AMERICANS WITH DISABILITIES ACT: ACCESSIBILITY CLAIMS REGARDING CITY FACILITIES

EDWIN P. VOSS, JR.
Brown & Hofmeister, L.L.P.
740 East Campbell Road
Suite 800
Richardson, Texas 75081
(214) 747-6100
(214) 747-6111 (facsimile)
E-mail: evoss@bhlaw.net

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CHAPTER 9.1

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AMERICANS WITH DISABILITIES ACT: Accessibility Claims Regarding City Facilities

I. INTRODUCTION

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act ("ADA"). This historic legislation was intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The ADA is intended to supplement and expand the previous federal law that applies to persons with disabilities, the Rehabilitation Act. The ADA reflects our nation's faith and hope in the promise of all individuals and helps to ensure that our nation's opportunities are more accessible to all. While the ADA is designed to eliminate past effects of either accessibility problems or outright discrimination, recent litigation trends indicate a more aggressive approach to these issues vis-à-vis a city's facilities, an approach that was probably not considered or appreciated when the ADA was created. This paper will therefore touch upon these recent trends, and is not intended to be a comprehensive discussion of all aspects of ADA litigation.

II. THE ADA

A. The Rehabilitation Act Connection

Drawing from the Civil Rights Act of 1964, the Rehabilitation Act (specifically, Title V thereof) was enacted to prohibit discrimination by entities receiving federal funds. *See* 29 U.S.C. § 794(a); and 28 C.F.R. § 41.51(a). Pursuant to 28 C.F.R. § 41.51(d), recipients of federal funds are required to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." Furthermore the Department of Justice has mandated:

> No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

28 C.F.R. § 41.51(a). As application of the Rehabilitation Act progressed, it was felt that limiting the prohibition of discrimination to only those who received federal funding was insufficient to address the needs of the disabled. As a result, the ADA was enacted, and is the primary focus of this article. The Rehabilitation Act is nonetheless cited and used in litigation today, in tandem with the ADA, since numerous courts have held that the same standards apply for assessing compliance with both the Rehabilitation Act and the ADA, and that prior decisions under the Rehabilitation Act are precedential to the ADA, so that the ADA and the Rehabilitation Act generally are interpreted *in pari materia. See, e.g., Kemp v. Holder,* 610 F.3d 231, 234-35 (5th Cir. 2010); *Pace v. Bogalusa City Sch. Brd.*, 403 F.3d 272, 287-88, 289 n.76 (5th Cir. 2005) (en banc).

B. What is the ADA?

The ADA provides civil rights protection to individuals with disabilities, similar to the protections provided to individuals on the basis of race, color, sex, national origin, age, and religion. At the time of its enactment, some 43,000,000 Americans suffered from physical or mental disabilities. 42 U.S.C. § 12101(a)(1). Congress had determined that society had isolated and segregated individuals with disabilities. 42 U.S.C. § 12101(a)(2). Discrimination against individuals with disabilities was found to be persistent in critical areas such as employment, housing, public accommodations, transportation, communication, education, recreation, institutionalization, health services, voting, and access to public services. 42 U.S.C. § 12101(a)(3).

The primary purpose of the ADA was to provide a "clear and comprehensive national mandate for the elimination of discrimination" with "clear, strong, consistent, enforceable standards" to address such discrimination. 42 U.S.C. § 12101(b)(1) and (2). To that end, the ADA provides individuals with disabilities "civil rights protections with respect to discrimination that are parallel to those provided to individuals on the basis of race, color, national origin, sex, and religion." 56 Fed. Reg. 35,545 (1991). Its principal elements were drawn from the Civil Rights Act of 1964, and from Title V of the Rehabilitation Act of 1973. *Id.* The ADA, therefore, can be seen to employ the framework of both of those Acts for issues of coverage, enforcement, and terms and concepts for what constitutes discrimination.

It is noteworthy that the scope of the ADA covers not only intentional discrimination, but also the discriminatory effects of "benign neglect, apathy, and indifference." *Helen L. v. DiDario,* 46 F.3d 325, 335 (3rd Cir. 1995)(internal quotations omitted). Discrimination could, therefore, involve the active preclusion of employment based on one's disability, or passive limited access for wheelchair bound individuals. *See, e.g., Crowder v. Kitagawa,* 81 F.3d 1480, 1483 (9th Cir. 1996)(Congress intended ADA to cover discriminatory impact of facially neutral barriers).

The ADA therefore guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications. The ADA is codified at 42 U.S.C. §§ 12101-12213 and is divided into five

sections or "titles" that have specific provisions grouped by subject matter applicability. Title I addresses private sector employment. 42 U.S.C. §§ 12111-12117. Title II addresses public programs and facilities. 42 U.S.C. §§ 12131-12134; 12141-12150; 12161-12165. Title III addresses public accommodations. 42 U.S.C. §§ 12181-12189. Title IV is a collection of miscellaneous provisions that apply to Titles I, II and III, as specified. 42 U.S.C. §§ 12201-12213.

