DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4943–N–02]

Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The purpose of this notice is to present a final report of the Department of Housing and Urban Development's review of certain accessibility provisions of the International Building Code, 2003 edition (2003 IBC), published by the International Code Council (ICC).[1] 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 Act), the regulations implementing the 1988 Amendments to the Act, and the Fair Housing Accessibility Guidelines (the Guidelines) and, therefore, that the 2003 IBC could be recognized by the Department as a safe harbor for compliance with the law.

The Department published a draft report on its review of the accessibility provisions of the 2003 IBC on August 6, 2004, soliciting comments on preliminary findings made by a Departmental Task Force that identified eight issues in which it appeared that the 2003 IBC was not consistent with the Act or the Guidelines, and an additional issue (Issue 9) which related to changes made to the 2003 IBC in the 2004 Supplement.

The Task Force reviewed and analyzed the comments responding to the draft report. Based on this analysis, of the eight issues that apply to the 2003 IBC, the Department has concluded that it can withdraw seven of its areas of concern, leaving one major issue that is clearly inconsistent with the Act and the Guidelines.

The Department is aware of the benefits of having a more recent edition of the IBC recognized by the Department as a safe harbor for compliance with the Act. Then buildings will be built with the accessible features required by the Act. Rather than declining to grant safe harbor status to the 2003 IBC in total, the Department has decided to grant safe harbor status conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating that:

ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7.

The Department expects that ICC will publish and disseminate this statement in the following ways:

1. Placement on its Web site, especially on pages where technical aspects of 2003 IBC are described;

2. Including the statement with all versions of 2003 IBC that are distributed 30 days after publication of HUD's final report;

3. Within 45 days of the publication of HUD's final report, sending the statement by U.S. Mail or e-mail to jurisdictions and individuals on ICC's marketing lists for code materials, and

4. Providing the statement orally or in writing whenever technical assistance is provided concerning the 2003 IBC requirements for accessible routes between site arrival points and accessible building entrances.

During the next code change cycle, if ICC seeks to have the 2006 edition of the IBC declared a safe harbor, ICC must modify the IBC to clearly state, in a manner acceptable to the Department, that an accessible pedestrian route must be provided from site arrival points to accessible building entrances of buildings required to provide Type B dwelling units, unless site impracticality applies.

The Department's final report is intended to provide technical assistance to ICC and other interested parties. The Department is not promulgating any new technical requirements or standards by way of this final report, nor is this final report an endorsement of a model building code. The Department recognizes however, that one important way to increase compliance with the design and construction requirements of the Act is to incorporate those requirements into state and local building codes.

FOR FURTHER INFORMATION CONTACT: Cheryl Kent, Special Advisor for Disability Policy, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5240, Washington, DC 20410–0500; telephone (202) 708–2333, extension 7058 (voice). (This is not a toll free number.) Hearing- or speech-impaired individuals may access this number TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339 (TTY).

Location of Documents: This final report is located at *http://www.hud.gov/offices/fheo/disabilities/modelcodes/.* The Fair Housing Act, the Fair Housing Act regulations, and the Fair Housing Accessibility Guidelines can also be obtained through links provided at this Web site.

SUPPLEMENTARY INFORMATION:

I. Background

A. 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, familial status, and disability.[2] In its 1988 Amendments to the Act, 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 Act's design and construction requirements.

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 Standard for buildings and facilities providing

[1] The 2003 International Building Code (8©) is a copyrighted work owned by the International Code Council, Inc. Quotations are included in this notice by permission of the Council.

[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.''

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).

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'' (56 FR 9472–9515), which 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'' (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 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. 3604(f)(5)(C)). However, Congress authorized the Department to encourage the inclusion of these requirements into their state and local procedures. *Id.*

The Department's review of model codes falls within its mandate to provide technical assistance to state and local governments to incorporate the design and construction requirements of the Act into their laws and procedures for review and approval of newly constructed multifamily dwellings.[3] In the course of its review of model codes over the past several years, the Department has made every effort to ensure that any code or version of a code it deems a safe harbor provides at least the same level of accessibility that is required under the Act.

B. The 2000 International Building Code, 2001 Supplement to the International Codes and the Code Requirements for Housing Accessibility

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 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.

With respect to housing, the IBC contains requirements for three different types of accessible dwelling units, which include sleeping units when such units are used as a residence. The most accessible of these three types is an ''Accessible Unit,'' which is wheelchair accessible and meets the requirements of those chapters of the ICC/ANSI A117.1–1998 standard that apply to numerous types of buildings, and not just dwelling units. A second level of accessibility is set forth in the requirements for ''Type A'' dwelling units. Under the IBC, a percentage of units must provide for a high level of accessibility, especially in kitchens and bathrooms, but will also have some features of adaptability. The third level of accessibility is a ''Type B'' dwelling unit, which is a unit that is intended to comply with those features of accessible and adaptable design required under the Fair Housing Act. The requirements set forth for Type B dwelling units apply to a greater number of dwelling units in a building but do not require as great a level of accessibility as Type A dwelling units, and instead provide a basic degree of accessibility as well as some features of adaptable design, particularly in kitchens and bathrooms.

In 1999, at the request of the model code organizations, the Department reviewed 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. 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). 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 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

[3] 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.

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 which also includes related commentary entitled, ''Code Requirements for Housing Accessibility'' (CRHA), published by ICC in October 2000. The ICC subsequently issued an errata sheet to the CRHA. This errata sheet includes corrections that are reflected in the 2001 Supplement to the IBC.

Based upon HUD's review, the 2000 IBC, as amended by the 2001 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.

II. HUD-Recognized Safe Harbors for Compliance With the Fair Housing Act Design and Construction Requirements

As a result of the review and subsequent actions outlined above, the Department has recognized 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.

If a state or locality has adopted one of the above documents, covered residential buildings that are built to those specifications will be designed and constructed in accordance with the Act as long as 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).

III. The 2003 International Building Code Review and Comment Process

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 Act's 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) Civil Rights Division, Housing and Civil Enforcement Section, 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 Act.

