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BY ELECTRONIC AND REGULAR MAIL

Ms. Susan Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
725 17th Street, N.W.
Washington, DC 20503

Re: Upcoming Notice of Proposed Rulemaking

Dear Ms. Dudley:

On behalf of the American Hotel and Lodging Association (AH&LA), I would like to thank you for agreeing to meet with AH&LA's representatives to discuss AH&LA's concerns about the Department of Justice's (DOJ) upcoming Notice of Proposed Rulemaking (NPRM) implementing the provisions of Title III the Americans with Disabilities Act (ADA).

This is the first rulemaking under Title III of the ADA since the Act was first passed in 1990 and the initial regulations were issued. Over the last 16 years, the lodging industry has found that compliance with Title III's mandates has been very expensive and frustrating because of some unduly burdensome requirements and the lack of clear regulatory guidance on key subjects. This comprehensive revision of the current ADA Standards for Accessibility,¹ referred to as the ADA and ABA Accessibility Guidelines ("ADA/ABA-AG"), presents an opportunity for the Executive Branch to reexamine both existing requirements that are being readopted, and new requirements that are being proposed for the first time. AH&LA's members fully support and recognize the need for accessible lodging facilities in our country and have spent billions of dollars on making their facilities more accessible to people with disabilities. However, AH&LA believes that some requirements have no basis in fact, and others require a level of accessibility that imposes costs that are not justified. AH&LA has presented all of its arguments and data to DOJ. Having not seen the NPRM, AH&LA does not know whether DOJ has addressed any of its concerns. Accordingly, AH&LA would like to bring these concerns to OMB so that it is aware of them and can determine whether they have been addressed. To the

¹ The current ADA Standards are at 28 C.F.R. Part 36, App. A.

extent that those concerns have not been addressed and OMB believes that they merit attention, AH&LA requests that the NPRM be sent back to DOJ for further consideration.

I. DOJ IS REQUIRED TO EXERCISE ITS OWN JUDGMENT ABOUT WHETHER THE GUIDELINES ISSUED BY THE ACCESS BOARD SHOULD BECOME LEGALLY ENFORCEABLE BECAUSE THE ACCESS BOARD DOES NOT HAVE THE AUTHORITY TO DICTATE MINIMUM STANDARDS.

As OMB is aware, the ADA/ABA-AG was drafted and issued by the Access Board as guidelines, and it is up to DOJ to issue them as regulations. One of AH&LA's overarching concerns is that DOJ may have been unwilling to deviate from any of the requirements of the ADA/ABA-AG because of a mistaken belief that it has no discretion to adopt standards that are less stringent than the minimum guidelines set by the Access Board. In fact, DOJ, as the rulemaking entity, has full discretion to do so. Although the ADA states that DOJ must issue regulations that are "consistent with the minimum guidelines and requirements" issued by the Access Board, 42 U.S.C. § 12186(c), the majority of the Access Board members are not appointed in a manner that gives them any authority to dictate minimum standards. As explained below, allowing them to do so would violate the Appointments Clause of the Constitution.

In Buckley v. Valeo, 424 U.S. 1, 140-142 (1976), the Supreme Court held that the acts of "rulemaking" and rendering of "advisory opinions" are "functions [that] represent[] the performance of a significant governmental duty exercised pursuant to a public law These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'" Id. 692-93. The Court then held that the newly created Federal Election Commission could not engage in these administrative functions – authorized by Congress in the 1974 Amendments to the Federal Election Campaign Act – because the members of the Commission were not appointed in the manner required by the Constitution for "Officers of the United States." The Appointments Clause requires that Officers of the United States be appointed by Presidential nomination and "by and with the advice of the Senate." Constitution, Art. II, § 2, cl. 2.

The Access Board has twenty-five voting members, thirteen of whom are members of the public appointed by the President without the advice and consent of the Senate. See 29 U.S.C. § 792 (a). Thus, the Board is dominated by persons who are clearly not "Officers of the United States." As a result, the Board cannot set minimum standards that DOJ must follow, as that activity would constitute de facto rulemaking reserved only for "Officers of the United States."

Recognition of DOJ's legal authority to adopt less stringent alternatives to what the Access Board has proposed is critical because it means that DOJ cannot simply justify a requirement by claiming that it cannot change what the Access Board has done. DOJ must determine for itself whether each requirement is justified.

II. THERE MUST BE A SAFE HARBOR FOR ELEMENTS AND SPACES ALREADY COMPLIANT WITH CURRENT ADA STANDARDS.

AH&LA strongly supports a safe harbor for elements and spaces in existence at the time that the ADA/ABA-AG takes effect that already comply with the current ADA Standards. At a minimum, DOJ should specify in the new regulations that such elements and spaces do not have to be retrofitted to conform with the new ADA/ABA-AG in the absence of any future alterations.

Furthermore, under the current ADA Standards, when alterations are made to a primary function area, the restrooms, water fountains, telephones, and path of travel to the primary function area must be made to comply with current accessibility requirements at a cost of up to twenty percent of the budget for the primary function area. AH&LA urges DOJ to make clear that if these elements already comply with the existing rules and they are not being altered, they should not have to be modified to meet the new ADA/ABA-AG solely because the primary area that they serve is altered.

The safe harbor should also apply to elements and spaces complying with existing standards even if they are altered in the future. Most, if not all, of AH&LA's members have already modified their guest rooms to comply with current accessibility requirements at great expense. It is very likely, however, that these rooms will be renovated in the future after the new ADA/ABA-AG takes effect. Making those rooms comply with the new requirements at that time will be very expensive and difficult because of several key changes to bathroom and dispersion requirements discussed in Sections V-VII. For example, under current ADA Standards, a vanity can be placed within the clear floor space required around the toilet, and that is the approach that most lodging facilities have adopted in making their guest rooms accessible. The ADA/ABA-AG does not allow this. To compound the difficulty, the new ADA/ABA-AG requires that the vanity space in accessible rooms be comparable to that in non-accessible rooms, leaving lodging owners no flexibility in how to comply with the more stringent clear floor space requirement. As a result, already accessible bathrooms will have to be made larger in order to comply with these two new requirements.

Another example that illustrates the unreasonableness of requiring already compliant elements to comply with the new ADA/ABA-AG upon renovation is as follows: Standard light switches in a room are located at 54" AFF where there is a side approach. This location complies with current ADA Standards. In connection with a renovation that takes place after the new ADA/ABA-AG is issued by DOJ, the light switch fixtures are changed to switches that contain built-in night lights. The locations of the electrical boxes are not moved, nor is the wallcovering changed in the renovation. However, if compliance with the ADA/ABA-AG were required, all the switches would have to be moved from 54" AFF to 48" AFF in connection with the "alteration". This would result in a significant expense to move electrical boxes that would not otherwise be moved and to replace all the wallcovering since old wallcovering usually cannot be matched.

