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Title II of the ADA: Constructing Accessible Public Rights-of-Way and Reducing Exposure for Plaintiffs' Attorney Fees in the Process

by

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TITLE II OF THE ADA: CONSTRUCTING ACCESSIBLE PUBLIC RIGHTS-OF-WAY AND REDUCING EXPOSURE FOR PLAINTIFFS' ATTORNEY FEES IN THE PROCESS

by
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Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("Title II" or "ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504") and similar provisions in state laws require local government facilities and programs to be accessible for persons with disabilities. This paper focuses on the accessibility requirements for public rights-of-way that are new, newly altered or pre-existing, including the engineering difficulties posed by the lack of promulgated standards for public rights-of-way. This paper also addresses how a voluntary compliance program both for newly constructed or altered sidewalks and curb ramps, and to undertake corrections of curb ramps that can be considered as either new or altered after January 26, 1992, may prevent or minimize lawsuits by private plaintiffs, including limitations on claims for attorney fees.

The principle of accessible sidewalks and curb ramps for persons with disabilities is relatively clear. However, the details and engineering requirements for the accessibility of public rights-of-way are not so clear. This paper suggests a course of action for determining whether there are ADA compliance issues for the sidewalks and curb ramps of your municipality and how to proceed if issues are identified. Although there is no guarantee that the suggested course of action will prevent private plaintiff lawsuits, the suggested course of action nevertheless should limit exposure to successful lawsuits and should limit the municipality's liability for the plaintiff's attorney fees as an added benefit to making the municipality's system of sidewalks accessible.

Which sidewalks and curb ramps must be made accessible and when?

The purpose of Title II of the ADA is to guarantee that qualified disabled persons enjoy meaningful access to public services, programs and activities. *See Tennessee v. Lane*, 541 U.S. 509, 531-32, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004); *Iverson v. City of Boston*, 452 F.3d 94, 100 (1st Cir. 2006). Regulations promulgated to implement Title II have included an obligation since January 26, 1992, to make accessible sidewalks and curb ramps that are constructed or altered. 28 C.F.R. § 35.150. Existing facilities, meaning facilities that aren't newly constructed or altered, including sidewalks and curb ramps, may need to be modified to make city programs accessible. 28 C.F.R. § 35.151.

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[1] Co-authored by Christopher Frost, Assistant City Attorney, City of Ann Arbor, Michigan. This paper is not a publication of the City of Ann Arbor and should not be cited or construed as the official policy or position of either the City of Ann Arbor, Michigan, or the Office of the Ann Arbor City Attorney.

Streets, sidewalks and curb ramps constructed or altered since January 26, 1992

28 C.F.R. § 35.151 states the requirements for new construction and alteration of facilities by a public entity, including new construction and alteration of streets, roads highways and pedestrian walkways. For new construction, 28 C.F.R. § 35.151(a) provides that "each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992." If a facility is altered, 28 C.F.R. § 35.151(b) requires that "the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992." 28 C.F.R. § 35.151(e) specifically addresses the requirements for curb ramps

> "(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
> (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways."

These provisions raise the question as to what actions are considered street alterations that would trigger the obligation to install compliant curb ramps. The 1994 Supplement to the Title II Technical Assistance Manual for state and local government programs and services that is published by the U.S. Department of Justice adds the following language to the end of Section II-6.6000, Curb Ramps, in the 1993 Technical Assistance Manual:

> "Resurfacing beyond normal maintenance is an alteration. Merely filling potholes is considered to be normal maintenance."

Although the Technical Assistance Manual does not have the force of law, is simply the Department of Justice's interpretation of what is already required by the ADA, and a court would need determine whether that interpretation is a permissible interpretation of the ADA requirements if an issue arose, *see, Schmidt v. Safeway*, 864 F. Supp. 991, 1001 (D. Or. 1994), in *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. Pa. 1993),), *cert. denied sub nom., Hoskins v. Kinney*, 511 U.S. 1033 (1994), the court addressed the issue of whether street resurfacing constituted an alteration for purposes of 28 C.F.R. § 35.151(e). The court looked to the general language governing alterations in 28 C.F.R. § 35.151(b), in particular the language describing alterations "that affects or could affect the usability of the facility or part of the facility." *Id.*, 9 F.3d at 1072. The court concluded, "if an alteration renders a street more 'usable' to those presently using

it, such increased utility must also be made fully accessible to the disabled through the installation of curb ramps." *Id.*, 9 F.3d at 1073. The court further observed that,

> "[28 C.F.R. § 35.151(e)] effectively unifies a street and its curbs for treatment as interdependent facilities. If a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory disabilities. At the time that the City determines that funds will be expended to alter the street, the City is also required to modify the curbs so that they are no longer a barrier to the usability of the streets by the disabled." *Id*.

The court affirmed the district court's holding that street resurfacing was an alteration within the meaning of 28 C.F.R. § 35.151(b) which must be accompanied by the installation of curb cuts under 28 C.F.R. § 35.151(e), *Id.*, 9 F.3d at 1075, after adopted with approval the district court's reasoning that,

> "Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel. The surface of a street is the part of the street that is 'used' by both pedestrians and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way. *Id.*, 9 F.3d at 1073-1074.

See also Lonberg v. City of Riverside, 2007 U.S. Dist. LEXIS 38824 at 17 (C.D. Cal. May 15, 2007) (following *Kinney*).

Not yet addressed in any cases are those situations that fall somewhere between filling potholes and resurfacing. If a telephone, gas or electric company disturbs pavement in or near an intersection when it accesses its lines for either emergency repairs or routine maintenance, is this an "alteration" that requires the company to include installation of curb ramps or correction of existing but improperly constructed curb ramps? Must the company reconstruct the intersection so that the curb ramps and street crossing are accessible? Or is this more like a pothole for which restoration to the pre-existing condition is sufficient? What if the repair work requires the company to dig up all or a portion of a non-compliant curb ramp? Is that an alteration that requires the company to reinstall the curb ramp correctly rather than reinstall it in its pre-existing, non-compliant condition?