The Task Force was provided with a matrix and a briefing by ICC representatives concerning the changes to the accessibility provisions reflected in the 2003 IBC. The Task Force did not review any other sections of the 2003 IBC except as necessary to analyze the changed provisions identified by the ICC. The Task Force consulted only with the ICC during its preliminary review, because that organization is the official interpreter of the code. However, in order to ensure the possibility of receiving input from the broadest range of interested individuals and groups, the Department published a draft report in the **Federal Register** on August 6, 2004 (69 FR 47947) with a request for comments on the recommendations as well as on any other sections of the 2003 IBC that may be of concern to members of the public.

HUD received comments from forty-six individuals and organizations. Those comments are discussed in the section-by-section analysis of this Final Report. The ICC, the National Association of Homebuilders (NAHB), and the United Spinal Association commented on all of the issues that the Department had identified as problematic in granting safe harbor status to the 2003 IBC. Other organizations, including Paralyzed Veterans of America and R. C. Quinn Consulting, Inc., commented on some of the provisions.

In addition, HUD received a number of comments that did not specifically relate to the recommendations in the Draft Report, but which related to the enforcement of the Act and the Guidelines in general. Since the Task Force's charge was only to address whether the 2003 IBC could qualify as a safe harbor, a response to those comments is beyond the scope of this Final Report.

IV. Overview of Comments, Final Analysis, and Conclusions

HUD's draft report identified eight sections of the 2003 IBC that the Department's Task Force determined may not be consistent with the requirements of the Act and the Guidelines. In addition, the draft report identified certain issues of concern to the Task Force that did not directly affect safe harbor status of the 2003 IBC. All of these issues are individually discussed in the section-by-section analysis under Part V, below.

Several organizations, including the ICC, submitted comments referring the Department to Section 102.1 of the 2003 IBC. That provision reads:

> *102.1 General.* Where, in any specific case, different sections of this code specify different materials, methods of construction or other requirements, the most restrictive shall govern. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable.

As the section-by-section analysis that follows demonstrates, the Department understands that Section 102.1 of the 2003 IBC requires code officials to interpret the accessibility sections in Chapters 10 and 11 of the 2003 IBC in a manner that ensures that the code section with the highest level of accessibility applies in any given circumstance. With that understanding,

the Department has withdrawn many of the concerns contained in the draft report.

In addition, many of the comments the Department received pointed out that the code changes to the 2003 IBC were the result of the ICC's efforts to incorporate the accessibility requirements of the Americans with Disabilities Act of 1990 and the ADA Accessibility Guidelines. The Department understands the importance of taking steps to harmonize the federal government's requirements for facilities that are subject to the ADA with accessibility requirements used by the private sector and supports the ICC's efforts in that regard. In those instances where such efforts had the unintended consequence of apparently conflicting with the accessible design and construction requirements of the Act, the Department's comments focused on clarifications that would achieve consistency with Act's design and construction requirements without undermining the provisions in the code addressing ADA requirements. The Department has concluded that, with one exception, any perceived conflicts between 2003 IBC language intended to incorporate ADA standards and the Act's requirements are resolved by the application of Section 102.1 of the 2003 IBC.

V. Analysis

A. General—Use of the Term ICC/ICC/ANSI A117.1–1998

In the draft report, HUD had noted that the 2003 IBC does not use the full acronym ICC/ANSI A117.1–1998 throughout the code, and instead uses ''ICC A117.1.'' Because the Act and the Guidelines reference the ''ANSI'' standard, the Department had recommended 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, as has been done in previous versions.

The Department received two comments in response to this recommendation, both opposing the recommended change and explaining that the American National Standards Institute (ANSI) no longer promulgates standards as it did when the Act and the Guidelines were drafted. Currently the promulgator of the A117.1 standard is the ICC, and ANSI is only the accrediting group for the standard. The commenters explained that the current convention in all ICC codes is to reference the promulgator (development secretary and publisher) of the standards, and not the process or accrediting group.

Based on the comments received and the fact that the 2003 IBC does reference ICC/ANSI A117.1–1998 in Chapter 3, Referenced Standards, page 591, the Department withdraws this recommendation.

B. 2003 IBC Provisions Identified in Draft Report That Were of Concern to the Department as Not Meeting Accessibility Requirements

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

The draft report concluded that Exception 3 to Section 1008.1.4 of the 2003 IBC did not meet the accessibility requirements of the Act and the Guidelines and recommended that it be revised to add clarifying language such as that in the 2003 IBC Commentary (Commentary). Based upon the Task Force analysis of the comments received about this issue, the Department has concluded that this section of the 2003 IBC does not preclude recognition of the Code as a safe harbor.

Section 1008.1.4, entitled ''Floor elevation,'' specifies the general requirement that there be a level landing on each side of a door. Exception 3 exempts Group R–3 occupancies from this requirement, permitting a landing at an exterior door of up to 7¾ inches. Since Group R–3 occupancies include multilevel townhouses with interior elevators and group homes that do not operate as a single-family residence, the Department concluded that Exception 3 permits these structures to have a step of up to 7¾ inches at their exterior doors, thus leading to less accessibility than is required by the Act and the Guidelines. Although the Commentary for Exception 3 explains that the exception does not apply to the primary entrance door or to exterior doors that open to decks, patios or balconies in Type B dwelling or sleeping units. *See* Commentary, p. 10–39. Exception 3 itself does not contain similar limiting language.

The commenters, including the ICC, generally did not agree with the draft report's conclusion that Exception 3 to Section 1008.1.4 is inconsistent with the Act and HUD's Guidelines. They stated that Exception 3 is not applicable to covered multifamily dwellings under the Act. To support this conclusion, they first noted that Section 102.1 of the IBC provides that if different sections of the IBC specify different requirements, ''the most restrictive shall govern.'' They note further that because other provisions in the IBC require accessible entrances and accessible routes to Type B units, and thus are more restrictive than Section 1008.1.4 Exception 3, the more restrictive provisions apply and nullify Exception 3. As one example, the commenters, including the ICC, pointed to Section 1107.4, which by virtue of Section 102.1, mandates an accessible route at the primary entrance of all Type B units. Thus, Group R–3 occupancies that are required to be designed and constructed as Type B accessible dwellings, including a multilevel townhouse with an interior elevator and a group home that does not operate as a single-family residence, must have primary entrances on an accessible route. In other words, these dwellings are not permitted to have a landing of up to 7¾ inches at their exterior doors.

