IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 93-1168

ELIZABETH KINNEY, et al.

Plaintiffs-Appellees

v.

HOWARD YERUSALEM, et al.

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF JURISDICTION

The district court entered its final judgment in this case on February 2, 1993 (J.A. 8). Defendants filed a timely notice of appeal on February 18, 1993 (J.A. 6). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291. The district court's jurisdiction was based upon 28 U.S.C. 1331, 28 U.S.C. 1343(3), and 28 U.S.C. 1343(4).

INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcement of the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. (ADA). One of the express purposes of the ADA, 42 U.S.C. 12101(b)(3), is to "ensure that the Federal Government plays a central role in enforcing the standards established in [the Act] on behalf of individuals with disabilities."

Section 204 of the ADA requires the Attorney General to promulgate regulations to implement Title II, which prohibits discrimination in the services, programs, and activities of a

public entity, 42 U.S.C. 12134. Pursuant to that authority, the Attorney General promulgated the regulations that are the subject of this appeal. As far as we are aware, this will be the first appellate decision to interpret those regulations.

STATEMENT OF THE ISSUES

1. Whether resurfacing of a street is an "alteration" that requires a public entity to install curb ramps, pursuant to 28 C.F.R. 35.151(e)(1), a regulation implementing section 202 of the Americans with Disabilities Act, 42 U.S.C. 12132 (ADA).

2. Whether there is an "undue burden" defense for violation of the ADA regulations requiring public entities undertaking alterations of existing facilities to make the altered facilities accessible to persons with disabilities.

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

Section 202 of the ADA, 42 U.S.C. 12132, provides:

> [n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The statute directed the Attorney General to promulgate regulations implementing this very general prohibition against discrimination, 42 U.S.C. 12134(a). With two exceptions (explained below), Congress required that the regulations be

consistent both with the ADA and with the original coordination regulations issued by the Department of Health, Education, and Welfare in 1978 under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, concerning nondiscrimination based on

handicap by recipients of Federal financial assistance, 42 U.S.C. 12134(b).1/ With respect to program accessibility in existing facilities and communications, Congress required that the regulations be consistent with the Department of Justice Section 504 regulations applicable to federally conducted activities, which are codified at 28 C.F.R. Part 39, ibid.

In accordance with this mandate, the program accessibility regulations promulgated by the Attorney General follow the approach of the Section 504 regulations in distinguishing between existing facilities, on the one hand, and new construction and alterations, on the other, see 56 Fed. Reg. 35708, 35710 (July 26, 1991).2/ "[B]ecause the cost of retrofitting existing facilities is often prohibitive," id. at 35708, the regulations regarding such facilities require that each service, program, or activity conducted by a public entity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities, 28 C.F.R. 35.150(a). They do not require a public entity to "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service,

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1/The HEW regulations are now codified at 28 C.F.R. Part 41.

2/Roads are included within the definition of "facility." 28 C.F.R. 35.104.

program, or activity or in undue financial and administrative burdens," 28 C.F.R. 35.150(a)(3).

In contrast, the regulations are more stringent concerning new construction and alterations of existing facilities. Where alterations are commenced after the effective date of the ADA,

> [e]ach facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of 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 * * *.

28 C.F.R. 35.151(b). In addition, the regulations specifically address the installation of curb ramps. In relevant part, they require, 28 C.F.R. 35.151(e)(1), that

> [n]ewly 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.

B. Procedural History

Individuals with disabilities who live and work in the City of Philadelphia (City) and Disabled in Action of Pennsylvania, a non-profit organization of persons with disabilities, filed this class action against the Secretary of the Pennsylvania Department of Transportation (PennDOT) and the Commissioner of the Streets Department of the City seeking to require the City to install curb ramps on all streets that have been resurfaced since January 26, 1992, the effective date of the ADA.3/

3/Plaintiffs have settled their claims against PennDOT.

The parties filed cross-motions for summary judgment. Plaintiffs contended that resurfacing is an alteration of the street within the meaning of 28 C.F.R. 35.151(e)(1). The City argued that since resurfacing affects only the street, it does not trigger an obligation to alter the curb. Alternatively, the City argued that, if resurfacing is an alteration within the

meaning of the regulation, the City is entitled to show that installation of curb ramps would result in an undue burden, under 28 C.F.R. 35.150(a)(3), and is therefore not required.