Lodging facilities that have already spent billions of dollars to make their accessible guest rooms comply with current standards should not have to make further changes to their accessible rooms in future alterations. See Discussion at pages 5-6. The assumption underlying the requirement that alterations be made to comply with new construction standards to the maximum extent feasible is that the incremental cost of making the element compliant at the time of the alteration will be small. While that assumption is correct in some situations, it generally does not apply in the hotel guest room situation, as shown above. Compliance with the new and even-more stringent clear floor space and comparable vanity requirements in the alterations context will invariably necessitate the relocation of bathroom walls or even guest room walls for rooms that are already accessible under current standards. It might even require the loss of a guest room to expand the bathroom in an accessible guest room. The expense of such compliance will be enormous.

As of 2004, there were 4.4 million hotel rooms in the United States. See U.S. Census Bureau, Statistical Abstract of the United States: 2007, Table 1264. Conservatively assuming that at least 4% of those rooms must be accessible (the actual range under the ADA Standards and the ADA/ABA-AG is 2.6-7.7%), 176,000 rooms must be mobility accessible. If there is no broad safe harbor which protects all currently mobility accessible hotel rooms and does not require them to comply with the expanded ADA/ABA-AG requirements in future alterations, every single accessible room that is renovated in the future will have to undergo changes to specifically comply with the ADA/ABA-AG requirements. Assuming very conservatively that it costs an additional \$10,000 to make these changes in each of the 176,000 accessible rooms, this cost would be approximately \$1.76 billion.²

III. ACCESSIBLE ROOM SCOPING UNDER THE ADA/ABA-AG IS EXCESSIVE AND NOT JUSTIFIED BY ANY EMPIRICAL DATA.

For new construction, the new ADA/ABA-AG retains the same requirements for the number of mobility accessible rooms in lodging facilities. However, these requirements are not supported by any objective data or studies, and are grossly in excess of what can be justified.

According to the most recent Census data available (2002), 1.22% of the population 15 years and older uses a wheelchair or scooter. AH&LA's economic consultants projected the percentage of the population that will be using a wheelchair or scooter up to 2021, and found that this percentage is only likely to increase to 1.36%. See Projected U.S. Mobility Aid use, 2007-2021, prepared by PriceWaterHouseCoopers National Economic Consulting for American Hotel & Lodging Association (July 19, 2007) (Attachment A).

Thus, even assuming that individuals with disabilities travel and stay in lodging facilities at the same rate as non-disabled persons, the current Census data would only support a

² Hilton Hotels provided DOJ with data from a recent renovation showing that the cost of retrofitting 9 rooms with roll-in showers in one hotel was \$419,000 (average cost of \$46,500 per room). Another hotel has reported to AH&LA that a retrofit for 10 rooms with roll-in showers averaged \$23,000 per room. These numbers did not include the cost associated with lost revenue resulting from the rooms being out of inventory for accessibility renovations.

requirement that a maximum of 1.4% of the rooms in a lodging facility be mobility accessible.³ The ADA/ABA-AG however, requires 2.6%-7.7% of rooms to be wheelchair accessible, 1.8 to 5.5 times the percentage that is justifiable under a theory of demographic parity. See ADA/ABA-AG Table 224.2 (Guest Rooms with Mobility Features).

In response to this point, one DOJ official noted that there are persons with mobility disabilities who use crutches, canes, or walkers who are not included in the cited Census numbers. While this is true, virtually all of the space requirements for accessible guest rooms (i.e. the requirements that cost the most) are only necessary for guests who use wheelchairs or scooters. Regular guest rooms are already required to have 32" wide doors which make the rooms accessible to persons using canes, walkers, and/or crutches.

At one of the meetings with DOJ, a suggestion was made that having rooms with different levels of mobility accessibility might be a solution. While AH&LA continues to believe that the current scoping of mobility accessibility rooms is excessive and should be reduced, it could support the retention of current scoping if a substantial number of the required accessible rooms only require accessibility features that are helpful to those who use canes, walkers, and crutches. AH&LA believes that the only permanent features that might fall into this category would be higher toilet seats and grab bars.

In a FOIA request to the Access Board and meetings with DOJ, AH&LA asked for the basis for the scoping for mobility accessible rooms. Neither agency was able to cite to a single study or any data to support the scoping. The only basis cited by DOJ officials was anecdotal evidence of a shortage of accessible rooms. Such anecdotal information about the need for accessible rooms (i.e. individual complaints about not being able to get an accessible room), without more, does not provide a justification for the excessive scoping because there are many reasons why a disabled individual, on any given night, might not be able to get an accessible room at a particular hotel. Those reasons could include: (1) the hotel's assignment of accessible rooms to non-disabled guests before the disabled guest arrives; (2) an inadequate reservation procedure that does not ensure that a request for an accessible room is filled; (3) the hotel is only subject to barrier removal obligations because it is an existing facility, and the required barrier removal does not result in fully accessible rooms; and (4) the hotel in question has not complied with its obligations to remove barriers or to provide the number of accessible rooms that is required to ensure equal access to people with disabilities.

Any one of these reasons could result in a guest with a disability not getting an accessible room. These problems would not necessarily be addressed by scoping that exceeds what is justified by the Census data.

³ AH&LA notes that because individuals with disabilities are actually less likely to travel than non-disabled persons, this analysis most likely overstates the percentage of rooms that should be mobility accessible.

Excessive mobility room scoping is a critical issue for AH&LA's members because they are expensive to create, especially in facilities built before 1993 when the accessible room requirements of the ADA became effective. To put matters into perspective, as of 2004, there were 4.4 million hotel rooms in the United States. See U.S. Census Bureau, Statistical Abstract of the United States: 2007, Table 1264. Conservatively assuming that at least 4% of those rooms must be accessible (the actual range under the ADA Standards and the ADA/ABA-AG is 2.6-7.7%), the total number of mobility accessible rooms required is 176,000. Assuming that it costs an average of \$20,000 to create an accessible room (either in new construction or alterations),⁴ the industry has spent more than \$3.5 billion to provide accessible rooms that will directly benefit only 1.22% of the U.S. population.

IV. THERE IS NO JUSTIFICATION FOR INCREASING THE NUMBER OF MOBILITY ACCESSIBLE GUEST ROOMS THAT MUST BE CREATED IN PRE-1993 FACILITIES THROUGH THE ALTERATIONS PROCESS.

Current ADA Standards section 9.1.5 (Alternations to Accessible Units, Sleeping Rooms, and Suites), states:

When sleeping rooms are being altered in an existing facility, or portion thereof, subject to the requirements of this section, at least one sleeping room or suite that complies with the requirements of 9.2 (Requirements for Accessible Units, Sleeping Rooms, and Suites) shall be provided for each 25 sleeping rooms, or fraction thereof, of rooms being altered until the number of such rooms provided equals the number required to be accessible with 9.1.2.

Thus, under current law, if a pre-1993 hotel renovates 100 rooms, 4 of those rooms (1 in 25) must be made both mobility and communications accessible under 9.1.2, and 4 additional rooms (1 in 25) must be made communications accessible under 9.3.

The ADA/ABA-AG eliminates the 1 in 25 rule completely, replacing it with the following language in Section 224.1.1 (Alterations):

Where guest rooms are altered or added, the requirements of 224 shall apply only to the guest rooms being altered or added until the number of guest rooms complies with the minimum number required for new construction.