This type of work does not fit the reasoning in *Kinney, supra*. Although the municipality will require the restoration work to be done according to city specifications, which should incorporate ADA requirements, this is not work being done to improve the street for users, promote commerce, etc. Nevertheless, in an effort to maximize accessibility, to get work done by others, which will assist the municipality in making its system of sidewalks more accessible, adoption of a "you touch it, you fix it" policy may, in most cases, get the

corrective work done as part of the restoration work done by the utility company.[2] This likely will work best where the municipality already has installed curb ramps, but where those ramps may not be in compliance. This is also an opportunity to try to get the utility company to relocate any installations that may make compliance harder, either immediately or later, at the intersection in question, e.g., a hand hole in the middle of a curb ramp. Although a utility may argue against restoration beyond what was already there, for work where the work to "fix" it isn't difficult, isn't much different and isn't significantly or at all more costly than work to put it back the way it was, this shouldn't be met with much resistance from the utility company. Having a policy and standards that are uniformly and firmly applied, and work to educate the municipality's usual engineering and construction contacts at the utility helps.

However, there may be intersections where a substantial amount of design engineering needs to be done, including possible redesign and reconstruction of a portion of the sidewalk and/or roadway, to make the street crossings and curb ramps accessible. These intersections also might include those where barrier curbs remain. In those cases, the utility company and its engineers may not have the time, resources or skill to undertake that kind of design and the municipality may prefer not to have a third party undertake such work. A balance needs to be reached between arguing (to disability rights plaintiffs) that such work is akin to potholes and does not trigger the obligation to install accessible curb ramps and arguing (to the utility companies) that work that impacts the sidewalk, curb ramps and/or street at an intersection triggers the obligation to install curb ramps or or make accessible existing curb ramps. Exceptions may need to be made to the "you touch it, you fix it" policy.

Streets, sidewalks and barrier curbs or curb ramps existing as of January 26, 1992

A second regulation, 28 C.F.R. § 35.150, addresses the responsibilities of public entities relative to "existing facilities."[3] Although a public entity is required to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by

[2] The "you touch it, you fix it" policy is an adaptation of the "You Touch/You Fix" Rule that was incorporated into Paragraph 3 of the February 4, 2005, "Fourth Stipulation Regarding Consent Decree and Order Filed May 5, 1997 and Order" in McConnell v. City and County of Honolulu, Civil No. 96-01111 DAE/KSC (D. Hawaii) which states: "Any element or features within the public right-o-way that affect pedestrian usability and are being altered in such a way to allow them to be made accessible shall, to the maximum extent feasible, meet the new construction requirements."

[3] "Existing facilities" of a municipality include "all or any portion of [its] buildings, structures, sites, complexes, . . . roads, walks, [and] passageways" that were in existence at the time of the ADA's enactment. 28 CFR § 35.104.

individuals with disabilities," 28 C.F.R. § 35.150(a), this section further provides that it does not "(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." Thus, public entities are not required to retrofit their existing facilities if program accessibility can be provided otherwise. *Lane*, 541 U.S. at 532; *Iverson*, 452 F.3d at 99. A public entity may select among a number of alternatives for accomplishing program accessibility, including "redesign of equipment, reassignment of services to accessible buildings, . . . delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, . . . or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(b)(1). This section further provides that "[a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." *Id.* This section also does not "[r]equire a public entity to take any action that would threaten or destroy the historic significance of an historic property." 28 C.F.R. § 35.150(b)(2). Finally, a public entity is excused from undertaking "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3).[4] *See Lane*, 541 U.S. at 532.

Public entities were required to develop transition plans for their facilities for which structural changes will be undertaken to achieve program accessibility. The plan was to have been done within six (6) months after January 26, 1992. 28 C.F.R. § 35.150(d)(1). With respect to barrier curbs and curb ramps, 28 C.F.R. § 35.150(d)(2) provides,

> "If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local

[4] 28 CFR § 35.150(a)(3) further provides, "In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity."

> government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas."

Although structural changes to existing facilities are to be made within three years of January 26, 1992, the regulation further provides that they are to be done, "in any event as expeditiously as possible." 28 C.F.R. § 35.150(c). The prevailing view of the federal courts is that private plaintiffs do not have standing to sue a public entity to enforce the obligation to adopt and/or to implement the provisions of its transition plan. *Iverson,* 452 F.3d at 101; *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913-915 (6th Cir. 2004). As noted by the court in *Iverson*:

> "Nothing in the text of Title II requires public entities to conduct self-evaluations, let alone to do so by the date prescribed in the regulation. Conducting a self-evaluation may well facilitate compliance with the strictures of Title II -- but a municipality's failure to self-evaluate does not in and of itself render municipal services, programs, or activities inaccessible to disabled persons. Put another way, it is altogether conceivable that a public entity may be in full compliance with Title II without observing the commands of the self-evaluation regulation. Given this state of affairs, we hold that the self-evaluation regulation imposes a burden on public entities not imposed by Title II itself and, therefore, is not enforceable through the instrumentality of Title II's private right of action." 452 F.3d. at 101.

Although the Court of Appeals for the Tenth Circuit ruled to the contrary in *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 857-860 (10th Cir. 2003), holding that private plaintiffs could sue to enforce the self-evaluation and transition plan regulations, the court in *Iverson* opined relative to *Chaffin* that "recent Supreme Court precedent dashes any hope that these regulations are so enforceable" and rejected the *Chaffin* analysis as error. 452 F.3d at 96, 101-102. *See, also, Californians for Disability Rights, Inc. v. Californians Dep't of Transp.*, 249 F.R.D. 334, 342 (N.D. Cal. 2008).

What standards apply to make new or altered public rights-of-way "readily accessible" for persons who are mobility or vision impaired)?

Good question. The answer is both hard and easy. In summary: although design standards have not yet been approved for public rights-of-way, the design standards that have been approved for other types of sites and facilities are a good safe harbor. Following are a history and analysis of design standards and how they can and should or should not be applied to public rights-of-way.

On July 26, 1991, the United States Access Board published the Americans with Disabilities Act Accessibility Guidelines ("ADAAG")[5] to assist the Department

[5] These are now entitled "ADA Standards for Accessible Design," but they still

of Justice in establishing accessibility standards for new construction and alterations in places of public accommodation and commercial facilities. The final version of ADAAG, revised as of July 1, 1994, contains scoping provisions and technical specifications generally applicable to buildings and facilities (sections 1 through 4) and additional requirements specifically applicable to certain types of buildings and facilities covered by title III of the ADA: restaurants and cafeterias (section 5), medical care facilities (section 6), business and mercantile facilities (section 7), libraries (section 8), accessible transient lodging (section 9) and transportation (section 10). When the United States Department of Justice published its final regulations implementing title III of the ADA, it incorporated ADAAG as the accessibility standards for newly constructed and altered places of public accommodation and commercial facilities covered by title III. At the same time, the Department of Justice also published its final regulations implementing title II of the ADA. The Department of Justice's title II regulations give state and local governments the option of choosing between designing, constructing or altering their facilities in conformance with the Uniform Federal Accessibility Standards ("UFAS")[6] (Appendix A to 41 C.F.R. Part 101-19, Subpart 101-19.6) or with ADAAG (Appendix A to 28 C.F.R. Part 36), except that if ADAAG is chosen, the elevator exemption contained in section 4.1.3(5)[7] and section 4.1.6(1)(k)[8] of ADAAG does not apply. *See* 28 C.F.R. § 35.151.[9]

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are commonly referred to by their title before official adoption or by that title's acronym ADAAG. Cf., *Independent Living Resources* v. *Oregon Arena Corp.*, 1 F. Supp. 2d 1124, 1130 (D. Ore. 1998) (criticizing references to these as "Guidelines" instead of as "Standards").