The commenters provided the following additional examples of other provisions that supersede Exception 3: (1) Section 1107.2, because it mandates that Type B units comply with the applicable portions of ICC A117.1, Chapter 10, which requires, *inter alia*, an accessible primary entrance on an accessible route from public and common areas (*see* ICC A117.1 Section 1003.2, 1998 Edition); (2) Section 1104.3, which mandates when a building or portion thereof is required to be accessible, an accessible route must be provided to each portion of the building, to accessible building entrances connecting accessible pedestrian walkways, and to the public way; (3) Section 1107.3, because it specifies that rooms and spaces available for use by residents, including ''any exterior spaces, including patios, terraces and balconies'' must be accessible; and (4) Section 1008.1.4 Exception 5, which permits a 4-inch, not a 7¾-inch, landing at exterior decks, patios or balconies made of impervious surfaces.

The Department has carefully considered the above comments and determined that it agrees that the provisions discussed above sufficiently supersede Exception 3 of Section 1008.1.4 with respect to Type B dwelling units in buildings subject to the Act. Therefore, the Department withdraws its earlier finding that the Exception may be problematic.

Some of the commenters stated that they believed that the Act's design and construction requirements do not apply to townhouses with interior elevators in multifamily buildings of four or more dwellings or group homes with four or more units. This is incorrect. It has been the Department's longstanding position that the Act's design and construction requirements include townhouses with interior elevators if those townhouses are part of multifamily buildings of four or more units. HUD's position on this

has been stated in numerous public documents. (*See, e.g.*, 54 FR 3244, 3251 (January 23, 1989) preamble to the Department's regulations implementing the Act; 55 FR 24377 (June 15, 1990) preamble to proposed Guidelines; 56 FR 9481 preamble to Guidelines; 59 FR 33362–68 (June 28, 1994) Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, Question 13.) In addition, this view is acknowledged in ICC's ''Code Requirements for Housing Accessibility,'' Commentary to Section 406.7.2 (IBC 1107.7.2).

In addition, the Act's design and construction requirements apply to group homes that do not operate as single-family residences. This was discussed in detail in the policy statement in the Department's Final Report on IBC 2000. (*See* 65 FR 15745, 15759 (March 23, 2000). The Department also notes that the 2003 IBC is consistent with this approach. Group homes with four or more sleeping units and five or fewer residents are characterized as Group R–3 and are required to meet the Act's design and construction requirements. Such group homes are not, as two commenters asserted, Group R–4 occupancies, *i.e.*, residential care/assisted living facilities with six to sixteen occupants.

2. Section 1008.1.6, Thresholds: Exception

The Department's draft report stated that as drafted, the new Exception to Section 1008.1.6 could be confusing. Section 1008.1.6 sets forth the general requirement that a doorway threshold cannot exceed ¾ inch for a sliding glass door and ½ inch for other doors. The new exception allows for a threshold of 7¾ inches 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. HUD noted that while the ''means of egress'' and ''accessible route'' limitations would appear to ensure that the 7¾ inch threshold is not permitted in Group R–2 and Group R–3 housing that is subject to the Act, there might be confusion regarding patio doors and other exterior doors that are not a means of egress.

Two commenters, including the ICC, wrote that they did not believe the new Exception could lead to confusion. They stated that the Exception's language is clear that it does not apply to doors that are part of the route required to be accessible, including patio doors and any other exterior doors that are part of the accessible route.

After carefully considering these comments and reviewing the plain language of the code, the Department has now concluded that the language of the Exception is sufficiently clear and does not require revision.

3. Chapter 11: Accessibility: Section 1104.1, Site Arrival Points: Exception

The Department's draft report concluded that the new exception to Section 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 (hereinafter identified as vehicular or pedestrian arrival points). As the Department's draft report indicated, the 2003 IBC adds a new exception to Section 1104.1, Site Arrival points. The 2003 IBC text states:

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 view that the language of this section allows the builder much greater latitude to decide whether to provide a pedestrian route than the Guidelines and other current HUD recognized safe harbors allow.

The Department's draft report explained that the Guidelines' Requirements 1 and 2 require an accessible pedestrian route, within the boundary of the site, from vehicular and pedestrian arrival points to the entrances of covered buildings and dwelling units, except in very limited circumstances where a site is impractical due to steep terrain or unusual characteristics. However, the new Exception at Section 1104.1 apparently could allow a developer to provide only a vehicular route from a public street or sidewalk at the entry point of the site to the covered dwellings, regardless of the conditions of the site. Application of this Exception could lead to development of housing which would have had an accessible pedestrian route from site arrival points if any of the current HUD recognized safe harbors were followed, but would not have an accessible pedestrian route from site arrival points if the 2003 IBC Exception to Section 1104.1 were followed.

The Department's draft report recommended that the 2003 IBC be amended to include a new provision under Section 1107 to address site arrival points and that this new provision be worded in a manner that is similar to Section 1104.1, but without the Exception. The Department has carefully reviewed the comments received on this issue.

After considering the comments, the Department now believes that Sections 1104.1 and 1107.4, properly interpreted, require an accessible pedestrian route to the same extent as other HUD recognized safe harbors. As explained in the discussion below, however, the Department continues to believe that the language of the Exception to Section 1104.1 could lead to less accessibility than that required by the Act and the Guidelines unless ICC informs jurisdictions and past and future purchasers of the 2003 IBC that such an interpretation is inconsistent with the intent of the 2003 IBC. Therefore, in order to have safe harbor status for this Section, ICC must publish and distribute a statement to jurisdictions and past and future purchasers of the 2003 IBC stating that: ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7.

The Department expects that ICC will publish and disseminate this statement in the following ways:

1. Placement on its Web site, especially on pages where technical aspects of 2003 IBC are described;

2. Including the statement with all versions of 2003 IBC that are distributed 30 days after publication of HUD's final report;

3. Within 45 days of the publication of HUD's final report, sending the statement by U.S. Mail and/or e-mail to jurisdictions and individuals on ICC's marketing lists for code materials, and

4. Providing the statement orally or in writing whenever technical assistance is provided concerning the 2003 IBC requirements for accessible routes between site arrival points and accessible building entrances.

This statement of intent is consistent with the interpretation that ICC and NAHB proffered in their comments on the draft report as discussed below.

During the next code change cycle, if ICC seeks to have the 2006 edition of the IBC declared a safe harbor, ICC must modify the IBC to clearly state, in a

manner acceptable to the Department, that an accessible pedestrian route must be provided from site arrival points to accessible building entrances of buildings required to provide Type B dwelling units, unless site impracticality applies.