On February 2, 1993, the district court granted judgment for the plaintiffs as to every City street where bids for resurfacing were let after January 26, 1992.4/

C. Facts

1. Consequences of lack of curb ramps.5/

In the City of Philadelphia, curbs without curb ramps at street intersections "present a major barrier and obstruction" for persons with disabilities who use wheelchairs, walkers, or crutches (J.A. 182).6/

4/Plaintiffs are not appealing the court's rejection of their claim that curb ramps are required on all streets on which resurfacing was performed after the effective date of the ADA, regardless of when bids were let for the job.

5/We use the term "curb ramps" throughout this brief because the regulations require "curb ramps or other sloped areas." 28 C.F.R. 35.151(e). Curb ramps are also sometimes called "curb cuts." For purposes of the ADA regulations, the term "curb ramp" includes both built-up curb ramps and ramps cut from the curb (J.A. 175 (Fig. 12 & 13)).

6/Exhibit R is the Declaration of Erik Von Schmetterling, M.D., the President of Disabled In Action of Pennsylvania.

The front wheels of a wheelchair are very sensitive to obstacles (J.A. 183). Thus, a wheelchair may overturn when the user must attempt to navigate a curb to travel between a street and a pedestrian walkway, causing injury to the user (ibid.).7/ Sometimes, if a user attempts to ride a wheelchair over a curb without a ramp, one set of wheels may become stuck on the uncut curb and disable the wheelchair (id. at 184-185). The wheelchair

occupant then must wait until a passerby, who is willing and able, can dislodge the chair from the curb (ibid.). Lifting a wheelchair, which can weigh as much as 200 lbs., not including the weight of the occupant, requires considerable strength (id. at 185-186). In addition, there is often damage to the wheelchair, which must be repaired before the user can continue (id. at 184-186).

Because of the absence of curb ramps, wheelchair users often have to ride in the street, which leaves them vulnerable to injury from cars, trucks, and buses (id. at 186-187). Sometimes when a wheelchair user has gained access to a pedestrian walkway by means of a curb ramp at one end of a street, she/he discovers that there is no way to exit the sidewalk at the other end of the block (id. at 187-188). When this happens, the wheelchair user must retrace his/her path to the accessible curb ramp and continue the journey in the street (id. at 188).

7/Even where curb ramps are available, they often do not meet the standards required by the ADA, because they have a "lip" that is too large or are in need of repair (J.A. 183-184, 186).

For individuals with some types of disabilities, being lifted over the curb can cause excruciating pain (J.A. 187). The injuries caused by wheelchair accidents involving curbs result not only in physical pain and additional disability, but also involve the expense of medical bills, loss of income, and repair for the wheelchair (id. at 182, 187).8/

Without curb ramps, persons with disabilities often cannot gain access to private commercial or public buildings, cannot

travel to a bus stop, and cannot use their cars (id. at 188). As a result, such persons often miss or are late for important medical and business appointments or for social or cultural engagements when they encounter curbs that cannot be navigated (id. at 187). They "have great difficulty seeking and retaining employment, traveling for pleasure or work, or partaking in social and cultural activities" (id. at 188).

2. Resurfacing of streets

When the City needs to resurface a street, road or highway, it prepares a "Proposal and Specification" describing the work to be completed and advertises the fact that on a particular date, it will receive bids for that work (J.A. 249-251; J.A. 144). Contractors who are interested in bidding on the job purchase a copy of the "Proposal and Specification" (J.A. 251-252). It refers to specifications governing the project (J.A. 144). Those which are relevant to street resurfacing

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8/In extreme cases, persons with disabilities have died from complications of surgery required because of wheelchair accidents involving curbs (J.A. 182).

include Standard Specifications for Paving and Repaving, 1967 (J.A. 117) and Standard Construction Items, 1990 (J.A. 122) (J.A. 248, 272). Bids are received, and the City notifies the responsive low bidder that she/he has been awarded the contract (id. at 256-257).

In addition to awarding construction contracts, the City also maintains a force of 300 people that performs work on the streets, including some resurfacing, minor pothole repairs, small patching, and normal street maintenance (id. at 279, 300-301,

314-315; J.A. 152-158).

There are 2400 miles of streets, roads, and highways within the City (J.A. 268-269). In terms of construction, the upper layer of the streets are asphalt, the base under the asphalt is concrete, and the sub-base is stone (id. at 275, 277). Resurfacing means putting on another surface (id. at 295). In some resurfacing projects, new asphalt is simply laid over the old (id. at 221, 295, 316). In other cases, a process called "milling" is completed before new asphalt is laid (id. at 261, 278-279, 316).