[6] UFAS was developed by the General Services Administration, Department of Defense, Department of Housing and Urban Development, and the United States Postal Service to implement the Architectural Barriers Act of 1968 (42 U.S.C. § 4151 et seq.) which requires certain federally financed buildings to be accessible. Most Federal agencies reference UFAS as the accessibility standard for buildings and facilities constructed or altered by recipients of Federal financial assistance for purposes of section 504 of the Rehabilitation Act of 1973, as amended. Note that although "Appendix A to 41 CFR Part 101-19, Subpart 101-19.6" continues to be referenced as the location of UFAS, the standards can no longer be found there. UFAS can be found at http://www.wbdg.org/ccb/ASTAND/handi.pdf or at http://www.access-board.gov/ufas/ufas-html/ufas.htm. As a practical matter, there is little difference between ADAAG and UFAS.

[7] Title III of the ADA does not require elevators for a newly constructed or altered facility if it is less than three stories or has less than 3,000 square feet per story, unless the facility is a shopping center or mall; a professional office of a health care provider; or a terminal, depot or other station used for specified public transportation or an airport passenger terminal. See 28 CFR § 36.401(d) and § 36.404. ADAAG section 4.1.3(5), governing new construction, requires elevators for newly constructed and altered buildings and facilities. The exception stated in the Title III regulations is repeated, along with three additional exceptions. One is

In the meantime, on December 21, 1992, the United States Access Board published a notice of proposed rulemaking in the Federal Register that proposed to add four sections to ADAAG that would apply specifically to certain types of buildings and facilities covered by title II of the ADA, including section 14, Public Rights-of-Way.

The Access Board published an interim rule on June 20, 1994, that would have added section 14, along with some other sections and provisions to ADAAG.[10] However, in the final rule that was published on January 13, 1998, the Access Board elected to reserve rulemaking relative to public rights-of-way and eliminated section 14 (Public Rights-of-Way) as well as all the definitions that pertained to section 14. 63 FR 2000, 2003 and 2013 (January 13, 1998).

Without section 14, the provisions in ADAAG don't apply to public rights-of-way. "Accessible route" is defined in 28 C.F.R. Part 36, Appendix A § 3.5 as a "path connecting all accessible spaces of a building or facility." The definition further provides that "[e]xterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks ramps, and lifts." The definition of "vehicular way" in § 3.5 includes streets. Nevertheless, it is clear from the definition of "facility" that a public sidewalk is not an "accessible route" for purposes of the technical requirements of section 4 of ADAAG. "Facility" is defined in § 3.5 as "[a]ll or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property <u>located on a site</u>." (Emphasis added.) "Site" is defined in § 3.5 as "[a] parcel of land <u>bounded by a property line or a designated portion of a right-of-way</u>." (Emphasis added.) Thus, by definition, a facility may be bounded by a public right-of-way, but is not the public right-of-way itself.

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for elevator pits and mechanical rooms. Elevators also are not required if ramps compliant with section 4.8 are used or, in certain circumstances, if platform lifts compliant with section 4.11 are used.

[8] ADAAG section 4.1.6(1)(k), governing alterations, repeats the exception in the regulations for certain buildings less than three stories or with less than 3,000 square feet per story.

[9] Because the provision in 28 CFR § 35.151 that "the elevator exemption" does not apply is in the singular, because it refers only to sections of ADAAG, because section 4.1.2 of UFAS has the same exceptions as ADAAG for elevator pits and mechanical rooms and where access is provided either by ramps or by platform lifts but does not have the exception for certain building less than three stories or with less than 3,000 square feet per story, and because the foregoing exception for smaller buildings is the only exception in both section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG, the non-applicability of the elevator exemption in 28 CFR § 35.151 is an exclusion of only the elevator exception for certain smaller buildings.

[10] 59 FR 31676 (June 20, 1994) as corrected at 59 FR 32751 (June 24, 1994).

When section 14 was eliminated, there was no amendment to either section 3 or section 4 to expand the definition of facility or to apply the technical requirements of section 4 to pedestrian routes within a public right-of-way (as opposed to within a site), thereby reinforcing that the current provisions of ADAAG do not apply. The fact that modification of the existing ADAAG provisions would have been required to extend some of the ADAAG standards to pedestrian routes within the public right-of-way further reinforces that if the existing ADAAG standards are used, they may be difficult to apply to all site conditions found in the public right-of-way.

In a case involving public rights-of-way, the court in *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1341 (S.D. Cal. 1997), referenced provisions in the published but not adopted Section 14 of ADAAG for the applicable standards, referencing in particular the provisions for site infeasibility. *Id*., 978 F. Supp. at 1341, fn. 15. Although the plaintiffs argued that the city had not met the standards in section 4 of ADAAG for the curb ramps in question, the court granting summary judgment to the city based on site infeasibility conditions in the right of way. *Id*., 978 F. Supp. at 1341. This reinforces that sections 4 and 14 were drafted to apply to two different types of routes and that the site conditions for pedestrian routes in public rights-of-way are not always amenable to application of the standards in section 4 of ADAAG.

In *Alford v. City of Cannon Beach*, 2000 U.S. Dist. LEXIS 20730 at 71 (D. Or. January 17, 2000), the court recognized the foregoing analysis and held that "'[s]ite' does not include city streets." Although the court examined compliance with the requirements of § 4.3, the court noted that it was only assuming but not deciding that the § 4.3 Accessible Route standards of section 4 of ADAAG applied to curb ramps in the city's public right-of-way. 2000 U.S. Dist. LEXIS 20730 at 72, fn. 14.