The Department's regulations implementing the Act require that dwellings subject to the Act's design and construction requirements be designed and constructed to provide an accessible entrance on an accessible route to covered buildings and dwelling units, unless it is impractical due to terrain or unusual site characteristics. The Guidelines describe the conditions that must be met for establishing this site impracticality. *See* 56 FR 9504–9504 (March 6, 1991). The regulations and the Guidelines also require accessible and usable public and common use areas, which includes accessible routes. Specifically, Requirement 2 of the Guidelines requires an accessible route, within the boundary of the site, from public transportation stops, accessible parking spaces, accessible passenger loading zones, and public streets and sidewalks to accessible building entrances, unless site impracticality applies.

Section 2 of the Guidelines defines an ''accessible route'' as 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. The definition further states that under the circumstances described in Section 5, Requirements 1 and 2, an accessible route may include a vehicular route. Once again, however, the circumstances that allow a vehicular route are very limited. See discussion under Issue 4.

The Department received a number of comments on this issue. Two of the commenters, ICC and NAHB, acknowledged a potential conflict. However, these commenters were of the opinion that the 2003 IBC provision at Section 1107.4 controls. As support, they cite Section 102.1, which states that where different sections of the code specify different requirements, the most restrictive shall govern; and where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable. These commenters proffered that Section 1107.4 contains more restrictive criteria. Section 1107.4 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.[4]

Based on the statement in the above text that an accessible route must connect building or facility entrances with the primary entrance of each * * * Type B unit and with exterior and interior spaces and facilities that serve the units, ICC took the position that site arrival points ''do serve units on the site.''

Another commenter expressed a belief that Section 1107.2, which requires compliance with ICC/ANSI A117.1–1998, addresses the Department's concern.

The Department has given careful consideration to these comments. However, the Department does not believe the commenters' interpretation is supported by a plain reading of the code. First, the Department does not agree that the text of Section 1107.4, on its face, effectively cancels out the Exception at Section 1104.1. The text of Section 1107.4 does not address site arrival points; therefore, the text of Exception 1 to Section 1107.4 cannot, on plain reading, be construed to apply to site arrival points. In addition, Exception 1 to Section 1107.4 does not apply to site arrival points because that exception is addressing the narrow circumstances when a vehicular route is allowed between building entrances and public and common use facilities elsewhere on the site. Instead, Section 1107.7 of the 2003 IBC addresses site impracticality.

Moreover, the Department does not believe that the term ''facility'' would be readily construed to include the edge of the public right-of-way where a site arrival point may be located. Further, as Section 1104.1 is entitled ''Site arrival points,'' we do not believe that a local jurisdiction would readily interpret Section 1107.4 as being applicable to site arrival points.

The Department also disagrees with the comment that Section 1107.2 addresses the Department's concern because Section 1107.2 requires Type B dwelling units to comply with Chapter 10 of ICC/ANSI A117.1–1998. The only provision in Chapter 10 that deals with areas exterior to the dwelling unit is Section 1003.2, which simply states that the accessible primary entrance shall be on an accessible route from public and common areas. This text does not specifically refer to site arrival points and the 2003 IBC definitions for the terms ''common use'' and ''public use areas'' do not include all site arrival points. Further, as scoping requirements are contained in the building code itself, it does not appear that a provision in the ICC/ANSI A117.1–1998 would nullify the exception at Section 1104.1 of the 2003 IBC.

None of the commenters addressed the Department's primary concern, which is that the new exception in Section 1104.1 would allow builders to choose to design and construct sites that do not have an accessible pedestrian route and only a road or driveway from site arrival points to accessible dwelling unit entrances, regardless of whether the site meets the criteria for site impracticality established in the Guidelines.

Without ICC's public dissemination of a statement to jurisdictions and past and future purchasers of the 2003 IBC of its interpretation that sites required to provide Type B dwelling units are required to provide an accessible route connecting site arrival points and accessible building entrances (unless site impracticality applies), the Department believes that the new exception at Section 1104.1, in the absence of a specific provision under Section 1107 addressing site arrival points, would be interpreted as creating a conflict with the requirements in the Act and the Guidelines. That conflict is not resolved by the provisions of Section 1107.4. The Department believes that its objection could be resolved, however, and safe harbor status could apply, if ICC publishes and distributes a statement to jurisdictions and past and future purchasers of the 2003 IBC stating that:

> ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7.

The Department expects that ICC will publish and disseminate this statement in the following ways:

1. Placement on its Web site, especially on pages where technical aspects of 2003 IBC are described;

2. Including the statement with all versions of 2003 IBC that are distributed 30 days after publication of HUD's final report;

3. Within 45 days of the publication of HUD's final report, sending the statement by U. S. Mail and/or e-mail to

[4] Section 1107.4 includes exceptions, one of which deals with situations when a vehicular route will be allowed between entrances of covered buildings and dwelling units and public and common use facilities elsewhere on the site. This exception is discussed under Issue #4.

jurisdictions and individuals on ICC's marketing lists for code materials, and

4. Providing the statement orally or in writing whenever technical assistance is provided concerning the 2003 IBC requirements for accessible routes between site arrival points and accessible building entrances.

During the next code change cycle, if ICC seeks to have the 2006 edition of the IBC declared a safe harbor, ICC must modify the IBC to clearly state, in a manner acceptable to the Department, that an accessible pedestrian route must be provided from site arrival points to accessible building entrances of buildings required to provide Type B dwelling units, unless site impracticality applies.

The Department offers the following as one possible method to provide the requisite clarity during the next code change cycle: addition of a provision to Section 1107 to address site arrival points, as set forth in 1107.X below. Text in brackets is optional, but included below for consistency with other provisions in 2003 IBC Section 1107.

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 building entrance(s) for each building containing [Accessible units, Type A units, and] Type B dwelling units.

The Department does not believe the above provision will require more than is required by the Act or the Guidelines since the 2003 IBC addresses site impracticality, consistent with the Guidelines, under 2003 IBC Section 1107.7.