Thus, under Section 224.1, when a hotel undertakes to renovate a certain number of rooms, the hotel must reference Tables 224.2 (Guest Rooms with Mobility Features) to determine how many accessible rooms must be provided as a result of the renovation. Assuming the number of

⁴ Hilton Hotels provided DOJ with data from a recent renovation showing that the cost of retrofitting 9 rooms with roll-in showers in one hotel was \$419,000 (average cost of \$46,500 per room). Another hotel has reported to AH&LA that a retrofit for 10 rooms with roll-in showers averaged \$23,000 per room. These numbers did not include the cost associated with lost revenue resulting from the rooms being out of inventory for accessibility renovations.

rooms is 100 (as in the prior example), Table 224.2 would require that five rooms be made mobility accessible, as compared to four under the current 1 in 25 rule of Section 9.1.5. The new ADA/ABA-AG also explicitly requires that one of the five new accessible rooms has a roll-in shower. See Section 224.1.1 (referencing Table 224.2 which requires one roll-in shower for facilities with 100 guest rooms). The current law on alterations (Section 9.1.5) does not explicitly require roll-in showers.

The chart below shows the difference between the current law on alterations and the new ADA/ABA-AG:

COMPARISON OF MOBILITY ACCESSIBLE ROOM REQUIREMENTS FOR ALTERATIONS UNDER CURRENT LAW VERSUS NEW ADA/ABA-AG		
Number of rooms renovated	Current ADA Standards for mobility accessible rooms in alterations (i.e. 1 in 25)	New ADA/ABA-AG requirement for mobility accessible rooms in alterations (based on Table 224.2)
75	3	4 (including 1 with roll-in shower)
100	4	5 (including 1 with roll in shower)
125	5	7 (including 2 with roll-in shower)
150	6	7 (including 2 with roll-in shower)
175	7	8 (including 2 with roll-in shower)

The table above makes clear that the new ADA/ABA-AG makes significant, substantive changes in the scoping requirements for hotel guest room alterations, with no discussion or justification.

V. THE ADA/ABA-AG IMPOSES NEW AND VERY COSTLY DISPERSION REQUIREMENTS FOR MOBILITY ACCESSIBLE ROOMS CREATED THROUGH ALTERATIONS IN PRE-1993 FACILITIES.

The current ADA Standards do not require the dispersion of mobility accessible rooms in pre-1993 facilities that are created through the alterations process. Section 9.1.5 of the current ADA Standards governing transient lodging room alterations only requires that accessible rooms created in connection with alterations comply with Section 9.2. Section 9.2 does not contain the dispersion requirement. Dispersion is discussed in Section 9.1.4. This understanding of the regulation is consistent with the DOJ's statement in the Technical Assistance Manual that "[t]here are special less stringent requirements for alterations in many other areas, including . . . hotels (Section 9.1.5)." See ADA Title III Technical Assistance Manual, Section III-7.7000(3) (emphasis added).

The ADA/ABA-AG appears to require dispersion of accessible rooms for pre-1993 facilities, and AH&LA strongly opposes this change. See ADA/ABA-AG § 224.5. Facilities

built prior to 1993 were designed before there were any federal accessibility requirements for public accommodations and the footprints for most guest rooms are in many instances not sufficiently large enough to meet accessibility requirements (e.g. accessible bathrooms and 36" path of travel on both sides of the bed). The only way for some pre-1993 facilities to provide an accessible room in some room types (doubles are a good example) would be to combine two existing rooms to create one. AH&LA does not believe that the ADA requires such a drastic and costly measure resulting in a significant loss of lodging space just to achieve dispersion in a pre-1993 facility. Owners of such facilities must be given flexibility to determine which rooms are best suited to be made accessible based on the conditions presented. Moreover, the existing defense of technical infeasibility that applies to alterations would not prevent a plaintiff from taking the highly unreasonable position that room footprints must be changed in order to provide accessible rooms in all different classes, since moving walls is not considered by DOJ to be technically infeasible unless the wall is load bearing.

The enormous cost associated with requiring dispersion of accessible rooms in pre-1993 facilities cannot be justified by the marginal benefit, and AH&LA urged DOJ to retain and abide by the current no-dispersion rule.

AH&LA also urged DOJ – if DOJ was unwilling to remove the dispersion requirement for pre-1993 facilities from the ADA/ABA-AG – to clarify the dispersion requirements as applied to such facilities as follows:

- (1) room (interior or exterior) footprints do not have to be changed in order to meet dispersion requirements;
- (2) dispersion should only be required among the types of rooms affected by an alteration. Thus, a facility may have eight types of rooms, but if the renovations only affect two types of rooms, the accessible rooms should only have to be dispersed over those two types of rooms; and
- (3) Subject to (1) and (2) above and technical infeasibility, a facility need only provide one room in each of the following types: single if provided, double if provided, and suites if provided.

VI. THE ADA/ABA-AG'S NEW DISPERSION REQUIREMENTS FOR NEW CONSTRUCTION ARE CONFUSING AND REQUIRE CLARIFICATION.

Section 224.5 of the ADA/ABA-AG states:

Guest rooms required to provide mobility features complying with 806.2 and guest rooms required to provide communications features complying with 806.3 shall be dispersed among the various classes of guest rooms, and shall provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. Where the minimum number of guest rooms required to comply with 806 is not

sufficient to allow for complete dispersion, guest rooms shall be dispersed in the following priority: guest room type, number of beds, and amenities.

Section 224.5 contains an advisory, as follows: "Factors to be considered in providing an equivalent range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and non-smoking, and the number of rooms provided."

This new language is very confusing because different terms are used to potentially refer to the same thing with no definitions. What is a "class" or "type" or "option" or "amenity"? AH&LA proposed that DOJ clarify the language in the ADA/ABA-AG by adopting the following principles in its forthcoming regulations:

A transient lodging facility constructed after the effective date of the ADA/ABA-AG has met its obligation to disperse guest rooms under Section 224.5 if it complies with the following requirements:

- Dispersion should first be based on two room classes: Standard and premium (i.e., upgraded amenities and/or limited access floor). Exception: If the facility has a premium room class which totals not more than 2% of the total room count, no accessible room in this class is required.
- Within each of the two room classes if the following types of rooms are provided, at least one accessible room of that type must be provided: single bed, multiple beds, and suites.
- If view is a major factor used by the facility in pricing and/or distinguishing rooms (e.g. in beachfront properties), then the facility shall provide at least one accessible room with a premium view⁵ in each class of rooms (standard and premium) where such a view is provided in non-accessible rooms of that class.
- If the facility provides smoking rooms, at least one smoking room will be provided in each class of rooms (standard and premium).

The dispersion principles outlined above go beyond the current ADA Standards which do not include view and smoking/non-smoking as factors.