In its brief dated April 6, 2001, for the United States as *amicus curiae* to the Court of Appeals for the Ninth Circuit in Barden v. City of Sacramento, No. 01-15744, the U. S. Justice Department stated explicitly that the standards in ADAAG were drafted to apply to Title III facilities and not to public rights-of-way. (Brief at pp. 16-21.)

The United States Department of Justice has recently published and posted on its disabilities rights web page a series of chapters in a publication entitled "ADA Tool Kit for State and Local Governments," available at: http://www.ada.gov/pcatoolkit/toolkitmain.htm. Chapter 6 of the Tool Kit recognizes that standards need to be developed to apply to sidewalks and curb ramps in the public right-of-way and refers public entities to the "Revised Draft Guidelines for Accessible Public Rights-of-Way" ("PROWAC") that were published by the United States Access Board on November 23, 2005, as best engineering practices. http://www.access-board.gov/prowac/draft.htm. Chapter 6

also notes that although the November 23, 2005, guidelines developed by the Access Board "will not be enforceable under Title II of the ADA until the Department of Justice and the U.S. Department of Transportation issue regulations adopting them as standards," and although the process of adopting accessibility standards for public rights-of-way "may be lengthy," Chapter 6 is an effort to ensure that state and local governments that construct and alter highways, streets, roads, sidewalks and pedestrian crossings "do not create barriers to access by omitting curb ramps while the broader debate on accessibility requirements for public rights-of-way moves forward." (Chapter 6, p. 3)

Despite the foregoing, litigants and courts generally seem to have accepted ADAAG as the applicable standards, or have simply applied the ADAAG standards without discussion of why they have done so. *See, e.g., Ability Center of Greater Toledo v. City of Sandusky*, 133 F. Supp. 2d 589, 592 (N.D. Ohio 2001) (reliance by the parties and court on standards in section 4 of ADAAG without discussion or dispute); *Deck v. City of Toledo (Deck II)*, 76 F. Supp. 2d 816 (N.D. Ohio 1999) (plaintiffs sought relief based on allegations of multiple curb ramps installed in violation of the standards in section 4 of ADAAG; no dispute by the city as to the applicability of those standards and the applicability was accepted without question, but also without decision, by the court); *see Voices for Independence (VFI) v. Pa. DOT*, 2007 U.S. Dist. LEXIS 72834, 9-10 (W.D. Pa. Sept. 28, 2007) ("Precise engineering specifications for curb ramps are set forth in the [ADAAG], compliance with which is deemed to satisfy the requirements of § 35.151 and the ADA. . . Alternatively, the public entity may depart from the ADAAG standards 'when it is clearly evident that equivalent access' is provided." (cites omitted)); *Kinney*, 9 F.3d at 1072 (reliance without on ADAAG without discussion in the context of street resurfacing and curb ramps; discussion limited to the meaning of "alteration"); *Jones v. White*, 2006 U.S. Dist. LEXIS 61605 at 18 (S.D. Tex. Aug. 29, 2006) (court applied ADAAG standards to curb ramps); *Lonberg*, 2007 U.S. Dist. LEXIS 38824 at 12 (relies on the general language in 28 C.F.R. § 35.151 that ADAAG or UFAS must be followed and applies UFAS to the curb ramps at issue without further discussion and apparently without dispute as to the applicability of UFAS to curb ramps in the public right-of-way); *Californians for Disability Rights*, 249 F.R.D. at 348-349 (in a case involving curb ramps, among other facilities, defendants argued a named plaintiffs was an inadequate class representative for reasons that included his lack of awareness of ADAAG standards).

Notwithstanding the statements on behalf of the United States in its *amicus curiae* brief in the Barden v. City of Sacramento case, and notwithstanding the language in the recent Chapter 6 of the Justice Department's Tool Kit, a review of Department of Justice technical assistance letters related to curb ramps and of those portions of settlement agreements between the United States (represented by

the Justice Department) and local governments[11] that pertain to curb ramps discloses that the standards in ADAAG are used and imposed.[12]

Thus, it is understandable if private plaintiffs and their attorneys insist that the standards in section 4 of ADAAG apply to curb ramps and sidewalks within the public right-of-way and a municipality should not be surprised if they are presented with that position.

PROWAC should at some point be published for public comment, revised following comments[13] and eventually approved as official Title II standards for public rights-of-way. Until then, they are not enforceable and only provide guidelines. However, with the recommendations from both the U.S. Department of Justice and the Federal Highway Administration that they be followed as best engineering practices, compliance with those standards is very defensible, particularly if the standards in section 4 of ADAAG don't fit a particular situation in a public right-of-way.

In the meantime, with the exception of detectable warnings (truncated domes), compliance with section 4 of ADAAG is a good safe harbor, with guidance from PROWAC when there is a gap in the provisions in ADAAG.

In addition, in the context of an alteration, ADAAG allows for departure from the prescribed standards in cases of technical infeasibility. Section 4.1.6(1)(j) of ADAAG provides "if compliance with 4.1.6 is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible." In this context, "technically infeasible" is defined to mean that the alteration,

> "has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility."

Section 4.1.6(3)(a) further provides, relative to ramps and curb ramps:

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[11] These documents can be found through the FOIA page of the Justice Department's ADA web pages: http://www.ada.gov/search.htm.

[12] The author did not have an opportunity to check to see whether the language as to applicable standards has changed in technical assistance letters or settlements since publication of Chapter 6 of the Tool Kit.

[13] It is fairly clear that the standards in PROWAC still do not include provisions applicable in all situations that may arise and have some design and/or engineering issues that probably will and should be debated and addressed before they are finalized.

> "(a) Ramps: Curb ramps and interior or exterior ramps to be constructed on sites or in existing buildings or facilities where space limitations prohibit the use of a 1:12 slope or less may have slopes and rises as follows:
>
> (i) A slope between 1:10 and 1:12 is allowed for a maximum rise of 6 inches.
>
> (ii) A slope between 1:8 and 1:10 is allowed for a maximum rise of 3 inches. A slope steeper than 1:8 is not allowed."

The maximum deviations that are permitted from the standard 1:12 (8.33%) running slope still do not work in many situations. Topographic features and structural constraints in the public right-of-way present challenges that cannot be met within those limits, particularly when a street already exists with adjacent structures.

The court's decision in *Schonfeld, supra*, based on technical infeasibility seems to recognize that greater latitude for departure from the given standards may be required within the public right-of-way than for a facility within a site. The court found that curb ramps which had "linear slopes greater than 8.33% and in some cases as much as 17 – 18%," where the steeper slopes were a consequence of technical infeasibility, did not violate the applicable regulations. *Schonfeld,* 978 F. Supp. at 1341.