This paper focuses on the ADA's requirements set forth in Title II (and applicable miscellaneous provisions in Title IV) that apply to state and local governments that provide the basis for claims against municipalities regarding facility, services and program accessibility.

C. What is Title II?

Title II of the ADA addresses public programs and activities. Title II of the ADA protects qualified individuals with disabilities from discrimination on the basis of disability in accessing services, programs, or activities. 42 U.S.C. § 12132. To effect this prohibition, the statute requires certain designated federal agencies to develop implementing regulations, the first of which were promulgated in July of 1991. This rulemaking effort continues today. The regulations detail a wide range of administrative and procedural requirements, including compliance with design and construction standards. Those standards are expressed in the *Americans with Disabilities Act Accessibility Guidelines* ("ADAAG"). *See* 28 C.F.R. Part 35. Title II entities may choose to comply with either the ADAAG or the *Uniform Federal Accessibility Standards* ("UFAS") until the Department of Justice ("DOJ") completes Title II rulemaking (an effort which is now underway). It is, therefore, imperative that the successful practitioner have a working knowledge of the Rehabilitation Act, the ADA, and these accompanying regulations.

D. Who is a Disabled Person?

Under the ADA, a disabled person is one who is defined as a "qualified individual with a disability":

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. §12131(2). A "disability" is defined in the ADA, as well:

> The term "disability" means, with respect to an individual –
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). For further clarity, the ADA defines the term "auxiliary aids and services" (from § 12131(2), above) broadly:

> The term "auxiliary aids and services" includes –
> (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
> (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
> (C) acquisition or modification of equipment or devices; and
> (D) other similar services and actions.

42 U.S.C. 12102(1). And, to be sure that there is no doubt about the applicability of the ADA (specifically, Title II), the term "public entity" is defined:

> The term "public entity" means –
> (A) any State or local government;
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
> (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

42 U.S.C. §12131(1). With these definitions, it is clear to see the broad theme of the ADA, and how its applicability is carried forward from its enabling legislation's stated purposes.

E. Examples of Title II Requirements.

1. Equality in participation and benefits

Those with disabilities must have an equally effective opportunity to participate in or benefit from city programs, services, and activities. 42 U.S.C. § 12132. Examples of when disability discrimination occurs:

a. A deaf individual does not experience equal opportunity to benefit from attending a public meeting if she does not have access to what is said through an interpreter or by using an assistive listening device.
b. Someone who uses a wheelchair will not have an equal opportunity to participate in a program if applications must be filed in a second floor office of a government building without an elevator.
c. Use of printed information alone is not equally effective for those with low vision who cannot read regular written material.

2. Integrated setting ("mainstreaming")

Individuals with disabilities cannot be excluded from regular programs or required to accept accommodations. The city may offer separate or special programs when necessary to provide people with disabilities an equal opportunity to benefit from the programs. Examples of such special programs include:

a. A recreation department sponsors a separate basketball team for wheelchair users.
b. A museum offers a tour for blind people, which permits them to touch and handle specific objects on a limited basis (but cannot exclude a blind person from the standard tour).

3. Eligibility criteria and medical inquiries

A city's eligibility criteria for participation in its programs, services, or activities must not screen out or tend to screen out people with disabilities, except in rare instances when such requirements are necessary. A program cannot request medical information unless it can demonstrate that each piece of information requested is needed to ensure safe participation in the program.

4. Safety

A city may impose legitimate safety requirements necessary for the safe operation of its services, programs, and activities. Safety requirements must be based on real risks, not on speculation, stereotypes, or generalizations about people with disabilities.

5. Surcharges

Although providing accommodations may result in some additional cost, a city may not place a surcharge only on particular individuals with disabilities to cover expenses. For example, there can be no extra program charge to a deaf person who benefited from interpreter services, or to groups of people with disabilities, but a tuition fee may be increased for all students across the board.

6. Reasonable modifications

A city must reasonably modify its policies, practices, or procedures to ensure access and equal opportunity to individuals with disabilities. For example, a lengthy and complex application process could be modified for people with mental disabilities who are unable to complete the process on their own. Modifications might include simplifying the process or individually assisting applicants.

7. Personal services and devices

A city is not required to provide people with disabilities with personal or individually prescribed devices (hearing aids or communication devices) or to provide services of a personal nature (such as assistance in eating, toileting or dressing).

8. Maintenance of accessible features

A city must ensure equipment and features of facilities are in working order and accessible to individuals with disabilities. Isolated or temporary interruptions in access due to maintenance and repair of accessible features are acceptable.

F. What are the Requirements for Facility Access?

A city must ensure its programs, activities, and services are accessible to individuals with disabilities. One key aspect of that requirement is facilities access. Regulations implementing the general provisions of Titles II and III of the ADA - including those that cover buildings and facilities - were published in the Federal Register on July 26, 1991, in three parts (the Part designations are Federal Register divisions only and do not relate to titles of the ADA):

- Part II - Architectural and Transportation Barriers Compliance Board - 36 C.F.R. Part 1191 - ADAAG for Buildings and Facilities; Final Guidelines.
- Part III - DOJ, Office of the Attorney General - 28 C.F.R. Part 36 - Nondiscrimination by Public Accommodations and in Commercial Facilities; Final Rule (this is the Title III regulation; subpart C contains requirements for existing facilities; subpart D covers new construction and alterations, incorporating ADAAG as Appendix A).
- Part IV - DOJ, Office of the Attorney General - 28 C.F.R. Part 35 - Nondiscrimination on the Basis of Disability in State and Local Government Services; Final Rule (this is the Title II regulation: subpart D contains requirements for existing facilities and new construction and alterations).