AH&LA notes that although mandating dispersion in new construction after the ADA/ABA-AG takes effect is not as burdensome as it would be for altering pre-1993 facilities, there is still a very substantial cost that must be weighed by DOJ. Mobility accessible rooms must have larger footprints to accommodate larger bathrooms and accessible routes within the room. Because guest rooms of the same type are typically stacked in hotel construction, requiring many different types of mobility accessible guest room types will result in more stacks

⁵ A premium view is one that results in a higher room charge.

with larger footprints. The result is higher construction costs, fewer rooms and decreased revenues for the facility.

VII. THE NEW REQUIREMENT FOR ENLARGED CLEAR FLOOR SPACE AT TOILETS AND "COMPARABLE" VANITY SPACE CANNOT BE JUSTIFIED.

Under the current standards, there must be a large clear floor space around the toilet, but a vanity may be positioned in this floor space so long as its leading edge is at least 18" away from the toilet centerline. The new ADA/ABA-AG does not allow any elements, including the vanity, to be placed in the clear floor space. In addition, the new ADA/ABA-AG requires that vanities in accessible rooms be comparable to those in non-accessible rooms. The current rules have no such requirement, giving lodging facilities more flexibility in how to achieve the necessary clear floor space around the toilet (*e.g.*, decreasing the size of the vanity).

In its comments to the ANPRM, AH&LA analyzed at great length the very serious impact of the new requirements of enlarged floor space around toilets and comparable vanity space. The analysis showed that the new requirements result in an approximately 35% decrease in living space, versus an approximately 16% decrease in living space (compared to a non-accessible room) under the current standards (based on typical 12 ft and 13 ft wide rooms). See Attachment B (room diagrams previously included in ANPRM comments to DOJ).

Compliance with these two new requirements in new construction will result in higher costs because the accessible rooms will have to be substantially larger. Further, the cost impact will not be limited to the accessible rooms, as square footage changes in one accessible room will typically be reflected in all the guestrooms in the same stack. Because accessible rooms will have to be dispersed throughout the hotel based on a myriad of factors (see discussion in Section VI above), many stacks of rooms will be affected.

Compliance with these two new requirements in pre-1993 facilities that undergo alterations after the new standards become effective will be even more expensive and disruptive. Retrofitting such buildings to create accessible rooms during renovations is already a challenge under current standards. The new clear floor space and comparable vanity requirements will guarantee that bathroom walls will have to be moved, and guest room footprints will likely have to change as well, resulting in an overall decrease in the number of guest rooms in a facility and revenues.

AH&LA urges OMB to scrutinize whether the benefits to be obtained by these two new requirements are justified by the cost.

VIII. GUIDANCE IS NEEDED WITH REGARD TO HOW MANY OR WHAT KINDS OF ALTERATIONS IN A GUEST ROOM TRIGGER A REQUIREMENT TO MAKE THE ROOMS FULLY MOBILITY ACCESSIBLE.

Section 4.1.6(c) of the ADA Standards states that "[i]f alterations of single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire space shall be made accessible." How this applies to a guest room renovation continues to

vex AH&LA's members and their consultants. How many and what kinds of altered elements trigger the requirement that an entire guest room be made accessible (i.e. in compliance with ADA Standards (Section 9.2.2)?

Consider the following common question: Does replacing the faucets of the tub and lavatory amount to an alteration of the entire space? What if the lavatory vanity and the floor tile are also replaced? What if the toilet is also replaced? What if the living/sleeping areas are altered but not the bathroom? DOJ must tell the industry where it draws the line in the upcoming regulations. The alternative is unnecessary confusion and litigation.

The basic problem stems from the fact that lodging facilities rarely, if ever, intend to change the footprints of the guestrooms or the bathrooms inside the rooms in a renovation. If an entire guestroom must be made accessible, however, bathroom walls would likely have to be moved to make the bathroom accessible.

As previously stated, AH&LA maintains that each specific element that is altered must comply with the ADA/ABA-AG to the maximum extent feasible (subject to the safe harbor principles discussed in Section II), but that the alterations should not trigger additional obligations with regard to other elements in the room that are not directly addressed by the alterations. Thus, if a facility changes the flooring material, drapery hardware, and replaces the toilet fixture and vanity without moving them, these elements will have to comply with the ADA/ABA-AG to the maximum extent feasible. However, these changes should not result in a requirement that the facility (1) relocate the toilet so that its centerline is 18" from the side wall (unless a modification can be made without changing the plumbing rough-ins such as by installing an offset flange); (2) move walls or fixtures to create necessary clear floor space in the bathroom for a 60" turning radius or T-turn; or (3) install a roll-in shower.

DOJ may not agree with this position, but at a minimum, it should provide guidance on where the line is drawn in the forthcoming regulations.

IX. THE NEW ACCESSIBLE EMPLOYEE WORK AREA REQUIREMENTS REPRESENT A RADICAL DEPARTURE FROM EXISTING LAW AND ARE NOT JUSTIFIED IN THE LOGGING CONTEXT.

Under the current ADA Standards, the only requirement pertaining to employee work areas is that they be designed and constructed so that individuals with disabilities can approach, enter, and exit the area. See ADA Standards § 4.1.1(3).

The ADA/ABA-AG contains new requirements for employee work areas that constitute a radical departure from existing law. Section 206.6.8 states that "*common use circulation paths within employee work areas shall comply with [section] 402.*" ADA/ABA-AG 206.6.8. A "common use circulation path" is defined in section 106.5 of the ADA/ABA-AG as "an exterior or interior way of passage for pedestrian travel" that is "made available for the shared use of two or more people." Thus, this definition covers every path that is used inside of an employee work area. Every such path must comply with Section 402 which sets forth extensive requirements for

accessible routes, including, but not limited to, minimum 36" wide paths of travel, turning space for wheel-chairs, and limitations on elevation changes.

The phrase "employee work area" is defined as "[a]ll or any portion of a *space* used only by employees and used only for work." The only limitation contained in this extraordinary expansion of the ADA Standards is that "[c]orridors, toilet rooms, kitchenettes, and break rooms are not *employee work areas*." See Section 106.5.

Thus, Section 206.6.8 of the ADA/ABA-AG requires every path within a space used only by employees and only for work to meet the requirements for an accessible route. This section only exempts from its coverage employee work areas that are: (1) less than 1000 s.f.; (2) involve "work area equipment"; or (3) are outside and fully exposed to the weather. See Guidelines, Section 206.6.8.

A typical lodging facility has many "back of the house" areas that would be subject to this provision (e.g. kitchens, laundries, engineering departments, administrative offices). To comply with accessible route requirements, these areas would have to be substantially enlarged, resulting in, at a minimum, a loss of space used by guests of the facility.

In meetings with AH&LA, DOJ expressed the view that Section 206.6.8 of the new ADA/ABA-AG does not require every path that is inside of an employee work area to be 36" wide and otherwise comply with the accessible route requirements. If this is in fact the case, then DOJ must modify this language in the NPRM to state what paths, if any, DOJ expects to be accessible in employee work areas, because the language as written plainly requires that *all* paths meet accessibility requirements. AH&LA members are very concerned about this new requirement, especially if it is to be applied to facilities that are already in existence when the new ADA/ABA-AG takes effect. For example, requiring an existing kitchen to comply with this new employee work area requirement -- whether immediately after the new ADA/ABA-AG takes effect or in connection with an alteration -- would result in a need to expand the kitchen significantly in order to keep the same number of workstations and fixtures. Not only would the renovation costs be enormous because the kitchen footprint would have to change, but the decrease in revenues resulting from the decrease in selling/public space would be substantial as well. It is extremely important for DOJ to not only clarify this new requirement.