In Paragraph 16 of the "Fourth Stipulation Regarding Consent Decree and Order Filed May 5, 1997 and Order" in McConnell v. City and County of Honolulu, *supra*, the parties reported that a "usability assessment" of curb ramps by wheel chair users concluded that "[R]amps are usable with up to a 14.0% - 14.2% slope. The average usable slope criterion was determined to be 13.5%." As a result, the parties stipulated and the court ordered that reconstruction of previously installed ramps would not be required for ramps with running slopes less than 13.5%.

Although the PROWAC standards were drafted for public rights-of-way, they do not include a provision that defines or otherwise addresses technical infeasibility in the context of public right-of-way. Nevertheless, some provisions deal specifically with the unique topography of streets and road ways.

R301.4.2 Street or Highway Grade, provides: "Where the walkway of a pedestrian access route is contained within a street or highway border, its grade shall not exceed the general grade established for the adjacent street or highway." In addition, the Advisory to R303.2 [Curb Ramp] Types states:

> "It will sometimes be necessary to limit the run of a parallel or perpendicular ramp in order to avoid 'chasing grade' indefinitely. In new construction at standard curb heights, required level landings can provide a datum for measuring most curb ramp slopes.

> "Limiting new ramps to an 8.3% slope on steep routes will result in a slight increase in grade on the balance of the route, but will facilitate street crossing and a timely and manageable ascent to the sidewalk, particularly important when crossing in traffic."

Thus, PROWAC recognizes that sidewalks may not be limited to 5% or 8.3% but will follow the adjacent road grade. This is important because it reinforces the argument that a sidewalk does not become a "ramp" when its running slope exceeds 5%. If a sidewalk is not a ramp, the requirements for ramps in section 4.8 of ADAAG and in R406 of PROWAC[14] that there be level landings and hand rails do not have to be installed in public rights-of-way.

For pedestrian crossings, R305.2.2.3 Midblock Crossings provides, "The cross slope at midblock crossings shall be permitted to be warped to meet street or highway grade." Although this provision does not address the how a midblock curb ramp may intersect with the street or highway, the physics of the situation and the logic of the provision should lead to a conclusion that the curb ramp may warp at the bottom to meet the street or highway grade. Unfortunately, PROWAC is silent relative to possible warping or other alteration of ideal curb ramp dimensions for non-midblock curb ramps that meet, and street crossings that cross, streets with a grade in excess of 2%.

Detectable warnings (truncated domes)

Sections 4.7.7 of ADAAG requires detectable warnings the whole width and length of a curb ramp.[15] In contrast, PROWAC provides for the detectable warnings be 24 inches in length (R304.1.4) and usually placed adjacent to or near the curb line (R304.2) (placement will depend on the configuration of the ramp and curb line). The predecessor draft guidelines for public rights-of-way drafted by the Access Board had the same requirement. The position of the Access Board has been that this layout satisfies the "equivalent facilitation" clause (section 2.2) in ADAAG, which permits departures from the guidelines that provide equal or greater access. The Board "believes that the specifications for detectable

[14] The R406 provisions for ramps are part of "Chapter R4: Supplementary Technical Provisions," as opposed to being part of the "Chapter R3: Technical Provisions" that has the technical standards for pedestrian access routes and curb ramps.

[15] The requirement for detectable warnings in section 4.7.7 (and in 4.29.5 and 4.29.6) was suspended until July 26, 2001 (28 C.F.R. § 36.407), for reasons that included concerns about specifications, the availability of products for placement of the truncated domes, and issues related to maintenance such as snow removal. Issues relative to maintenance and snow removal remain, and there may be disagreements as to how the warning strips should be oriented when the curb ramp meets the street and/or cross walk at an angle or with a curved edge.

warnings in the draft rights-of-way guidelines provide a level of access substantially equal to or greater than that currently specified by ADAAG." http://www.access-board.gov/adaag/dws/update.htm

Of note is that the Federal Highway Administration also has approved the 24 inch dimension for detectable warnings and state transportation departments, as well as municipalities receiving federal highway funds, may be required to comply for curb ramps within state public rights-of-way:

> "When detectable warnings are installed on curb ramps, only the lower 610 mm (2 ft) of the curb ramp should be covered rather than the entire ramp to maximize detectability and minimize the negative impacts on people who rely on wheeled devices for mobility. In some cases, it may be beneficial to set the detectable warning back 152 mm to 200 mm (6 in to 8 in) from the curb. This allows wheelchair users to gain momentum before traveling over the truncated domes. It also gives people with vision impairments additional time to react to the detectable warning before they reach the street. Smooth surfaces should be provided adjoining to the detectable warning to maximize contrast. For example, it is better to install smooth concrete next to raised tactile surfaces than aggregate concrete because the change in texture is easier to detect." Chapter 6 of the FHWA's "Designing Sidewalks and Trails for Access; Part II of II: Best Practices Design Guide," available at: http://www.fhwa.dot.gov/environment/sidewalk2/sidewalks206.htm#det

What are the issues that arise in the design and construction of accessible sidewalks and curb ramps?

Engineers for a municipality still have to figure out how to make sidewalks and curb ramps accessible. Until standards specific to public right-of-way are approved, compliance with the standards in Section 4 of ADAAG are a good safe harbor. The biggest difficulties with the application of Section 4 standards to public right-of-way stem from the fact that sidewalks run along side existing streets. Sidewalks often have or need to have a running slope that matches the grade of the adjacent street. A curb ramp that connects a sidewalk to a street crossing needs to meet the street smoothly, without excessive cross slope, regardless of the running grade of eh street at the point where the bottom end of the curb ramp meets the street. Although ADAAG acknowledges possible difficulties due to geographic or other structural obstacles and allows some variations from the ideal standards in those cases, the actual ADAAG standards nevertheless was written for a ideal and flat world, or for one where the builder isn't constrained by the width of ROW easements, or by the reality of existing streets on hilly terrain. It is unlikely that the eventual standards for public rights of way will be more stringent or difficult that the standards in ADAAG. The draft PROWAC are very similar to the provisions in section 4 in most relevant aspects. Therefore, if a municipality uses ADAAG as a safe harbor for design and

construction and your engineers and contractors are able to comply with the ADAAG, you will have created an accessible system of sidewalks for which the design standards will be beyond dispute.