4. Section 1104.2 Within a Site

The Department's draft report raised two concerns about the language of the treatment of accessible routes within a site in the 2003 IBC. First, the Department raised the concern that it has had a number of reports that some users of the code had been applying Section 1104.2 to sites having dwelling units that are subject to the Act's requirements, rather than Section 1107.4 which contains more specific accessibility requirements. The report sought comments on how to revise Section 1104.2 to make its applicability clearer. Second, although Section 1107.4 in the 2003 IBC, which describes an accessible route, had not changed from the 2000 IBC as amended by the 2001 Supplement, the Department has had a number of reports that some users of the code are misinterpreting Exception 1 to that section 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 percent. Such an interpretation would produce a result that is inconsistent with the requirements of the Act and Guidelines. In this respect, the Department sought comments on how to clarify that Section 1107.4, Exception 1, applies *only* to situations where the finished grade of the site exceeds 8.33 percent *due to factors beyond the control of the designer, builder or owner.*

The Act, the Department's regulations implementing the Act, and the Guidelines require that dwellings subject to the Act's design and construction requirements be designed and constructed to provide an accessible entrance on an accessible route and accessible and usable public and common use areas. The requirements for accessible routes are covered under both Requirements 1 and 2 of the Guidelines. The Guidelines allow only a narrow exception. Specifically, paragraph (5) of Requirement 1 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 percent, 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. Emphasis added.

Similarly, under Requirement 2 of the Guidelines, item 1(d) in the chart addressing requirements for accessible public and common use areas, states:

1(d) Where site or legal constraints prevent a route accessible to wheelchair users between covered multifamily dwellings and public or common use facilities elsewhere on the site, an acceptable alternative is the provision of access via a vehicular route so long as there is accessible parking on an accessible route to at least two percent of covered dwelling units, and necessary site provisions such as parking and curb cuts are available at the public or common use facility.

The 2003 IBC includes provisions intended to address accessible routes within a site. Specifically, Section 1104.2 of the 2003 IBC reads as follows:

1104.2 Within a site. At least one accessible route shall connect accessible buildings, accessible facilities, accessible elements, and accessible spaces that are on the same site.

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.

However, Section 2003 IBC Section 1107.4 contains language similar to the Guidelines, Requirement 1, Paragraph (5), and Requirement 2, Chart Item 1(d). This language 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. * * *

The Department's interpretation of the code is that it is 2003 IBC Section 1107.4—and not Section 1104.2—which applies to sites that are subject to the Act. However, as noted above, some users of the code have misinterpreted the code and applied Section 1104.2 to sites that are subject to the Act. In addition, some users are misinterpreting or misapplying 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 slopes in excess of 8.33 percent. This is an incorrect interpretation of the code.

The Department received several comments on HUD Issue #4. These commenters disagreed with the Departments concerns regarding misinterpretations of these two sections of the 2003 IBC. These commenters, including the ICC, again pointed to Section 102.1 of the IBC, which provides that if different sections of the IBC specify different requirements, ''the most restrictive shall govern.'' The commenters stated that Section 1107.4, Exception 1 has more restrictive criteria for an accessible route between all Accessible, Type A and Type B units and exterior and interior spaces and facilities that serve that unit, and that this provision, therefore, would control.

The Department has carefully considered the above comments. In light of these comments, in particular, ICC's assertion that the more restrictive Section 1107.4 applies to sites having dwelling units subject to the Act, and not Section 1104.2, the Department is

withdrawing its concerns regarding Section 1104.2.

The Department also received a number of comments on its concern that Exception 1 to Section 1107.4 was being misinterpreted. The ICC has characterized the Department's concern as with the manipulation of the site to achieve a slope greater 8.33 percent in order to avoid the accessible route requirements. The ICC stated in its comments that the intent of the code was *not* to exempt such situations from the accessible route requirement. While the Department agrees with the ICC that deliberate conduct to avoid the requirements of law does not qualify for an exception, the Department's concern with the misinterpretation of Exception 1 to Section 1107.4 is greater.

Paragraph (5) of Requirement 1 of FHAG does not permit builders and designers to circumvent the requirement of providing an accessible route from accessible building entrances to public and common use facilities by simply planning or building finished grades with slopes in excess of 8.33 percent. It is expected that accessible routes to public and common use facilities will be provided. To receive an exemption from this requirement, builders, designers, and owners must show that factors beyond their control prevent them from providing such routes with finished grades of 8.33 percent or less. Thus, the Guidelines allow use of vehicles only upon a showing that accessible routes cannot be provided, and vehicles or accessible routes are not simply treated as alternatives to builders and designers of covered units. *See also* Requirement 2 of the Guidelines, item 1(d) of the chart.

The Department recognizes that the text, ''all of which are outside the control of the owner,'' which is in the Guidelines, Requirement 1, paragraph (5), does not appear in Exception 1 to Section 1107.4. However, the Department reads Section 1107 as the overarching requirement to provide accessible routes, including to public or common use facilities. Simply electing to design or build slopes in excess of 8.33 percent would make the accessible routes optional, and would not be consistent with the limited circumstances under which the Guidelines would permit vehicles to be used in lieu of accessible routes. Designers and builders who choose not to provide accessible routes based on an interpretation of this provision that differs from the Department's interpretation may not avail themselves of this safe harbor and may, accordingly, be subject to an enforcement action to make those routes accessible after they are built.

Commenters have pointed out that the requirements from any standard or code may be subject to misinterpretation, but believe the best way to address these issues is through additional information provided through commentaries or other educational means. The Department is in agreement with this. Further clarifying commentary by the ICC is recommended to reinforce that Exception 1 to Section 1107.4 is to be interpreted and applied to Type B units consistent with paragraph (5) of Requirement 1. Thus, the Department recommends ICC take steps to modify the commentary to Section 1107.4 consistent with the above discussion, in the next code change cycle.

5. Section 1104.3, Connected Spaces, and Section 1104.4, Multilevel Buildings and Facilities

The Department's draft report concluded that two new Exceptions added to the 2003 IBC, specifically, Exception 2 under Section 1104.3, and Exception 4 under Section 1104.4, did not appear to meet the requirements of the Act and the Guidelines for accessible and usable public and common use areas. The report raised a similar concern regarding Exception 1 of Section 1104.4, even though this Exception was in the 2001 Supplement previously considered by the Department. The draft report recommended that these sections be clarified to ensure compliance with the design and construction requirements of the Act and the Guidelines.