X. THE EXERCISE EQUIPMENT RULES WILL IMPOSE A SIGNIFICANT HARDSHIP ON SMALL LODGING FACILITIES UNLESS THEY ARE CLARIFIED.

The current ADA Standards do not address the accessibility of exercise equipment. The new ADA/ABA-AG requires an accessible route to one of each "type" of exercise equipment, and contains an "advisory note" stating that "[m]ost strength training equipment and machines are considered different types" and suggesting that two different machines working the same body parts are two different types. Because most exercise equipment is not a part of the built-in environment, DOJ has great latitude in deciding whether and how it will implement this requirement. Compliance with this requirement as drafted by the Access Board would adversely impact the vast majority of small exercise rooms provided by lodging facilities throughout the country and may well result in their elimination. AH&LA urged DOJ to adopt a more

reasonable approach either by (1) defining the word "type" based on the part of the body that is affected (e.g., a stair climber and a treadmill are still the same "type" because they both provide a cardiovascular lower body workout); or (2) exempting smaller exercise rooms (e.g. less than 500 s.f.) often found in lodging facilities from this requirement. According to three transient lodging brands, fitness centers range from 350 to 1400 s.f. in size.

XI. CURRENT CONSTRUCTION AND MANUFACTURING TOLERANCES MUST BE MAINTAINED IN THE ADA/ABA-AG.

AH&LA has three significant concerns regarding the issue of construction and manufacturing tolerances.

First, Section 104.1.1 of the ADA/ABA-AG states that construction and manufacturing tolerances do not apply "where the requirement is stated as a range with specific minimum and maximum endpoints." As stated in the last meeting, construction tolerances should apply even when a specific range is provided because other criteria may demand a dimension at or near the maximum or minimum accessibility criteria, requiring that the element be positioned at the extreme of the accessibility range. A small construction tolerance will not affect usability, and construction is an imprecise activity. If the top of a toilet seat is ¼" beyond the range of 17" to 19", a disabled person will still be able to fully utilize the seat.

Second, DOJ must make clear that when a dimension is specified as a minimum or maximum, construction tolerances do apply. The Advisory note to Section 104.1.1 of the ADA/ABA-AG says that tolerances "may" apply in this situation, but there is no reason why they should not apply. The "may" terminology is confusing, will easily lead to disagreements, and must be clarified to state that tolerances would apply.

Third, Section 104.1 (Dimensions) states that "[d]imensions that are not stated as "maximum" or "minimum" are absolute. DOJ must make clear that Section 104.1.1 modifies this "absolute" concept, and that dimensions that are not stated as "maximum" or "minimum" are still subject to the construction and manufacturing tolerances.

XII. EQUIVALENT FACILITATION FOR POOL ENTRIES AND OTHER ELEMENTS SHOULD BE PERMITTED.

In its meetings with DOJ, AH&LA underscored the need to retain the equivalent facilitation examples contained in ADA Standards Sections 4.1.6 (elevator cars), 4.31.9 (portable text telephones at the front desk for use at public payphones nearby), 7.2 (provision of a folding shelf in lieu of lowered registration counter), 9.1.4 (providing multiple occupancy accessible guest rooms at rates for single occupancy rooms in lieu of having the latter in inventory), 9.2.2 (raised decks at patios), 9.3.2 (portable visual alarms). These tools have been used successfully to make facilities accessible to people with disabilities in a cost-effective way and should not be abandoned.

DOJ should also state that covered facilities can provide equivalent facilitation for swimming pool entries. Section 242.2 of the ADA/ABA-AG requires that all new pools smaller than 300 l.f. of perimeter have either a sloped entry or a lift. Larger pools must have either a sloped entry or lift plus one other accessible means of entry listed in Section 1009.

These rigid rules requiring, at a minimum, a lift or sloped entry (with two sets of handrails going down the slope), are inadvisable for several reasons. The sloped entry consumes a great deal of space and the handrails are potential hazards. Moreover, even the Access Board had to acknowledge that most wheelchairs cannot go down the ramp into the water because they would contaminate the water. The only solution is to require the public accommodation to provide a specially designed aquatic wheelchair -- a device to which a guest with a disability must be able to transfer to and from. The lift is also a potential safety hazard because it is a large obstruction both on the side of the pool deck and in the water, depending on the position that it is in. Ignoring the safety risks with electric lifts, even if the lift is hydraulic, there must be a pressurized water source for the lift, which then requires that a hose be run to the pool (a tripping hazard), or a protruding spigot be installed near the lift.

Because these methods of providing independent access to a swimming pool have serious problems, the DOJ should leave open the possibility for other options. As drafted, the rule forecloses the possibility that new technology and devices may provide better and more cost-effective options in the future. DOJ should make clear in the new regulations that other pool entry options may be acceptable in lieu of the sloped entry and/or lift. For example, there is a product called the Transfer Tier that can be used with new and existing pools that has been reported to be effective, safe, and have relatively small space requirements.

XIII. CONCLUSION

AH&LA looks forward to meeting with you and your staff to discuss these issues.

Very truly yours,



Minh N. Vu

cc: Marlene L. Colucci, Esq., AH&LA
Kevin Maher, AH&LA



Projected U.S. Mobility Aid Use, 2007-2021

Prepared for:

American Hotel & Lodging Association

July 19, 2007

National Economic Consulting

NEC

Projected U.S. Mobility Aid Use, 2007-2021

Introduction

The American Hotel & Lodging Association engaged PricewaterhouseCoopers LLP to project the number of mobility impaired persons requiring the use of a wheel chair or scooter in the United States over the 2007-2021 period. This report summarizes the data, methodology, and results.

Results in Brief

Based on the most recent available Census Bureau data, we estimate that 2.9 million Americans, 15 and over (excluding the non-civilian and institutionalized populations), use a wheel chair or scooter as of this year (2007). This represents 1.22 percent of the civilian non-institutionalized population 15 and over. By 2021, the portion of the civilian non-institutionalized 15 and over population using a wheel chair or scooter is estimated to increase to 1.36 percent, an increase of one-hundredth of one percentage point (0.01 percent) of the population per year.

These estimates include intermittent wheel chair and scooter users who also use canes, crutches and walkers. These estimates are based on the assumption that the percentage of the population requiring the use of wheel chairs and scooters within each age group remains constant at 2002 rates (the most recent year for which mobility aid use is available).

Wheel Chair and Scooter Using Population, 2007 and 2021
[15 and over civilian non-institutionalized population; in millions]

Item	2007	2021
Wheel Chair and Scooter Users	2.9	3.6
Percent of population	1.22%	1.36%

Source: PricewaterhouseCoopers estimates based on U.S. Census Bureau data.

