

Tech Topic

Sidewalks, ADA, and Civil Suits

Like the rest of the transportation network, sidewalks can pose safety concerns under even the best of circumstances, and sidewalks are a source of litigation for a variety of reasons. Historically, the classic case involved a sidewalk that was to some degree deteriorated and a pedestrian that tripped and sustained some injury, real or imagined, severe or not. More recently, civil suits centered on the Americans with Disabilities Act (and related statutes, regulations, and standards) have refocused attention for many local governments on the condition and accessibility of their sidewalks.

Like their pavements, signs, and other components, local governments generally wish to have a robust pedestrian system that is in good condition and responsive to the needs of its residents and visitors. But, just as with those other transportation components, there is rarely the available funding, right of way, or other resources necessary to achieve all those goals, and priorities must inevitably be set. Some of the landmark case law related to ADA requires that local agencies adjust those priorities to provide reasonable accommodation for all pedestrians, both able-bodied and disabled.

President Bush, speaking at the 1990 signing of the ADA, predicted limited tort litigation, saying *"...I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred."* Nonetheless, tort liability cases have been prevalent in the courts and have demonstrably impacted planning and design of all manner of public facilities. Regardless of where one comes down on these cases, local governments are well served to be aware of them and develop transition plans to comply with the standards of the U.S. Access Board. The synopses below should not be considered legal interpretation or advice; instead, these descriptions are an attempt to highlight significant finds of the Courts and agencies should consult with their Counsel to determine how these and other cases may bear on them.

In *Kinney v. Yerusalim* (1993), Kinney et al. pursued complaints against the Secretary of the Pennsylvania Department of Transportation (Yerusalim) and the Philadelphia Streets Department and among other findings, the Court of Appeals for the Third Circuit established that the resurfacing of a city street constituted an "alteration" in the language of ADA and as such, the City was ordered to install curb ramps on those portions of streets where resurfacing would take place (including retroactive requirements for those streets that had been resurfaced since January 26, 1992, the effective date of ADA). Also, the Court agreed that the "undue burden" language in ADA applies only to existing facilities and does not apply once alterations take place; hence, the cost of providing accessible ramps was of no issue once the resurfacing was established as an alteration.

In *Barden v. City of Sacramento, California* (2004), the final settlement set a nationwide precedent that required all cities and public agencies to make public sidewalks accessible. Under the settlement, the City will allocate 20% of its annual Transportation Fund for the ensuing 30 years to make pedestrian rights of way accessible to those with vision and/or mobility disabilities. This effort went beyond mere

curb ramps and included removal of barriers obstructing the sidewalk, narrow pathways, abrupt level changes, excessive cross slopes, and overhanging obstructions, as well as improvements to crosswalk access. Upgrades to ramps conducted as part of alterations (such as resurfacing) would be completed outside of this 20% allocation (i.e., in addition to the allocation).

Californians for Disability Rights, Inc. (CDR) et al. v. California Department of Transportation (Caltrans) et al. (2008) is an example where the Court addressed the question of sovereign immunity under the 11th Amendment to the Constitution. Caltrans offered an “invitation to ‘overrule’ Ninth Circuit precedent” by citing dissenting opinions in two Ninth Circuit decisions as authority, but the Court felt that to do so would be to ignore a host of Ninth Circuit decisions that “expressly find a valid abrogation in claims arising under Title II of the ADA.” In other words, the Court has determined that this matter has been satisfactorily settled and ADA suitably trumps the 11th Amendment. As importantly, this case began with CDR’s assertion that, because Caltrans had failed to survey its 2,500 miles of sidewalk, it could not know what access barriers exist and had therefore failed systematically to remedy barriers (such as missing or inadequate curb ramps, a lack of detectible warning devices, broken or uneven sidewalks, sidewalks that are too narrow, etc.). In essence, the plaintiffs have argued that the lack of the survey or inventory and the lack of a Transition Plan constitute a violation of ADA by themselves.

Here at home, the July 16, 2004 voluntary settlement between the Community Legal Aid Society, Inc. (CLASI), the United States Department of Justice (USDOJ), and the Delaware Department of Transportation (DelDOT) agreed to retrofit 100 curb ramps each year, in addition to any curb ramps installed or upgraded pursuant to its normal construction practices (which now include curb ramp upgrades whenever pavement alterations take place), until such time as the estimated 1,500 non-conforming sites have been remedied.

Suggested Further Reading and References:

- U.S. Code, Title 42, Chapter 126 (Equal Opportunity for Individuals with Disabilities, ADA): http://www.law.cornell.edu/uscode/42/usc_sup_01_42_10_126.html
- U.S. Access Board: <http://www.access-board.gov/>
- Remarks of President George H.W. Bush at the signing of the Americans with Disabilities Act, <http://www.eeoc.gov/ada/bushspeech.html>
- Opinion of the Court, Kenney v. Yerusalim, <http://www.access-board.gov/provac/yerusalim.htm>
- Barden v. Sacramento: <http://www.dralegal.org/downloads/cases/barden/settlement.txt>
- CDR v. Caltrans: http://www.dralegal.org/downloads/cases/caltrans/Caltrans_Order.pdf
- CLASI v. DelDOT settlement: <http://www.ada.gov/deldot.htm>



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