to unusual characteristics than the 2000 IBC because it uses the word “design” instead of “base”.

By using the term “design,” the 2003 IBC appears to suggest that the lowest structural member could be located higher than the design flood elevation, thus permitting the designer or builder to create “impracticality” where none would exist if the base elevation were employed.” States and localities may have additional requirements that would set the lowest structural member even higher than the design flood elevation. In such instances the 2003 IBC would permit more site impracticality than the Guidelines.

Conclusion

The Department believes the change from “base flood elevation” to “design flood elevation,” does not meet the requirements of the Act and the Guidelines.

Recommendation

The Department recommends that if the term “design flood elevation” is to be used, that the text of the first paragraph of Section 1107.7.5 be revised as follows:

“Design flood elevation. The required number of Type A and Type B units shall not apply to a site where the required design flood elevation results in:”

8. Section 1109.13 Controls, operating mechanisms and hardware: Exception 6

Section 1109.13 addresses the accessibility requirements for controls, operating mechanisms and hardware, added six new exceptions. This Section and exception #6 provide that:

Controls, operating mechanisms and hardware intended for operation by the occupant, including light switches that control lighting and ventilation and electrical convenience outlets, in accessible spaces along accessible routes or as part of accessible elements shall be accessible.

Exception: 6. Except for light switches, where redundant controls are provided for a single element, one control in each space shall not be required to be accessible.

The IBC Resource Handbook (Code Change E81-02, #11 page 442) states that the exceptions are similar to the exceptions already located in ICC A117.1 (1998), Chapter 10 “Dwelling Units,” Sections 1002.9 and 1003.9, and indicates, “since the same

problems exist for non-residential facilities, the exceptions are appropriate.” The Fair Housing Act references the ANSI A117.1 standard as an acceptable means for complying with the design and construction requirements of the Act. HUD’s regulations reference the 1986 edition of the ANSI A117.1 standard, however, the Department currently also recognizes the 1992 and 1998 editions of the standard. The 2003 IBC references the ICC/ANSI A117.1-1998 edition (referred to as ICC A117.1 in the 2003 IBC). The Exceptions to Section 1003.9 of ICC/ANSI A117.1-1998 were written to ensure consistency with the Act and HUD’s Guidelines. Both Sections 1002.9 and 1003.9 of the ICC/ANSI A117.1-1998 specifically exempt “ceiling fan mounted controls.” However, 2003 IBC Section 1109.13, Exception 6, contains broader language, i.e., “Except for light switches, where redundant controls are provided for a single element, one control in each space shall not be required to be accessible.” The IBC Commentary Vol. I (page 11-49) gives an example of how this exception would apply. The example cited is of a ceiling fan that could be operated by a wall switch and by the chain on the fan itself. Thus, the 2003 IBC language is broader than ICC/ANSI A117.1, which is limited to redundant controls on ceiling fans. The Department is uncertain as to the ramifications of this broader language.

Conclusion

The Department concludes that Section 1009.13, Exception 6 does not appear to meet the requirements of the Act.

Recommendation

The Department seeks comment on whether the broader text of new Exception 6 for redundant controls should be revised to be more restrictive to ensure consistency with the design and construction requirements of the Act, the Guidelines and Section 1009.9 of the ICC/ANSI A117.1-1998.

9. 2004 IBC Supplement

It has come to the Department's attention that a proposed change to the 2003 IBC, Change E120-03/04, has apparently been approved and will appear in the 2004 Supplement to the IBC. The Department believes this change creates a potential conflict with respect to the design and construction requirements of the Fair Housing Act, HUD's regulations, and the Fair Housing Accessibility Guidelines. Further, because of the reasons given for the change, HUD is concerned that users of the code may be interpreting Section 1107 of the 2000 IBC, as amended by the 2001 Supplement, in a manner that is contrary to the Department's interpretation of the code. Specifically, a question has been raised whether, in light of E120-03/04's proposed changes to the General Exceptions for purposes of determining the required number of Type B dwelling units, the IBC Section 1107's scoping requirements treat structures made up of buildings separated by firewalls as a single structure or as separate buildings. Moreover, the Department believes its concerns could impact whether the Department will recognize the 2003 IBC, as well as the 2004 Supplement once it is published, as a safe harbor for compliance with the Fair Housing Act's design and construction requirements.

Change E120-03/04, which the Department understands has been approved, deals with Section 1107.7, entitled “General Exceptions,” and proposes adding two new sections to Section 1107.7.1, “Buildings without elevator service.” The first of these two new sections, which would follow Section 1107.7.1.2, reads as follows:

Section 1107.7.1.3 Additional Stories with entrances through fire walls.