"Milling" involves removing the upper 2/3 1/2 inches of asphalt (or bituminous paving) by a piece of heavy machinery "in one continuous forward motion by planing, grinding or cutting" (J.A. 125-127). It may be done in 7 or 8 foot widths from each curb or for the full width of the street (ibid.). The specifications require that "[a]ll protruding manholes or structures and vertical joints * * * be left in a safe manner for

vehicular and pedestrian traffic" (ibid.; see J.A. 309-310). The City does not have the machinery required for milling, so any project that requires milling is performed, at least in part, by contract (J.A. 266, 279-280).

During the milling process, if a crack is discovered in the concrete base, it would be repaired before the street is resurfaced (id. at 281, 292-293). Each contract covers contingent items that may be necessary due to unforeseen circumstances (id. at 290).

The City does not include curb ramps in milling and

resurfacing contracts unless the curbs or the pavement are otherwise affected (J.A. 285-287). Curb ramps are normally included in reconstruction contracts, which include removal not only of the asphalt, but also the concrete sub-base of the street, because reconstruction involves portions of the sidewalk and the curbing (id. at 274-275, 286-288; Brief of Appellant Hoskins, 5). When curb ramps are installed in Philadelphia, they are done by cutting the existing curb, rather than building up the street to create a ramp (J.A. 123-124; compare J.A. 175, Fig. 12 (cut curb ramp) and Fig. 13 (built-up curb ramp)).

D. The Decision Below

In the memorandum opinion accompanying its judgment, the court first noted the importance placed by Congress on the removal of architectural barriers, such as curbs, as a means to eliminate discrimination against persons with disabilities, recognizing that "[w]ithout the ability to cross streets, the

opportunities afforded by the ADA are of little benefit" (J.A. 13).

The court then held that whether resurfacing of a street is an alteration triggering the obligation to install curb ramps depends upon whether resurfacing "affects or could affect the usability" of the street, 28 C.F.R. 35.151(b). It found that improvement of a street by resurfacing made it "more usable in a fundamental way" because resurfacing "makes driving on and crossing streets easier and safer [,] * * * helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel" (J.A. 18-19).

The court rejected defendants' argument that curb ramps are required only where the alteration itself offers an opportunity to provide for accessibility. It held that the decision in Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied, 485 U.S. 989 (1988), is inapposite because the Department of Transportation (DOT) regulation construed in Sykes, 49 C.F.R. 27.67(b), defined an alteration as a change that "affect[s] the accessibility of the facility" as opposed to its usability (J.A. 16-17).9/

Recognizing that Congress intended "that the forms of discrimination prohibited by [Title II of the ADA] be identical to those set out in applicable provisions of Titles I and III" of the Act, the court (J.A. 17, n.3) relied on the Attorney

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9/The district court's opinion inadvertently cited the relevant DOT regulation as 49 C.F.R. 27.65(a).

General's analysis of the term "usability" as employed in the provision of Title III dealing with new construction and alteration of public accommodations.10/ There the Attorney General stated that "usability" should "be read broadly to include any change that affects the usability of the facility, not simply changes that relate directly to access by individuals with disability." 28 C.F.R. Pt. 36, App. B, p. 613.

The court then turned to the City's alternative argument that, even if resurfacing is an alteration within the meaning of 28 C.F.R. 35.151(b), the City is excused from installing curb ramps if it can demonstrate that installation would result in "undue financial and administrative burdens," 28 C.F.R.

35.150(a)(3). The court held that there is no general undue burden defense in the ADA (J.A. 20). Rather, the defense is available only where specifically provided (ibid.). While the regulation dealing with a public entity's obligations in regard to existing facilities contains an undue burden defense, the regulations dealing with new construction and alterations do not. The court held that this distinction is logical in that, while the cost of retrofitting existing facilities can be quite burdensome, new construction and alterations "present an immediate opportunity to provide for accessibility" (J.A. 20-21).

The court found that this reading was also in accordance

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10/Title I, 42 U.S.C. 12111-12117, prohibits discrimination against persons with disabilities in employment. Title III, 42 U.S.C. 12181-12189, prohibits discrimination against persons with disabilities in places of public accommodation and commercial facilities.

with Congress' intent as expressed in the House Judiciary Committee Report (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 50 (1990)):

> The specific sections on employment and program access in existing facilities are subject to the 'undue hardship and undue burden' provisions of the regulations which are incorporated in Section 204. No other limitation should be implied in other areas.