If a city has undertaken to make its sidewalks and curb ramps accessible, why would private plaintiff lawsuits be a concern?

Cities that have undertaken to make their sidewalk systems accessible since 1992 in accordance with ADA and Section 504 still have found themselves subject to private plaintiff lawsuits because of how their curb ramps have been designed and/or constructed. Plaintiffs have claimed and successfully argued that the design and construction have not complied with the accessibility requirement of ADA. *See, e.g., Deck II*, 76 F. Supp. 2d at 823 (plaintiffs documented 302 curb ramps constructed between 1996 and 1998 that did not comply with ADAAG standards); *Lonberg*, *supra* (city constructed curb ramps to comply with UFAS but private plaintiffs identified 189 curb ramps that did not comply with UFAS); *Kinney*, *supra*; *Voice for Independence*, *supra*; *Schonfeld*, *supra*.

A review of cases such as the foregoing leads to the following observations:

(1) When a municipality has design and construction standards that have allowed non-accessible curb ramps to be built, that practice tends to continue to the present unless an intervening event has caused a change; and
(2) A municipality that accepts without challenge the claim of private plaintiffs that ADAAG or UFAS apply, as written, to public rights-of-way may be in a difficult position to argue to a court why curb ramps it has built that do not match the measurements in ADAAG or UFAS actually satisfy the accessibility requirements 28 C.F.R. § 35.151(e).

How to address each of the foregoing concerns is discussed below.

Can plaintiffs sue a public entity now for correction of curb ramps constructed in the 1990s?

The answer depends on the federal circuit the municipality is in.

In *Voices for Independence*, *supra*, the plaintiffs sued the Pennsylvania Department of Transportation ("PennDOT") for its alleged failure to install federally mandated curb ramps along PennDOT highways located in the cities of Erie and Meadville, Pennsylvania. Plaintiffs sought injunctive relief for correction of curb ramps installed since 1992. However, despite having ruled in an earlier case that the "continuing violation" doctrine would apply to allow equitable claims for actions older than two years,[16] in this case the court applied

[16] *Barrier Busters v. City of Erie, Pennsylvania*, No. 1:02cv203 (W.D. Pa.), The

the factors in *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001), and declined to apply the "continuing violation" doctrine to the plaintiffs equitable claims, thus limiting those claims to the same two year period that applied to claims for damages. The court noted that the "continuing violation" doctrine is construed in the third circuit as a "narrow exception" to the timely filing requirement. However, other circuits may not follow the same analysis. *See, e.g., Deck v. City of Toledo (Deck I)*, 56 F. Supp. 2d 886, 894-95 (N.D. Ohio 1999), in which the Court of Appeals for the Sixth Circuit held that the City of Toledo's failure to oversee contractors who installed noncompliant curb ramps could constitute a continuing violation as an "over-arching policy of discrimination" under the ADA, even though there was no specific intent to discriminate.[17]

Nevertheless, in *Voices for Independence* the court went on to hold that the two-year limitations period did not start to run at the time a curb ramp was constructed. Rather, the court applied the federal "discovery rule," that a cause of action as to any particular plaintiff accrued when the plaintiff knew or should have known of the injury which forms the basis of his or her Title II claim. In other words, the cause of action for a particular plaintiff accrued when he or she discovered or should have discovered that a particular curb face denied him or her proper access in violation of the ADA. The court went on to observe, "As the foregoing suggests, the date on which a cause of action may have accrued is unique as to any particular plaintiff and, indeed, as to any particular curb cut." *Id.*, 2007 U.S. Dist. LEXIS 72834 at 49-50. Citing *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 108 (3d Cir. 2003), the court also noted that expiration of the statute of limitations is an affirmative defense and that the defendants would bear the ultimate burden of proof on the matter. *Id.*, 2007 U.S. Dist. LEXIS 72834 at 50.

What can a municipality do to try to prevent private plaintiff lawsuits, both relative to past installations and relative to current and future installations?

If a municipality has installed or altered sidewalks and curb ramps since January 26, 1992, it may be vulnerable to suit if the measurements do not currently meet the standards in ADAAG or UFAS. If the municipality resurfaced streets and

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author could not locate a copy of the opinion; however, the *amicus curiae* brief of the United States in support of the plaintiffs' position is available at: http://www.ada.gov/briefs/adabrief.htm#anchor-Title%20II).

[17] The decision in *Deck I* is arguably inconsistent with the decision of the Court of Appeals for the Sixth Circuit in *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003), that continuing violations based on a "longstanding and demonstrable policy of discrimination" require a plaintiff to establish, by a preponderance of the evidence, "that some form of intentional discrimination against the class of which plaintiff was a member was the [defendant's] standard operating procedure." *Sharpe*, 319 F.3d at 269, quoting *EEOC v. Penton Industrial Publishing Co.*, 851 F.2d 835, 838 (6th Cir. 1988).

didn't install curb ramps to make the street crossing accessible, it also is vulnerable to suit. However, if the municipality designed and constructed the sidewalks and curb ramps to be accessible (most likely designed to meet the standards in ADAAG or UFAS), if the municipality diverged from those accessibility standards when the physical and structural constraints of the location precluded full compliance but still built the sidewalk or curb ramp to be as fully compliant and accessible as possible, and if the municipality created and has kept documentation that these facilities were properly designed and constructed, the municipality likely won't attract attention and a lawsuit, or will be able to defend successfully against such a lawsuit. If ADAAG (or UFAS) doesn't apply to sidewalks and curb ramps in the public right-of-way, what is the best course of action for a municipality to take to determine if the curb ramps or sidewalks it has already installed were been done according to standards and in a manner that does or does not provide access? If corrections need to be made, how should that be done?

Examination of past installations also may be a good indicator of whether the municipality's current program is adequate or whether changes may be needed to improve accessibility. In either case, the municipality also should examine whether it already has or needs to develop better documentation of what it has done so that the municipality has records it can use to assist it in its defense against lawsuits that may be filed.

Highlights of standards for the ideal ramp where no variation is required

The following highlights some provisions of the ADAAG (or UFAS) standards. Where PROWAC is different, the difference is noted.

The running slope (the slope of the path of travel) of an access route cannot exceed 1:20 (5%) or it becomes a "ramp," triggering the requirements of section 4.8, which include level landings every 30 feet and hand rails. ADAAG sections 4.3.7 and 4.8.1. NOTE: although there may be locations where level landings and handrails may be a good idea, consideration needs to be given relative to future maintenance and repair requirements for the hand rails, and whether the hand rails obstruct or otherwise interfere with pedestrian access to the sidewalk. In contrast, as discussed above, PROWAC specifically allows the running slope of a sidewalk to match the "general grade" of the adjacent street or highway and a grade in excess of 5% this apparently does not transform the sidewalk into a ramp. R301.4.2 Street or Highway Grade.