Where an entrance is provided to a story of a building from an accessible story of an adjacent building by an opening in a fire wall, all dwelling units and sleeping units intended to be occupied as a residence on that story shall be Type B units, provided that the planned finish floor elevation within 5 feet of each side of the door does not include a change in level in excess of 12 inches.

In HUD’s Final Report of HUD Review of Model Building Codes, the Department discusses the recommendation it made in its draft report, Draft Recommendation Number 5. The Department explains that its Draft Recommendation Number 5, dealing with areas of inconsistency between the 2000 IBC and the Fair Housing Act design and construction requirements, recommended that the 2000 IBC Exceptions in Section 1107.5.4 be modified by eliminating any reference to the term “building” and replacing it with the term “structure” to ensure that firewall criteria are eliminated for the purpose of scoping the accessibility requirements for Type B dwelling units. HUD considered public comments it received on this draft recommendation and also held discussions with members of the model code organizations who had been

identified to us as experts for their respective codes. In discussions with code experts, we were advised that the IBC definition of building is “that which is built or constructed,” and means any structure used or intended for supporting or sheltering any use or occupancy. HUD was further advised that a structure may be made of any number of buildings or other parts, but it is still a structure regardless of the components making up the structure. HUD was advised that Chapter 11’s scoping language at 1107.5.4 applies the requirements to Group R occupancies where there are four or more units in a single structure; therefore, regardless of whether or not the structure is made up of more than one building, it is still a structure of four or more dwelling units, and the accessibility requirements apply. The Department was also advised that the interpretation turns on the intent of the code and that the intent is clearly expressed in the Chapter 11 accessibility scoping provision, i.e., that accessibility applies to the structure, regardless of whether or not the structure is made up of separate buildings by virtue of firewalls. Based on this advice from the model code experts and the public comments, HUD withdrew its Draft Recommendation #5, indicating that upon re-examination, the Department believed that IBC Chapter 11 is clear with respect to its scoping requirements for Type B dwelling units because the charging paragraph of 2000 IBC Section 1107.5.4 scopes the required number of Type B dwelling units based on the total number of units in the “structure.”

The text of Proposal E120-03/04 deals with the same scoping language and Exceptions discussed above with respect to 2000 IBC (which has since been renumbered due to other changes to the code). The reasons offered to support Proposal E120-03/04

state that there is a “loophole” in the current IBC which allows designs that would violate the Fair Housing Act because, for example, a large residential building with an elevator could be divided by a fire wall, exempting the units on the non-elevator side of the fire wall from Fair Housing/Type B requirements. If the code is, in fact, being interpreted as creating this result, then HUD believes the IBC is being interpreted contrary to its intent.

In addition, the Department believes the text in E120-03/04 that is intended to address the perceived “loophole” is problematic and may negatively impact accessibility as required by the Act. The text of E120-03/04 Section 1107.7.1.3 states: “When an entrance is provided to a story of a building from an accessible story of an adjacent building by an opening in a fire wall, all dwelling units and sleeping units intended to be occupied as a residence on that story shall be Type B units, provided that the planned finish floor elevation within 5 feet of each side of the door does not include a change in level in excess of 12 inches.”

HUD’s regulations implementing the Act define a building as “a structure, facility or portion thereof that contains or serves one or more dwelling units.” 24 CFR 100.201. The Department, therefore, does not interpret “structures” that include firewall separations as creating separate buildings. The Department’s Guidelines reinforced this interpretation by amplifying the definition of covered multifamily dwellings to specify that “Dwelling units within a single structure separated by firewalls do not constitute separate buildings.” 56 FR 9500 (March 6, 1991). Therefore, the Department’s regulations and the Guidelines would not treat a structure that has firewall separations as

constituting separate buildings. A structure with one or more elevators would be covered in its entirety, and all dwelling units in the building would be required to comply with the Fair Housing Act's design and construction requirements irrespective of changes in level on either side of a door that happens to be "an opening in a firewall." In other words, since all units in the structure are covered and must be accessible, any changes in level would need to be ramped or provided with an accessible route by some other means.

The text of Change E120-03/04 Section 1107.7.1.3, therefore, provides a site impracticality test that would not be allowed under the Department's regulations and the Guidelines. Moreover, the criteria of this new site impracticality "test" is too easily met, since it utilizes only a short distance of 5 feet on either side of the door in the firewall, whereas the individual building test in HUD's Guidelines utilizes a distance of 50 feet from the entrance to all arrival points that are within that range, and if none, to the closest arrival point that is beyond 50 feet from the entrance. The criterion of 5 feet on either side of the firewall "door" is much less stringent and likely to result in fewer dwelling units being required to be accessible in contravention to the Act, HUD's regulations and the Guidelines.