ARGUMENT

I

RESURFACING OF A STREET IS AN ALTERATION WITHIN THE MEANING OF 28 C.F.R. 35.151(e) (1) THAT REQUIRES A PUBLIC ENTITY TO INSTALL CURB RAMPS

Section 202 of the ADA, 42 U.S.C. 12132, provides:

> [n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. The purposes of the ADA are plainly set out in the statute (42 U.S.C. 12101(b)):

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

In providing for promulgation of regulations to flesh out the very general nondiscrimination provision of Title II, 42 U.S.C. 12134, Congress gave the Attorney General extensive authority to interpret its requirements. Where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). Where the administrator's view of the statute is a reasonable one, a reviewing court is not free to set aside such regulations simply because it would have interpreted the statute differently. Batterton v. Francis, 432 U.S. 416, 424-426 (1977).11/

As the district court acknowledged (J.A. 13-14), the

elimination of architectural barriers such as curbs is among the most basic and fundamental purposes of the statute. The House Education and Labor Committee report recognized that "[t]he employment, transportation, and public accommodation sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 84

11/In addition, the ADA is a remedial statute, which must therefore be broadly construed in order to effectuate its purpose. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Peyton v. Rowe, 391 U.S. 54, 65 (1968).

(1990).12/ Accordingly, "local and state governments are required to provide curb cuts on public streets." Ibid.

The scheme of the Department of Justice ADA regulations differentiates between the obligation of public entities to provide curb ramps in existing streets where pedestrian walkways cross curbs and the obligation to install curb ramps in new construction and alterations of existing streets that "affect or could affect the usability of" the street, 28 C.F.R. 35.151(b). As to the former, public entities are required to adopt a transition plan with a schedule for providing curb ramps and other sloped areas where there is no other feasible way to make the streets accessible, giving priority to walkways serving entities covered by the Act. 28 C.F.R. 35.150(c) & (d). Such changes are to be completed within three years of the effective date of the Act (i.e., January 26, 1995), ibid.

The regulations mandate, however, that when a public entity undertakes to construct new streets, roads, or highways or to

make alterations in existing ones, it shall take the opportunity presented by those activities to install curb ramps at that time, 28 C.F.R. 35.151(e).13/

12/ The installation of curb ramps is important not only for persons in wheelchairs but also for ambulatory persons with mobility impairments, such as those who use walkers and crutches.

13/ The City argues (Br. 11-12, 21) that curb ramps will be installed on all City streets by January 1995 in accordance with its transition plan and that the requirement that it install curb ramps whenever it does resurfacing will take away resources from the orderly accomplishment of that plan. The regulations reflect the Attorney General's judgment that requiring public entities to (continued...)

The Department takes the position, sustained by the district court here, that resurfacing of a street is an alteration that triggers the obligation to install curb ramps. The reasonableness of the Department's conclusion is supported by the evidence introduced by the plaintiffs on summary judgment concerning the City of Philadelphia. As the district court found, resurfacing "entails more than minor repair work or maintenance" (J.A. 19).14/

The City argues (Br. 18-21) that summary judgment should not have been granted because there are genuine issues of fact regarding the various types of resurfacing projects undertaken by the City. In fact, however, there is no dispute that some types of resurfacing jobs are more extensive than others. The district court itself acknowledged that sometimes resurfacing only involves laying new asphalt over old (J.A. 19). The real issue is whether the district court was correct as a matter of law that even that degree of resurfacing is an alteration within the meaning of the regulations.

13/ (...continued)
install curb ramps during alterations to the street, in combination with the transition plan, provides an efficient way to accomplish an ultimate goal of the statute -- to have curb ramps throughout the City. Thus, under the scheme of the regulations, the obligation to prepare and implement a transition plan does not replace the separate and distinct obligation to install curb ramps when streets are altered.

14/ The court found (J.A. 19) that, while "sometimes new asphalt may simply be overlaid on top of the old surface," more often the work involves removing the old asphalt by a process known as "milling." During this process, cracks in the underlying base of concrete may be repaired and manholes may be raised or lowered to be flush with the newly paved street. Ibid.