The maximum cross slope (the slope perpendicular to the path of travel) for all sidewalks, ramps, curb ramps and level landings is 1:50 or 2%. Sections 4.3.7, 4.8.4 and 4.8.6. Except for midblock street crossings for which the cross slope may match the street grade, R305.2.2.3 and R303.2.2.3, PROWAC is the same.

The minimum width for all sidewalks, ramps and curb ramps is 36". Sections 4.3.3, 4.7.3 and 4.8.3. A level landing must be the width of the ramp and a minimum of 5' deep, and if there is a change in direction it must be 5' by 5'. Section 4.8.4. For curb ramps, PROWAC allows for landings that are 4' by 4'. R 303.2.1.3 and R303.2.2.3.

The maximum running slope of a curb ramp (or other ramp) is 1:12 or 8.33%. PROWAC sets the maximum running slope for a curb ramp at 8.3% in R303.2. The maximum running slope for a ramp also is 8.3%. R406.2.

The transition between the curb ramp and the gutter or street must be a flush, i.e., no "lip." ADAAG section 4.7.2; PROWAC R303.3.3.4.

The "counter slope" of the gutter or street at the foot of a curb ramp or landing cannot exceed 5%. ADAAG section 4.7.2; PROWAC R303.3.5.

As discussed above, there needs to be detectable warnings – both tactile and visual – either full width and length of the ramp, or full width and 2' length. ADAAG sections 4.7.7 and 4.29.2; PROWAC R304.

If a municipality has been installing curb ramps that don't match ADAAG measurements, and if site constraints are not the reason, the municipality may want to develop a plan for correction and undertake a program to reconstruct those curb ramps. Ideally, if it took X number of years to put them in wrong, the normal cycle for street resurfacing may allow them to be corrected within X years, if not sooner. Certainly any new curb ramps should be installed correctly. Where site conditions require variations, document the variation and the reasons. Also, document the measurements at the time of installation in case tree roots, frost heaves or some other force of man or nature disturbs the slopes of the installation.

When designing sidewalks, cross walks and curb ramps that do not fit the ideal measurements, design engineers should look at what they can do to meet or come close to the ideal standards before they justify what they cannot do

A good example of a steps such as the foregoing working to defeat a private plaintiffs lawsuit (as well as any fee-shifting) is found in *Schonfeld*, *supra*. The court found that the City of Carlsbad "has constructed curb ramps where necessary to provide access along highly-trafficked routes, has allocated funding and established a schedule for future curb ramp construction, and is addressing the particular intersections identified by plaintiffs as well as other intersections in accordance with ADA priorities." 978 F. Supp. at 1341. Although the plaintiffs identified several curb ramps that didn't match the measurements required by section 4 of ADAAG, the court found that,

> "[P]laintiffs have failed to identify any specific locations in which alteration or installation of curb ramps begun after January 26, 1992 has resulted in non-ADA-compliant ramps. On the contrary, defendant has offered evidence that curb ramps installed after January 26, 1992 meet ADAAG standards, taking into account site infeasibility considerations." *Id.* (relying on declarations pertaining to technical infeasibility that were filed by the city).

Although a municipality is not required to make all existing sidewalks accessible, 28 C.F.R. § 35.150(b)(1), and may be excused from an undertaking to remove a barrier curb where there hasn't been any street or sidewalk alteration if it would impose "undue financial and administrative burdens," 28 C.F.R. § 35.150(a)(3), those provisions do not apply when a street or sidewalk alteration triggers the need to install a curb ramp for accessibility.

A plan for compliance that includes a plan for correction of prior installations may reduce a municipality's liability for plaintiffs' attorney fees

A municipality that has a comprehensive ADA compliance plan in place that it is following should decrease the chances of a lawsuit under the ADA by private plaintiffs. If there is such a lawsuit, having and following such a plan should avoid or minimize both the probability of success by the plaintiffs and the municipality's liability for payment of plaintiffs' attorney fees under the ADA fee-shifting provision.

Attorney's fees are available to prevailing parties under numerous federal civil rights statutes, including the ADA (42 U.S.C. § 12205). The fee-shifting provision in 42 U.S.C. § 12205 states that "the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." This formulation is essentially the same other federal fee-shifting provisions and is interpreted similarly. *See, Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (enumerating attorney's fee statutes)*; Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005) (decision under 42 U.S.C. § 12205 guided by decisions in 42 U.S.C. § 1988 cases); *Robins v. Scholastic Book Fairs*, 928 F. Supp. 1027, 1035 (D. Or. 1996) (costs under 42 U.S.C. § 12205 considered to be the same as costs under 42 U.S.C. § 1988). 42 U.S.C. § 1988 provides for fee shifting for prevailing private plaintiffs in actions under various civil rights statutes. Courts have treated these various fee-shifting provisions interchangeably and have constructed a single line of jurisprudence that applies to all similar provisions. *See*, *Hensley v. Eckerhart*, 461 U.S. 424, 433 n7 (1983).

A party is deemed to have prevailed for purposes of fee-shifting where there has been a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-793 (1989). Material alteration

includes an enforceable adjudication on the merits as well as relief in the form of a judicially-enforceable consent decree or settlement. *See Buckhannon*, 532 U.S. at 604 (2001). However, the Supreme Court has stated that "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to affect the behavior of the defendant toward the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). The Court summarized the definition of "prevailing" in this way: "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.*

In a situation where a municipality has an ADA compliance plan already in place and a consent decree merely makes a part of that plan judicially enforceable, the municipality would be in a good position to argue that the plaintiff has received no direct benefit at the time of the consent decree and consequently is not a prevailing party for purposes of fee-shifting. Although these exact circumstances have not been addressed, several courts have held that where a plaintiff receives only a declaratory judgment or the possibility of future injunctive relief a direct benefit may not exist. *See Cady v. City of Chicago*, 43 F.3d 326, 330 (7th Cir. 1994) (injunctive relief that vindicates only "a generalized interest in having the government obey the law" is not a direct benefit for fee-shifting purposes); *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (finding no direct benefit where prisoner plaintiffs obtained modification of prison policy but one had been discharged and the other died, making direct benefit impossible); *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1278 (11th Cir. 1999) (finding no direct benefit where plaintiff was granted an injunction prohibiting county from further using a certain psychological test that plaintiff had already taken).