The Act, HUD's regulations implementing the Act, and the Guidelines require that covered multifamily dwellings be designed and constructed in such a manner that the public and common use areas are readily accessible to and usable by persons with disabilities. Requirement 2 of the Guidelines specifically addresses public and common use areas.

Sections 1104.3 and 1104.4 of the 2003 IBC read as follows, with the text of concern emphasized:

1104.3 *Connected spaces.* When a building, or portion of a building, is required to be accessible, an accessible route shall be provided to each portion of the building, to accessible building entrances connecting accessible pedestrian walkways and the public way. Where only one accessible route is provided, the accessible route shall not pass through kitchens, storage rooms, restrooms, closets, or similar spaces.

Exceptions: 1. In assembly areas with fixed seating required to be accessible, an accessible route shall not be required to serve fixed seating where wheelchair spaces or designated aisle seats required to be on an accessible route are not provided.

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.*

3. A single accessible route is permitted to pass through a kitchen or storage room in an accessible dwelling unit.

1104.4 Multilevel buildings and facilities. At least one accessible route shall connect each accessible level, including mezzanines, in multilevel buildings and facilities.

Exceptions: 1. An accessible route is not required to stories and mezzanines above and below accessible levels that have an aggregate area of not more than 3,000 square feet (278.7 m^2). This exception shall not apply to:

1.1. Multiple tenant facilities of Group M occupancies containing five or more tenant spaces;

1.2. Levels containing offices of health care providers (Group B or I); or

1.3. Passenger transportation facilities and airports (Group A–3 or B).

2. In Group A, I, R and S occupancies, levels that do not contain accessible elements or other spaces required by Section 1107 or 1108 are not required to be served by an accessible route from an accessible level.

3. In air traffic control towers, an accessible route is not required to serve the cab and the floor immediately below the cab.

4. 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.

In the draft report, the Department expressed concern that while the second clause of Exception 2 of Section 1104.3 references the accessibility requirements for mezzanines contained in Section 1104.4, the first clause does not. Therefore, it appeared that the first clause of this exception would allow a development subject to the design and construction requirements to construct a one-story clubhouse with a mezzanine that contained a common element, such as an exercise room, that was not also available on an accessible route. This would conflict with the 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.

In its report, the Department acknowledged that Exception 2 of Section 1104.4 exempts from the requirement for an accessible route only those levels of Group I and Group R occupancies that do not contain accessible elements or other spaces that Sections 1107 or 1108 require to be served by an accessible route. However, the Department raised a concern as to

whether Sections 1107 and 1108 clearly reached all of the types of public and common use areas that typically serve residential sites subject to the Act. The examples given in Section 1107.3 focus on toilet and bathing rooms, kitchen, living and dining areas, patios and terraces, all of which could be spaces interior to a dwelling unit. This raises the concern that spaces exterior to the unit are excluded from Section 1107.3.

The comments the Department received on this issue, including those comments from ICC, reiterated that when applying the code, specific requirements override general requirements (Section 102.1). ICC pointed out that Section 1107.3 of the code is more specific than Sections 1104.3 [5] and 1104.4 In response to the Department's concern that Section 1107.3 did not appear to reach all of the types of public and common use facilities that typically serve residential units that are subject to the Act's accessibility requirements, the ICC expressed the view that no list may reasonably include all possible types of such facilities and that the focus must be placed on the first sentence in this code section, which states, ''Rooms and spaces available to the general public or available for use by residents and serve Accessible Units, Type A units and Type B units shall be accessible.'' This sentence would not limit coverage to interior spaces of dwelling units.

The Department's concern about Exception 4 of Section 1104.4 was that it could be read to allow construction 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. One commenter stated that Exception 4 to Section 1104.4 was added in the effort to coordinate with requirements under the ADA, and there should not be a higher level of access under the Act than that specified for other types of facilities. According to the Commentary, Exception 4 permits small nonpublic second floors to be inaccessible, such as the second floor in a doctor's office that is used only for storage. Commenters also pointed out that the specific requirements of Section 1107.3 would prevent Section 1104.4 Exception 4 from being used to permit the creation of inaccessible common use spaces where they would otherwise be required by the Act.

The Department has carefully considered these public comments and the Sections of the code in question. In light of the public comments, in particular ICC's assertion that Section 1107.3 is more specific and overrides Sections 1104.3 and 1104.4, the Department is withdrawing its concerns.

The Department is also withdrawing its concern about Exception 1 to Section 1104.4 because it was already reviewed and accepted as part of the safe harbor given to the IBC 2000 as amended by the 2001 Supplement. Notwithstanding, some commenters misinterpreted the Department's recommendations in its draft report to mean that all public and common use spaces on all floors, including upper floors of a non-elevator building, must be accessible. The Department wishes to clarify that the Act and the Guidelines' requirement for accessible and usable public and common use spaces does not require such spaces that serve dwelling units on inaccessible stories of a non-elevator building to be accessible as long as comparable public and common use facilities are made available on an accessible route to covered dwelling units in the building.

6. Section 1105 Accessible Entrances: Section 1105.1.3, Restricted Entrances

The draft report concluded that 2003 IBC Section 1105.1.3 did not meet the accessibility requirements of the Act and the Guidelines. The draft report recommended adding clarifying language to that section to ensure that at least one restricted entrance to each common use area serving a covered building be accessible. Based on the Department's review of the public comments, the Department has concluded that this provision is not an obstacle to safe harbor status for the 2003 IBC.

As the draft report noted, 2003 IBC Section 1105 has been revised in its entirety. It is the Department's understanding that the revisions were intended to incorporate and be consistent with the new ADAAG. The revised section requires that in addition to accessible entrances required by six subsections, at least 50 percent of all public entrances must be accessible. Section 1105.1.3 reads as follows:

1105.1.3 Restricted entrances. Where restricted entrances are provided to a building or facility, at least one restricted entrance to the building or facility shall be accessible.

The code definition of ''public entrance'' is an entrance that is not a service entrance or a restricted entrance. The definition of a ''restricted entrance'' is an entrance that is made available for common use on a controlled basis, but not public use, and that is not a service entrance. There is a new code definition of ''common use area,'' which states: ''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 as ''Interior or exterior rooms or spaces that are made available to the general public.''