The City also argues (Br. 12-17) that the district court used the wrong definition of "alteration." It contends that the court should not have relied on the language in 28 C.F.R. 35.151(b) and the ADAAG to define alteration. The City suggests (Br. 12-13) that the court should look to the ordinary dictionary definition or that in Black's Law Dictionary. Resort to such external sources is unnecessary, however, because the ADA regulation, in conjunction with the accessibility standards referenced therein, supplies the definition by which the City and other public entities are bound.15/

Section 35.151(b) provides:16/

> Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of 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 Janurary 26, 1992.

15/ Even using the City's proferred definitions of alteration, there is nothing in those definitions that clearly excludes resurfacing. Both the ordinary dictionary definition and that contained in Black's Law Dictionary, cited in the City's brief,

p. 12, require only that the altered object be made different in some characteristic without changing it into something else. Resurfacing changes the surface of the street to make it smoother and safer to travel on.

16/ Contrary to the City's contention (Br.13), it was perfectly proper for the district court to refer to the general regulation concerning alterations, 28 C.F.R. 35.151(b), to interpret the more specific regulation dealing with alterations to streets, roads, and highways, i.e., 28 C.F.R. 35.151(e). Since Section 35.151(e) treats the street and the curb as a single "facility" for purposes of alterations, the City's contention that Section 35.151(b) is inapplicable to this case is incorrect.

Section 35.151(c) then provides that alteration of facilities in conformance with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), or with the Uniform Federal Accessibility Standards (UFAS), shall be deemed to be compliance with the requirements of section 35.151.17 The ADAAG states that "an alteration is a change to a building or facility made by, on behalf of, or for the use of a public accommodation or commercial facility, that affects or could affect the usability of the building or facility or part thereof." It provides illustrative, but not exhaustive, examples of activities that would be considered alterations and those, such as normal maintenance, that would not. The only difference between the ADAAG and Section 35.151(b) is that the ADAAG defines an alteration as a "change," while the regulation appears to assume that those terms are synonymous. Thus, while Section 35.151(b) is not written in classic definition style, when read in conjunction with the ADAAG definition, it explains what types of changes to a facility trigger an accessibility obligation by a public entity.18

17/ The Uniform Federal Accessibility Standards (UFAS) can be found at Appendix A to 41 C.F.R. Part 101-19.6.

18/ The City's argument that the ADAAG definition leads to a "silly redundancy" (Br. 15) results from a misreading of that definition. An alteration, under ADAAG, is a change, just as it is in the ordinary dictionary definition preferred by the City. The ADAAG definition then goes on to state that, for purposes of providing accessibility, an alteration is a change that affects usability.

The City makes much of the fact that the district court declined to apply the definition of alteration contained in UFAS, which public entities may choose to follow instead of ADAAG, pursuant to 28 C.F.R. 35.151(c) (Br. 15-17). We agree that the UFAS definition is relevant, because there is no reason to exclude streets, roads, and highways from the concept of "structure," UFAS, para. 3.5 (definition of alteration). We disagree, however, with the City's contention that the UFAS definition is too narrow to encompass resurfacing as an alteration. Resurfacing does change a "structural part[] or element[]" of the street, i.e., its surface (ibid.). The Attorney General's position is that resurfacing of a street is included under all relevant definitions of "alteration."

Even assuming, however, that reasonable minds could differ as to whether resurfacing is an alteration within the meaning of the regulations, the Department's position is consistent with the purpose of the statute and should therefore prevail. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., supra.

Section 35.151(e) clearly requires that altered streets contain curb ramps at intersections with the pedestrian walkways. The regulation, which treats the street and the curb as a single

facility, is eminently reasonable; it is difficult to imagine how a street could be made more accessible to persons with disabilities without installing ramps in the curbs. In other words, in order to make the altered facility, i.e., the street, accessible, the curb has to be altered as well.

The focus of the regulation on alterations that affect usability is reasonably related to one of the main purposes of the ADA -- to eliminate architectural barriers that hinder persons with disabilities from being able to participate in day-to-day activities on an equal basis with all persons in the United States. If a facility such as a street is being made more usable for persons without disabilities, it must also be made accessible to and readily usable by persons with disabilities.

Citing this Court's decision in Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113 (1987), the City also argues (Br. 18) that curb ramps are not required because "simple repaving of a street does not provide a feasible opportunity to install curb cuts under any reasonable interpretation of the ADA or the regulations."