Data Sources

As part of the Survey of Income and Plan Participation ("SIPP"), the U.S. Census Bureau collects data on mobility impairments. Mobility impaired persons are recorded in the survey by the types of mobility aid use reported. Both mechanized (wheel chair or scooter) and non-mechanized (crutch, cane, or walker) mobility aid use is included in the survey. Individuals that use both types of mobility aids are recorded in both categories.

The most recent mobility impairment data are for 2002 and are published in *Americans with Disabilities: 2002*¹, which is based on the fifth wave of the 2001 SIPP. The population represented in the SIPP is the civilian non-institutionalized population living within the United States. The institutionalized population, which is excluded from the SIPP, is composed primarily of persons residing in correctional institutions and nursing homes.² The Census Bureau publishes data on the mobility impaired population for three age groups (15-24, 25-64, and 65 and over). Mobility impairment data is not available for more narrowly defined age groups or by gender.

The Census Bureau also publishes population projections for the United States through 2050. The most recent projections are based on the 2000 decennial Census. Through 2006, the population projections have been superseded by estimates based on survey data and administrative records that have become available since 2000. The Census Bureau's population projections represent the entire

¹ U.S. Census Bureau, "Americans with Disabilities: 2002" Report P70-107, May 2006.

² According to the 2000 Census, approximately 4 million of the 281 million people in the United States resided in institutional group quarters.

U.S. population, including illegal immigrants, non-civilians, and the institutionalized. Population projections are available by age, gender, and race. The Census Bureau does not publish projections of the institutionalized or non-civilian populations.

Methodology

We used a five step process to project the mobility aid using population for three age groups (15-24, 25-64, and 65 and over) over the 2007-2021 period:

- Step 1. Calculate the 2006 percentage of civilian non-institutionalized persons in the total population by each age by dividing Census estimates of the civilian non-institutionalized population by Census estimates of the total population.
- Step 2. Estimate the civilian non-institutionalized population for the 2007-2021 period by multiplying the civilian non-institutionalized population percentage for 2006 (determined in Step 1) by the Census Bureau's projection of the total U.S. population in each year for each age.
- Step 3. Calculate the 2002 percentage of persons using mechanized mobility aids in the 15 and over civilian non-institutionalized population for three age groups (15-24, 25-64, and 65 and over) by dividing the number of mobility aid using persons into the total civilian non-institutionalized population, based on data from *Americans with Disabilities: 2002*.
- Step 4. Impute the 2002 percentage of persons using mechanized mobility aids for each year of age in each of the three age groups, for which mobility aid usage rates were calculated in Step 3, based on the assumption that mobility aid usage rates increase linearly with age in each age group.
- Step 5. Estimate the mobility aid using population for the 2007-2021 period by multiplying the imputed age-specific mobility aid using rates for 2002 (determined in Step 4) by the age-specific projections of the 15 and over civilian non-institutionalized population for the 2007-2021 period (determined in Step 2).

This methodology was reviewed with Census Bureau experts and makes use of the most recent available Census data, estimates, and projections. The methodology assumes that for each age the percentage of individuals using mechanized mobility aids relative to the total population remains constant at 2002 levels. To the extent that age-specific mobility aid use rises or falls in the future, these projections under or overstate, respectively, the future population of mobility aid users.

Detailed Results

Table 1, below, shows the projected number of wheel chair and scooter users over the 2007-2021 period, and the corresponding percentage of the civilian non-institutionalized 15 and over population using these mobility aids. These estimates include intermittent wheel chair and scooter users who also use canes, crutches and walkers.

Table 2, below, shows the projected 15 and over civilian non-institutionalized population, by age group, over the 2007-2021 period.

Table 1. Wheel Chair and Scooter Use, Projections for 2007 to 2021
 [15 and over civilian non-institutionalized population; in millions]

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Wheel Chair and Scooter Users															
15 and over	2.9	2.9	2.9	3.0	3.0	3.1	3.1	3.2	3.2	3.3	3.3	3.4	3.4	3.5	3.6
15-24	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
25-64	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.2	1.2	1.2	1.2
65 and older	1.6	1.6	1.7	1.7	1.7	1.7	1.8	1.8	1.9	1.9	2.0	2.0	2.1	2.2	2.2
Percent of Civilian Non-Institutionalized 15 and Over Population															
Wheel Chair and Scooter Users	1.22%	1.22%	1.23%	1.23%	1.24%	1.25%	1.25%	1.26%	1.27%	1.29%	1.30%	1.31%	1.33%	1.34%	1.36%
Memorandum:															
Civilian non-institutionalized 15 and over population	234.8	237.2	239.5	241.7	243.8	245.8	247.8	249.7	251.8	253.9	256.0	258.2	260.3	262.4	264.6

Note: These estimates include intermittent wheel chair and scooter users who also use canes, crutches and walkers.

Numbers may not sum due to rounding.

Source: PricewaterhouseCoopers estimates based on U.S. Census Bureau data.

Table 2. Civilian Non-Institutionalized Population by Age, Projections for 2007 to 2021
 [15 and Over Population; in millions]

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Civilian Non-Institutionalized Population															
15 and over	234.8	237.2	239.5	241.7	243.8	245.8	247.8	249.7	251.8	253.9	256.0	258.2	260.3	262.4	264.6
15-24	41.6	41.8	42.0	42.0	41.9	41.8	41.6	41.4	41.0	40.9	40.8	40.9	41.0	41.2	41.5
25-64	157.0	158.4	159.8	161.2	162.6	163.3	164.1	165.0	165.9	166.9	167.6	168.2	168.6	168.9	169.1
65 and older	36.2	37.0	37.7	38.4	39.3	40.7	42.0	43.4	44.8	46.1	47.6	49.1	50.7	52.3	54.0

Note: Numbers may not sum due to rounding.