The draft report's conclusion was based on the interpretation of Section 1105.1.3 that only one of the common use areas must be accessible in a building which is subject to the Act and has multiple separate common use areas, each having a restricted entrance. The Act, the Department's regulations implementing the Act, 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.

Three organizations commented on and disagreed with the conclusion in the draft report. They all believed that Section 1105.1.3 complies with the requirements of the Act. However, each commenter had a different rationale. The ICC stated that the correct interpretation of Section 1105.1.3 is that ''if all entrances to a common use space are restricted entrances, then at a minimum, one accessible entrance is required to each common use space serving Accessible, Type A or Type B units.'' The ICC also referenced Section 1107.3 and Section 1107.4 of the 2003 IBC, which require an accessible route from the units to this accessible entrance. A second commenter believed that the examples of common use areas with restricted entrances in a covered building were ''so remote they do not merit consideration.'' Without elaboration, this commenter stated that Section 1105.1.3 does meet the requirements of the Act for entrances even if Sections 1107.3 and 1107.4 were ignored.

The third commenter on this issue acknowledged that the Code provision could be misinterpreted. However, this commenter pointed out that the code definition of ''facility'' is ''All *or any portion* of buildings, structures, site improvements, element and pedestrian or vehicular routes located on a site.'' (Emphasis added by the commenter.) The commenter concluded that based on this definition, particularly the words, ''or any portion of,'' and using the example in the draft report, if there

[5] ICC pointed out in its comments, as a related note, that Exception 2 to Section 1104.3 has since been deleted under changes to the 2003 IBC that appear in the 2004 Supplement, based on the view that Exception 2 was redundant with issues addressed under Section 1104.4.

is controlled access to a building's weight room, laundry room, recreation room, and clubhouse, Section 1105.1.3 would require at least four accessible restricted entrances, that is, at least one for each facility.

The draft report noted that 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. Additionally 2003 IBC Section 1107.4 provides that at least one accessible route must connect the primary entrance of Type B dwelling units within a building or facility ''and with those exterior and interior spaces and facilities that serve the units.''

It is clear from the ICC's unambiguous interpretation of Section 1105.1.3, in response to the draft report, that this section was not intended to pre-empt the requirements of Sections 1107.3 and 1107.4. Additionally, the Department agrees that the inclusion of the term ''facility'' in Section 1105.1.3 may obviate an incorrect interpretation of this code revision. Therefore, the Department withdraws its objections to Section 1105.1.3. However, the Department recommends that ICC modify the language of Section 1105.1.3 in a subsequent code change cycle to add the following clarifying language in response to this concern: ''Section 1105.1.3 Restricted entrances. 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.''

7. Section 1107.7.5 Design Flood Elevation

The Department's draft report concluded that the change in terminology used in Section 1107.7.5 from ''base flood elevation'' to ''design flood elevation'' did not meet the requirements of the Act and the Guidelines. The Department recommended that if the new terminology is retained, that there also be a change in the text of Section 1107.7.5. As discussed below, based on the comments received, and the Department's review of the legislative history of the Act with respect to site impracticality and flooding issues, the Department believes the intent of this section of the 2003 IBC is consistent with the intent of the Act, the Department's regulations and the Guidelines, and therefore, it is withdrawing this issue as an obstacle to safe harbor status for the 2003 IBC.

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.* (Emphasis added.) 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 phrase in the Guidelines ''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'' is the same thing as the ''design flood elevation.'' Therefore, the Guidelines allow using the design flood elevation.

The 2003 IBC changes the term ''base flood elevation'' to ''design flood elevation.'' The 2003 IBC text reads as follows:

1107.7.5 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 nonelevator 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 (15 240 mm) exceeding 30 inches (762 mm), 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 (15 240 mm).

According to ICC documents, the change from the term ''base flood elevation'' to ''design flood elevation,'' was done to harmonize terminology with the Federal Emergency Management Agency (FEMA).

FEMA encourages local authorities to establish design flood elevations above the base flood plain. However, the Department's concern was that a local zoning or regulatory authority may impose an additional minimum height above the design flood elevation established by an authority having jurisdiction over the design flood elevation. Therefore, replacing the word ''Base'' with ''Design'' without deleting the words ''or above'' that permit additional height requirements above the design flood elevation established by the governing jurisdiction appeared to permit more site impracticality.

The Department concluded in the draft report that this change does not meet the requirements of the Act and the Guidelines, and recommended that 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: * * *

Several commenters, including ICC, reminded the Department that the phrase in the Guidelines which states, ''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'' is the same as ''design flood elevation.'' One commenter said that only 5 percent of the communities that participate in the National Flood Insurance Program have established design flood elevations that are above the base flood elevation. Another commenter said that only 3 percent of the incorporated jurisdictions in the U.S. have a design flood elevation above the base flood elevation.

While the Department has given consideration to comments it received on this issue, none of the commenters addressed our concern that a local zoning rule may require an additional height above the design flood elevation established by the governing authority. However, the Department is also cognizant of the fact that both the Department's regulations implementing the Act and the Guidelines recognize the need to adopt site impracticality criteria for sites with unusual characteristics such as floodplains or coastal high hazard areas which require the lowest floor to be raised a certain level at or above the base flood elevation. While the Act itself did not specify an impracticality standard for such situations, the legislative history indicated that Congress was sensitive to the possibility that certain natural terrain may pose unique building problems, and that in some locales, it is common to construct housing on stilts because of flooding problems. The Department believes the intent of this section of the 2003 IBC is consistent with the intent of the Act, HUD's regulations and the Guidelines; therefore, withdrawing the objection. However, ICC may wish to consider, in the future, revising the first sentence of Section 1107.7.5 as follows:

1107.7.5 Design flood elevation. The required number of Type A and Type B units shall not apply to nonelevator buildings on a site where the required design flood elevation results 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 (15 240 mm) exceeding 30 inches (762 mm), 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 (15 240 mm).

8. Section 1109.13 Controls, Operating Mechanisms and Hardware: Exception 6

The Department's draft report concluded that Exception 6 to Section 1109.13, ''Controls, operating mechanisms and hardware,'' did not appear to meet the accessibility requirements of the Act since the text of Exception 6 is worded more broadly than the example included in the Commentary, which cited a ceiling fan with both a wall switch and a chain on the fan itself. The Department sought comments on whether the broader text of new Exception 6 for redundant controls should be revised to be more restrictive. Based on the Department's consideration of the comments it received on this issue, the Department is withdrawing this issue and does not consider it an obstacle to safe harbor status for the 2003 IBC.