For example, a structure with several stories has two wings, and an elevator is designed with firewalls separating the elevators from the two wings. There is a common interior corridor that runs the length of each wing with dwelling units located on each side. The designer could raise one wing 12 inches higher so that the change in level of the planned finished floor on either side of the firewall is 12 inches. In doing so, the

designer could avoid compliance with respect to all of the units located in that wing on every floor of the building. Under the Department's regulations and the Guidelines, however, all dwelling units in the entire structure are covered, irrespective of the firewall, or a change in level of 12 inches from one wing to the other. In addition, since HUD's Guidelines do not provide any site impracticality exception for a structure that has one or more elevators, all of the units would be covered and would be required to be accessible irrespective of site impracticality considerations.

The second new exception added under 2003 IBC Section 1107.7, entitled "General Exceptions," which was included in Change E120-03/04, which we understand has been approved, reads as follows:

Section 1107.7.1.4 Additional Stories with entrances from bridges or elevated walkways. Where an entrance is provided to a story of a building from an accessible story of an adjacent building by a bridge or elevated walkway, all dwelling units and sleeping units intended to be occupied as a residence on that story shall be Type B units, provided the slope between the planned finish floor elevation at the building entrance and the planned finish floor elevation at the bridge or elevated walkway connection to the adjacent building is 10 percent or less.

This revised section differs from the requirement in HUD’s Guidelines. The Guidelines’ Requirement 1, paragraph (3) (b) provides that site impracticality will not be permitted in situations where:

“An elevated walkway is planned between a building entrance and a vehicular or pedestrian arrival point and the planned walkway has a slope no greater than 10 percent.” 56 FR 9504 (March 6, 1991). Emphasis added.

This provision in the Guidelines indicates that the slope will be measured between the building entrance and the adjacent vehicular or pedestrian arrival points, and not between “the planned finish floor elevation at the building entrance and the planned finish floor elevation at the bridge or elevated walkway connection to the adjacent building.” In addition, although the Guidelines’ provision at Requirement 1, Paragraph (3)(b) does not specifically state a maximum distance for the purpose of taking this measurement, the Department believes the distance of 50 feet provided for under Requirement 1, Paragraph (2) (a) is also applicable and reasonable. Bridges and elevated walkways typically appear in two types of site configurations—where there is a significant change in level or dip between a parking lot and the residential buildings it serves, and where a walkway connects a parking garage with a residential building. Because the proposed change uses the building entrance at one point, and the entry point of the walkway where it connects to an adjacent building, this provision may change the method by which the slope of a bridge or elevated walkway is calculated. Consequently,

this provision would decrease the scoping for Type B dwelling units in a manner that is inconsistent with the Fair Housing Act and the Guidelines.

This new exception, Section 1107.7.1.4, also has an impact on 2003 IBC Section 1105.1.2, Entrances from tunnels or elevated walkways. That section states: “Where direct access is provided for pedestrians from a pedestrian tunnel or elevated walkway to a building or facility, at least one entrance to the building or facility from each tunnel or walkway shall be accessible.” The 2000 IBC Section 1105.2, which has been deleted from the 2003 IBC as a result of the approval of Proposed Change E120-03/04, provided that: “Where a building or facility has entrances that normally serve accessible ... tunnels or elevated walkways... then at least one of the entrances serving each such function shall comply with the accessible route provisions of this chapter.” The new 2003 IBC Section appears to clarify that where there are multiple tunnels or elevated walkways, there must be at least one accessible building entrance to each tunnel or elevated walkway.

The new 2003 IBC Section 1105.1.2 does not appear to substantively change the accessibility requirements reflected in the Guidelines or in the 2000 IBC. However, the 2004 IBC Supplement adds an exception to 1105.1.2, which reads:

Exception: Where the entrance serves stories containing only dwelling units and sleeping units intended to be occupied as a residence, the entrance is required to be accessible only if the story contains required Accessible units, required Type A

units, or required by Section 1107.7.1.4 to contain Type B units. Emphasis added.

Since the new Exception 1107.7.1.4 may decrease the required number of Type B dwelling units, or even result in no Type B dwelling units being required (because the slope is calculated in a less stringent manner), the related provision at 1105.1.2 will result in no accessible entrance to that story of the building.

Based on the above analysis, and prior to the Department making its decision on whether the 2003 IBC will be recognized as a safe harbor for meeting the Act's design and construction requirements, the Department seeks comment on the concerns outlined above and the extent to which 2003 IBC Section 1107.7 General Exceptions should be clarified to ensure consistency with the design and construction requirements of the Act and HUD's Guidelines.