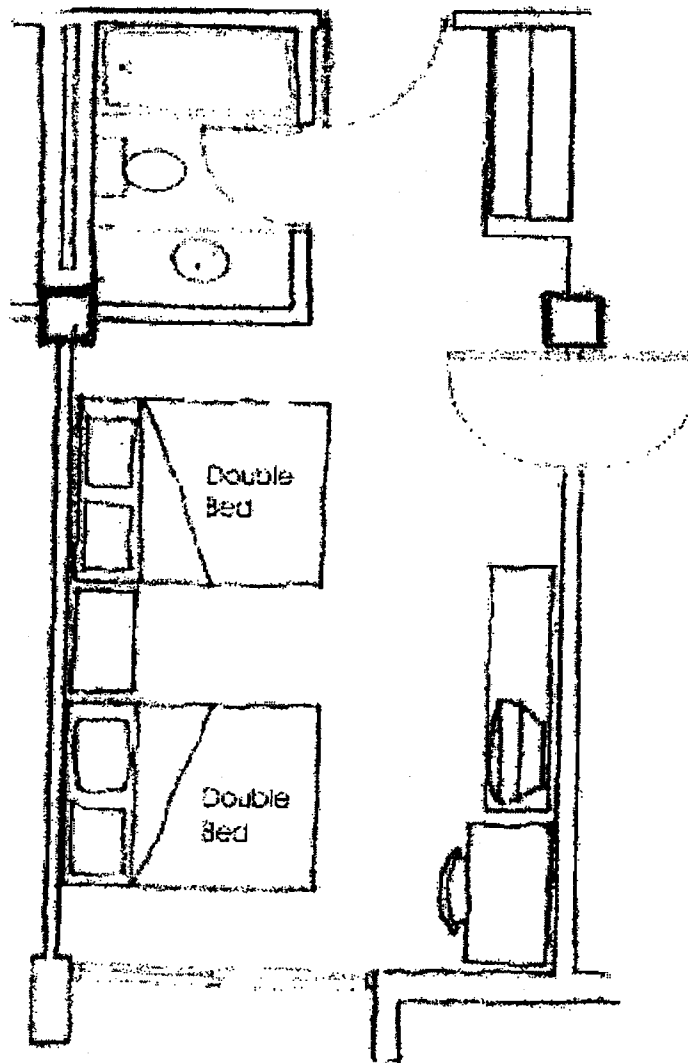
Source: PricewaterhouseCoopers estimates based on U.S. Census Bureau data.

ATTACHMENT B

ATTACHMENT II

Drawings 1-6

DRAWING 1

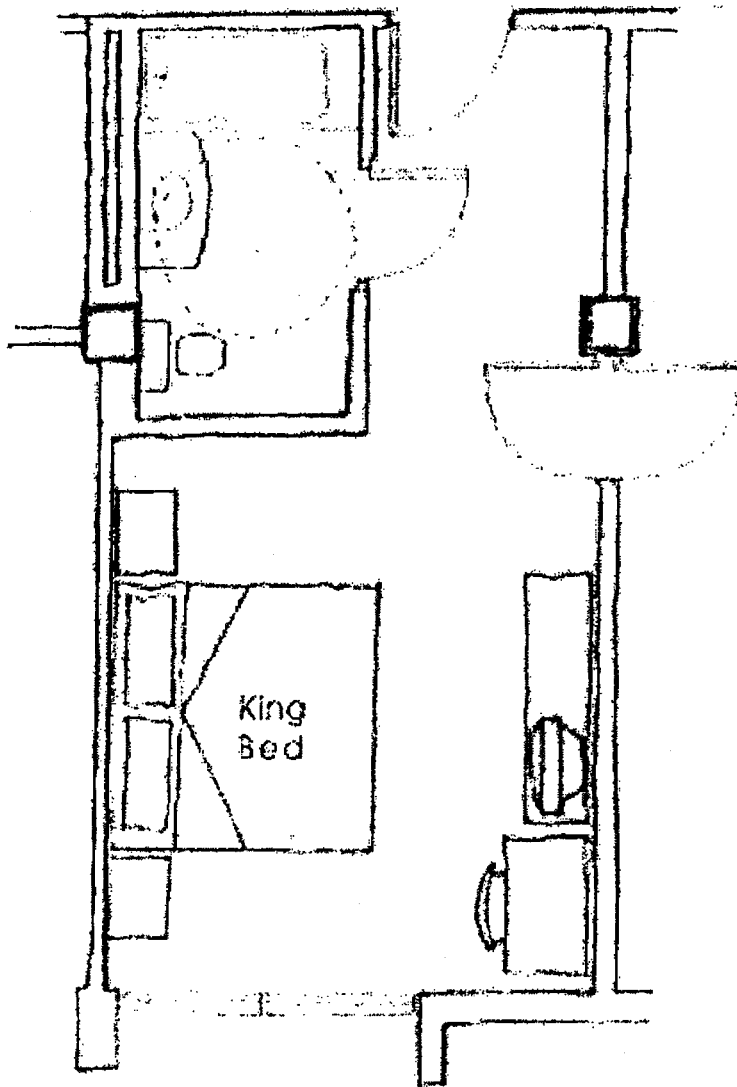


Typical 12ft wide room - with closet

16x12 = 196sqft
100% of total living space

Scale 1" = 1/4"

DRAWING 2

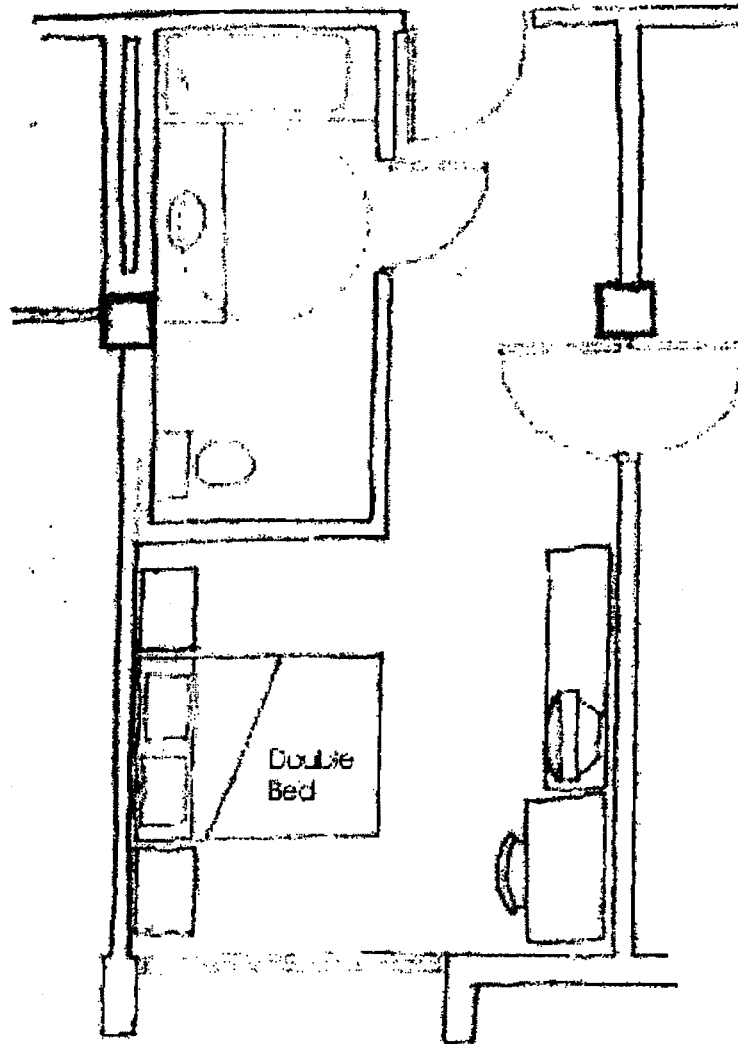


ADAAG Typical 12ft wide room - with open closet

13.5'x12' = 162sqft
16% reduction of total living space

Scale 1" = 1/4"