This Court in Sykes was interpreting a Department of Transportation Section 504 regulation that is very similar to 28 C.F.R. 35.151(b).9 Thus, this Court stated that the relevant questions in Sykes were "to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons" and "what degree of

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19/ The DOT regulation (49 C.F.R. 27.67(b) (1981)) provided:
Each facility or part of a facility which is altered by, on behalf of, or for use of a recipient [of Federal financial assistance] * * * in a manner that

affects or could affect the accessibility of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

accessibility * * * becomes 'feasible'" under the relevant standards, 833 F.2d at 1120-1121.

In the case of the ADA, however, the Attorney General has already determined, in promulgating 28 C.F.R. 35.151(e), that alterations to a street provide an opportunity to install curb ramps and that installation of curb ramps is feasible during such alterations. This Court should not accept the City's invitation to second-guess the Attorney General's determination in that regard. If the Court finds reasonable the Attorney General's conclusion that resurfacing is an alteration within the meaning of the ADA regulations, 28 C.F.R. 35.151(e) provides the answer to the questions this Court asked in Sykes.

II

THE DISTRICT COURT CORRECTLY HELD THAT THE UNDUE BURDEN DEFENSE IS NOT AVAILABLE UNDER THE REGULATIONS APPLICABLE TO NEW CONSTRUCTION AND ALTERATIONS

The district court held that the City cannot escape its obligation to install curb ramps on altered streets by demonstrating that doing so would result in "undue financial and administrative burdens," 28 C.F.R. 35.150(a)(3). The district court's judgment should be affirmed in this regard as well.

Section 204(b) of the statute, 42 U.S.C. 12134(b), requires that, with respect to program accessibility in existing facilities and communications, the ADA regulations be consistent with 28 C.F.R. Part 39, the Department of Justice Section 504

regulations applicable to federally conducted programs and activities. Those regulations provided an "undue burden" defense as to existing facilities, but not as to new construction and alterations to existing facilities.20

The House Judiciary Committee report specifies those portions of the ADA that are subject to the undue burden defense, i.e., employment and program access in existing facilities:

> While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole. The general prohibitions set forth in the Section 504 regulations, are applicable to all programs and activities in title II. The specific sections on employment and program access in existing facilities are subject to the "undue hardship" and "undue burden" provisions of the regulations which are incorporated in Section 204. No other limitation should be implied in other areas.

H. R. Rep. No. 485, 101st Cong. 2d Sess., pt.3 at 50 (1990) (footnotes omitted; emphasis added).21 The Department's ADA regulations track these instructions of Congress. Thus, the defense is available as to existing facilities; it is unavailable for new construction and alterations. As the district court held, that distinction is a logical one because retrofitting is

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20/ The inclusion of an "undue burden" defense as to program accessibility in existing facilities is explained in the editorial note to Part 39, 28 C.F.R., as being based upon language in the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), that "section 504 does not require program modifications that would result in a fundamental alteration in the nature of a program or modifications that would result in 'undue financial and administrative burdens.'" 442 U.S. at 412.

21/ While the report language does not mention "communications," it is clear from Section 204(b) of the ADA that Congress also intended the regulations with respect to "communications" to consistent with the federally conducted program regulations, 42 U.S.C. 12134(b). Accordingly, Subpart E of the ADA regulations,

which is applicable to communications of a public entity, provides an undue burden defense, 28 C.F.R. 35.164.
01-07081

generally more costly and burdensome than incorporating accessibility into the design for new construction and alterations.

The City's brief does not address the House Report language. Rather, the City argues (Br. 21-23) that, even if the street is being altered, the curbs themselves are "existing facilities" that are subject to the undue burden defense contained in 28 C.F.R. 35.150(a)(3). The curb may be an "existing facility" for those parts of the City where the streets are not being altered through resurfacing. Once the City undertakes to alter the street, however, the regulations require that accessibility be included in the work. The regulation dealing with new construction and alterations to streets, roads, and highways, 28 C.F.R. 35.151(e), treats the street and the curb as one "facility." It focuses on accessibility of the street, which cannot be accomplished without changing the curb. This is a reasonable interpretation of the statute that is entitled to controlling weight. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., supra. Accordingly, the district court correctly held that the City may not assert "undue burden" as a defense to installing curb ramps on altered streets.
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CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to this Court's policy, attorneys employed by the United States Department of Justice to represent the United States are exempt from bar admission requirements.

(Signature)

_____

Marie K. McElderry

Date: May 10, 1993
01-07084

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 1993, I served two copies of the foregoing Brief for the United States as Amicus Curiae by Federal Express courier service at the following addresses:

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