The 2003 IBC text reads as follows:

1109.13 Controls, operating mechanisms and hardware. Controls, operating mechanisms and hardware intended for operation by the occupant, including switches that control lighting and ventilation, and electrical convenience outlets, in accessible spaces, along accessible routes or as parts of accessible elements shall be accessible.

Exceptions:

* * * * *

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 draft report noted that IBC Resource Handbook (Code Change E81–02, #11 page 442) states that the exceptions to Section 1109.13 are similar to the exceptions already located in ICC/ANSI A117.1 (1998). The Department currently recognizes ICC/ANSI A117.1–1998 as an acceptable means of complying with the Act's technical requirements. Further, the Department is a member of the ANSI A117 Committee and worked with the Committee to draft the text of Section 1003.9 of Chapter 10 of ICC/ANSI. Section 1003.9 of the ICC/ANSI A117.1–1998 specifically exempts ''ceiling fan mounted controls.'' However, 2003 IBC Section 1109.13, Exception 6, contains broader language. In addition, the IBC Commentary Vol. I (page 11–49) gave only one example of how Exception 6 would apply, citing a ceiling fan that could be operated by a wall switch and by the chain on the fan itself.

The Department received three comments on this issue. Two commenters disagreed with the Department's conclusion that the language in Exception 6 is too broad. The ICC specifically said that other than ceiling fans (for which redundant controls are acceptable by the Guidelines), the most common example is range hood controls (which are not required by the Guidelines to be accessible). Another commenter, a proponent of the code text in Exception 6, pointed out that the text of ICC/ANSI A117.1, Section 1003.9, is not related to redundant controls, but rather, to controls mounted on the appliance itself. The commenter added that ceiling fans have a direction switch on ceiling fan housings which change the rotation from clockwise to counterclockwise, and it is impossible to provide an accessible control for this function short of disassembling the unit housing and voiding any warranty. This commenter pointed out that without the text of Exception 6, the concern is that some code officials could demand that inaccessible controls be removed even where redundant accessible controls are provided. Prohibiting any inaccessible controls could lead to requiring removal of fan and light switches on range hoods, which would also void the equipment's warranties.

In light of the public comments, the Department believes its concerns have been sufficiently addressed and is, therefore, withdrawing its earlier finding. Based on the comments received, the Department concludes that Exception 6 is only likely to impact controls on fixtures and appliances which are not required by the Guidelines, *i.e.*, ceiling fan and range hood controls.

9. 2004 IBC Supplement

In its draft report, under HUD Issue 9, the Department outlined two areas of concern with a change to the 2003 IBC, Change E120–03/04, which was approved for the 2004 Supplement to the IBC. These two areas of concern are: (1) A change to Section 1107.7, General Exceptions, that impacts scoping for Type B dwelling units, and whether IBC Section 1107 treats structures made up of buildings separated by firewalls as a single structure (as provided for in the Guidelines), or as separate buildings; and (2) a change to the text affecting the provision of accessibility in situations where there is an elevated walkway between a building entrance and opposing vehicular or pedestrian arrival points: specifically, whether the test for determining practicality will apply to the slope between the building entrance and vehicular or pedestrian arrival points (as provided for in the Guidelines), or between the building entrance and the opposing entrance to the walkway.

The public comments received on Issue 9 have satisfied the Department that it can withdraw its first concern to the extent that concern related to the 2003 IBC. Therefore, the Department is withdrawing these concerns with respect to the 2003 IBC as they have no impact on safe harbor status for the 2003 IBC. However, the Department continues to maintain that the two areas of concern outlined under Issue 9 of the Department's August 6, 2004 draft report, would negatively impact safe harbor status for the 2004 Supplement and any future edition of the code, such as the 2006 IBC, that incorporates those changes.

In the course of their comments on issue nine, the ICC and other organizations suggested that the Department should become more involved in the ICC model code change development process as it occurs, so that potential inconsistencies between future IBC code publications and HUD's interpretation of the accessibility requirements of the Act and the Guidelines can be avoided. The Department agrees that its participation would be beneficial, and if sufficient resources are available in the future, Department representatives will explore ways in which the Department can contribute to the ICC code change development process with respect to those code sections that relate to the accessibility requirements of the Act.

VII. Conclusion

After full consideration of the comments received, the Department has been able to resolve seven of the eight issues that it raised in the draft report which relate specifically to the 2003 IBC. The Department has determined that with respect to the remaining issues, it can grant safe harbor status to the 2003 IBC conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC, stating that:

ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site

impracticality is addressed under Section 1107.7.

The Department expects that ICC will publish and disseminate this statement in the following ways:

1. Placement on its Web site, especially on pages where technical aspects of 2003 IBC are described;

2. Including the statement with all versions of 2003 IBC that are distributed 30 days after publication of HUD's final report;

3. Within 45 days of the publication of HUD's final report, sending the statement by U.S. Mail and/or e-mail to jurisdictions and individuals on ICC's marketing lists for code materials, and

4. Providing the statement orally or in writing whenever technical assistance is provided concerning the 2003 IBC requirements for accessible routes between site arrival points and accessible building entrances.

During the next code change cycle, if ICC seeks to have the 2006 edition of the IBC declared a safe harbor, ICC must modify the IBC to clearly state, in a manner acceptable to the Department, that an accessible pedestrian route must be provided from site arrival points to accessible building entrances of buildings required to provide Type B dwelling units, unless site impracticality applies.

The Department has proffered one option of how ICC could modify the 2003 IBC in the next code change cycle to meet this condition. Furthermore, the Department will explore with ICC ways that the Department can contribute to the ICC code change development process with respect to those code sections that relate to the accessibility requirements of the Act. While its resources are limited, the Department recognizes the importance of the inclusion in building codes of accessibility requirements that are consistent with the Act, the Department's implementing regulations, and Guidelines.

Environmental Impact

This report is a policy document that sets out fair housing and nondiscrimination standards and provides for assistance in promoting fair housing and nondiscrimination. Accordingly, under 24 CFR 50.19(c)(3), this report is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321).

Dated: February 18, 2005.

Carolyn Peoples,

Assistant Secretary for Fair Housing and Equal Opportunity.

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