In many cases where a plan exists, however, the plaintiff will still obtain some relief, whether by expansion, revision, or acceleration of the plan or by money damages. In such a case, the plaintiff may be deemed to have prevailed for fee-shifting purposes. However, simply prevailing does not guarantee a grant of attorney's fees. Like other fee-shifting statutes, the ADA provides that the court may award reasonable fees. 42 USC § 12205 (emphasis added). The Supreme Court has interpreted this language to give wide discretion to the trial courts, noting that the degree of a plaintiff's success is the most important factor in determining the reasonableness of fees, and that where a plaintiff's success is limited, a court may award low fees or no fees. *See Farrar*, 506 U.S. at 115. With this principle in mind, a municipality may significantly curtail the degree of success upon which a plaintiff may base a claim for attorney's fees by enacting a comprehensive ADA compliance plan before litigation. The Supreme Court has held that where a plaintiff achieves only limited success, the trial court should award only those attorney's fees that are reasonable in relation to the successful claims and should exclude fees for time spent on unsuccessful claims. *See Hensley*, 461 U.S. at 440. A comprehensive compliance plan reduces the claims

available to a plaintiff, allowing a municipality to proactively limit the plaintiff's degree of success in litigation, and consequently limit liability for attorney's fees.

Furthermore, if a municipality has a viable compliance plan, it may be in a position to make a quick settlement offer and in so doing curtail potential fees. The Supreme Court has ruled that under rule 68 of the Federal Rules of Civil Procedure, where a plaintiff rejects a valid settlement offer in a civil rights case and subsequently recovers less than the offer, the court should exclude attorney's fees accrued after the offer was made. *See Marek v. Chesny*, 473 U.S. 1, 11-12 (1985).

The existence of a plan in progress also allows the municipality to attack a plaintiff's claim on the grounds of mootness and frivolousness. Given the length of time required for most lawsuits, a comprehensive ADA compliance plan being executed in its normal course may achieve the plaintiff's objective while in the course of litigation, thus resulting in a dismissal for mootness. *See, e.g. Am. Council of the Blind v. Wash. Metro. Area Transit Auth.*, 133 F. Supp. 2d 66, 74 (D.D.C. 2001) (where efforts to conform to ADA were ongoing at time of suit, case was dismissed as moot when train platforms become compliant while litigation was pending – no attorney's fees were awarded). In extremely rare cases, the court may even award attorney's fees to defendants where plaintiffs proceed with an action that is frivolous, unreasonable, or without foundation. *Fidelity Guarantee Mortg. Corp. v. Reben*, 809 F.2d 931, 935-936 (1st Cir. 1987) (court awarded attorney's fees to defendant under 42 USC § 1988 where plaintiff continued to litigate after it became clear its claims were baseless).

A comprehensive ADA compliance plan also gives a municipality leverage in negotiation, including negotiation of attorney's fees. The Supreme Court has held that plaintiffs may waive their right to attorney's fees or negotiate specific attorney's fees as a condition of settlement as long as the municipality does not have a statute, policy or practice of demanding such a waiver as a condition of settlement. *See Evans v. Jeff D.*, 475 U.S. 717, 730-741 (1986). Disposing of attorney's fees issues in settlement helps reduce the cost and uncertainty inherent in the litigation process.

Some considerations if/when settling a class action lawsuit

If you are faced with a class action lawsuit, you may want to consider a settlement that does not allow class members to opt out. This will protect against possible inconsistent cases relative to whatever equitable relief is negotiated or decided by the court. This option is limited to cases in which claims for damages are not involved. *See Molski v. Gleich*, 318 F.3d 937, 947-951 (9th Cir. 2003) (upheld certification of the class because injunctive relief predominated, but held that members in the class had to be allowed to opt out because of the substantial monetary damages at issue under California law). The remedial provisions of Title II of ADA and of the Rehabilitation Act allow compensatory and punitive

damages for a private plaintiff only if the plaintiff can show there was intentional discrimination. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 533-534 (1999); *Sandusky*, 133 F. Supp. 2d at 593. Therefore, unless there has been a claim for damages based on allegations of intentional discrimination, there may be little risk of a separate lawsuit for damages if damages are excluded from the settlement.

Rule 23(b)(2) of the Federal Rules of Civil Procedure does not preclude a court from allowing class members to opt out. However, where injunctive and/or declaratory relief is the exclusive remedy or where injunctive/declaratory relief predominates over monetary relief, there is a strong policy against an option to opt out. In fact, allowing class members to opt out may be an abuse of discretion. *Thomas v. Albright*, 139 F.3d 227, 233 (U.S.App. D.C. 1998). Recent cases that address Rule 23(b)(2) classes and the reasons for not allowing class members to opt out include *Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst.*, 435 F.3d 639, 651 (6th Cir. 2006); *Ayers v. Thompson*, 358 F.3d 356, 375-76 (5th Cir. 2004); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269 (W.D. Texas 2007) (includes a discussion of the applicable provisions of F.R.C.P. 23(b)). *Eubanks v. Billington*, 110 F.3d 87, 94 (U.S.App. D.C. 1997), has a good discussion of the policy behind precluding opt out in 23(b)(2) classes.

As another measure to avoid the possibility of inconsistent decisions relative to design and construction standards, you should try to include settlement of the state law claims in your settlement. The federal court may have separated and dismissed any claims under your state's disabilities rights statute that were included in the complaint. Federal courts are reluctant to rule on state law issues. However, a settlement under federal law that includes only equitable relief and pertains only to design and construction standards for facilities should have little or no conflict with state law design and construction requirements for those facilities. If there is any inconsistency, that should be resolved as part of the settlement. If the state law allows for claims for damages, the exclusion of damages from the settlement still leaves the option open for a class member to sue for damages and the settlement of the class claims for equitable or declaratory relief would leave that option open.

Conclusion

Installing curb ramps correctly at the outset is cheaper than going back to fix them later. If curb ramps have been installed incorrectly, the municipality should consider developing a plan to fix them. If this can be done as part of normal street resurfacing and/or sidewalk repair programs, it may not be much of an additional financial burden. If there isn't one already, considering adding a special request program so that members of the disabilities community and others can request accessible ramps in additional locations. The result will be a more accessible system of sidewalks within the municipality with the added benefit that the risks of a lawsuit by private plaintiffs and of having to pay attorney fees should be reduced.