DRAWING 3

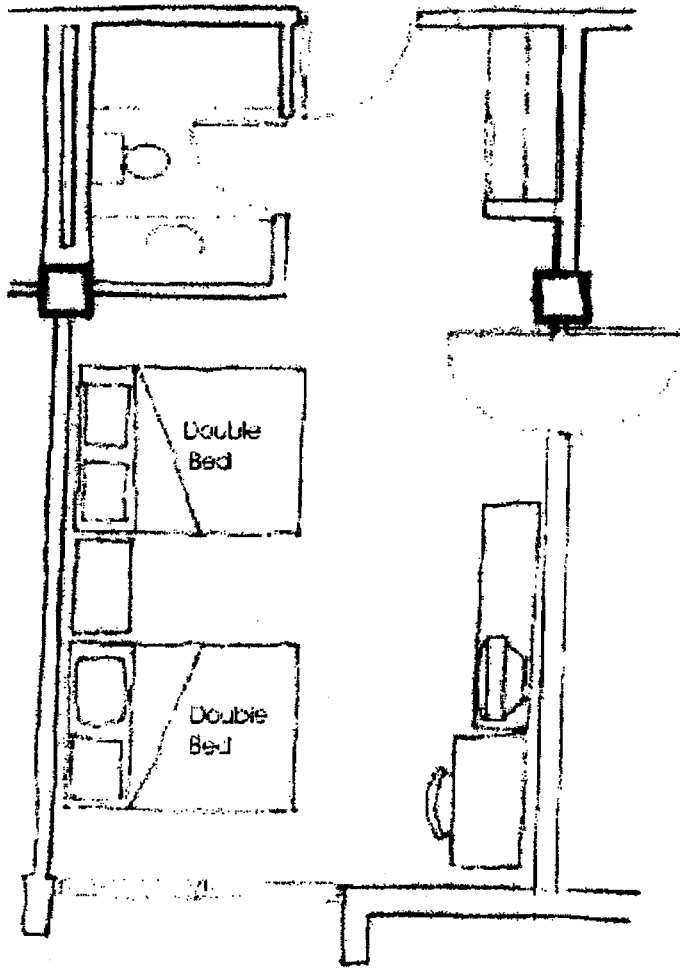


Proposed ADA/ABA-AG 12ft wide room - no closet

10.5x12' = 126sqft
35% reduction in living space

Scale 1" = 1/4"

DRAWING 4

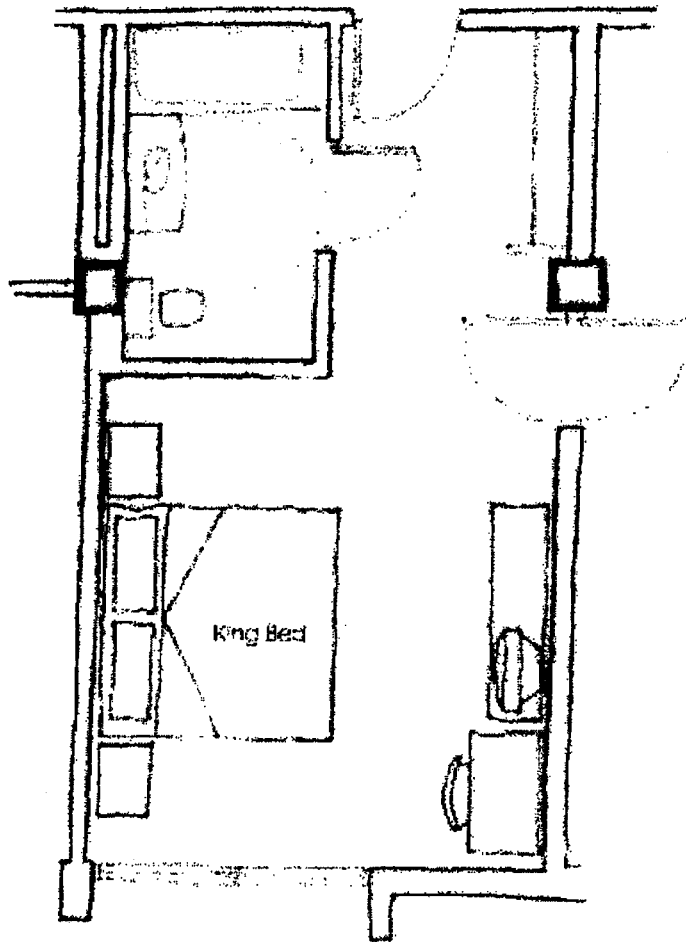


Typical 13ft wide room - with
closed closet

16x13' = 208sqft
100% of total living space

Scale 1" = 1/4"

DRAWING 5

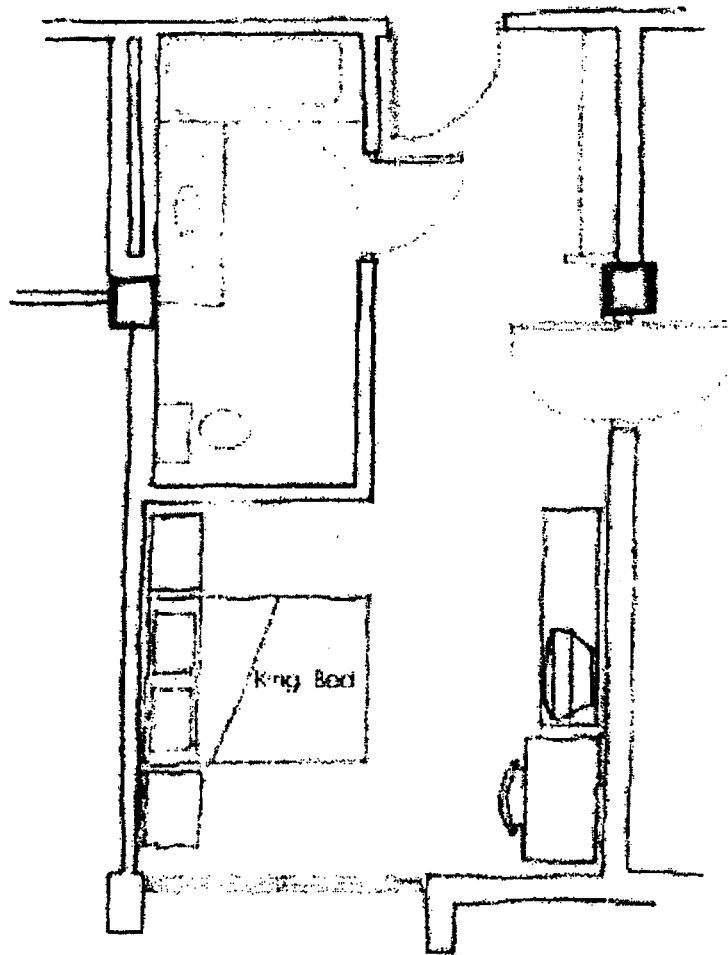


ADAAG Typical 13ft wide room - with open closet

13.5'x13' = 175.5 sqft
18% reduction of total living space

Scale 1" = 1/4"

DRAWING 6



Proposed ADA/ABA-AG 13ft wide room -
with open closet

10.5x13' = 136sqft
35% reduction of the total living space

Scale 1" = 1/4"