These regulations supplement Title II of the ADA by providing more details concerning accessibility in three practical areas: (1) new construction; (2) alteration and

renovation of existing facilities; and (3) overall program access.

1. New Construction

All newly constructed facilities (begun after 1-26-92) must be in strict compliance with federal and state building accessibility codes, statutes, and regulations.

2. Alteration and Renovation of Existing Construction

A city is required to make modifications to existing facilities that are "readily achievable" to ensure services, programs and activities are accessible. Some exemptions are provided for historic properties. In addition, generally, if a facility or part of the facility will be significantly altered or renovated, meeting current code requirements may be applicable (and, thereby, create better accessibility).

3. Overall Program Access

A city is not necessarily required to make every pre-ADA facility fully compliant with current accessibility codes; however, the regulations above emphasize that city services, programs, or activities must be accessible to and usable by people with disabilities *when viewed in their entirety*. This is called "overall program access." For example, not all pre-ADA swimming facilities must be accessible, but there must be an alternate and proximate swimming facility that is accessible.

Overall program accessibility can be achieved a number of ways. Structural options include altering existing facilities or constructing new ones. Nonstructural options include:

a. Acquisition or redesign of equipment.
b. Assignment of aides to assist individuals with disabilities.
c. Provision of services at alternate accessible sites.

A city must give priority to the option that results in the most integrated setting appropriate to encourage interaction among all users, including those with disabilities. Most state and local governments were required to prepare a self-evaluation plan to identify program access issues; from this, a transition plan was to be developed to fix items of construction that would be undertaken to achieve program accessibility. Transition plan work - except for curb ramp installation, for which DOJ proposed an extension - was to have been completed by January 1995.

On November 29, 1995, the DOJ published a Notice of Proposed Rulemaking, proposing to extend the date by which public entities must complete the installation of curb ramps required by the Title II rules and regulations. The comment period closed on March 1, 1996. On September 15, 2010, the DOJ issued the 2010 ADA Standards for Accessible Design. Those standards are available online at http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm. The Texas Municipal League has been monitoring the applicability of those standards, and is a recommended resource for the applicability of certain specifics. *See, e.g.*, TML Legislative Update, May 25, 2012 (Number 5), p. 4.

The devil is in the details concerning overall program access, with thousands of technical requirements that are highly detailed, *e.g.*, the height of a paper towel holder; the width of a toilet stall; and the cross slope of a sidewalk. The complexities of the ADA's regulations make 100% compliance difficult to attain. Terms of art, such as "reasonable accommodation," "readily achievable," and "undue hardship," are found in the standards, but are not hard and fast rules. Their application invariably depends on all the facts of the case. Title II can also be very rule-specific, at times, especially with regard to architectural and building code requirements. Many plaintiffs' attorneys contend that a finding of disability discrimination — with its potential award of attorney's fees — can be determined simply through use of a tape-measure and a level. *See* case discussion for examples, below.

Under Title II, government facilities built after January 26, 1992, must comply with the new construction standards set forth in the ADAAG or the UFAS. Any building alteration performed after this time is potentially subject to the same accessibility rules, as well as a requirement that a "path of travel" be provided to the area of alteration. *See Frame v. City of Arlington*, 657 F.3d 215, 222 (5th Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 1561 (2012)

To say that new construction standards are specific is an understatement. A water fountain, for example, must have a clear space between it and the floor of at least 27 inches in height, 30 inches in width, and 17 inches in depth. The spout can be no higher than 36 inches, and the water flowing from it must extend up no higher than an additional four inches. Controls can be either front mounted or side mounted (although they must be near the front edge). There may be many other requirements for fountains, and there are similar specifications for virtually every other part of a facility: toilets, doorways, ramps, aisles, walkways, counters, parking spaces, telephones, seating, *et cetera*. In most cases, there is either an apparent violation or not, depending on the specifications. Given the number of regulations and the degree of their specificity, it is not difficult for plaintiffs to find an apparent violation.

G. Two Key Administrative Requirements

1. ADA Coordinators

An ADA Coordinator is required to be specified by each public entity. The ADA Title II Coordinator should advise city employees, city contractors, and the public about the ADA and a city's compliance obligations, and should also handle the investigation of grievances filed by members of the public alleging discrimination in city programs, services, or activities.

2. Notification to Public

Wherever the public may access programs and services, there should be posted an "ADA Notification" which notes who may be contacted within a city regarding the ADA and access issues.

III. THE LATEST IN LITIGATION

A. Assault on Cities Using the ADA: a Nationwide Deluge of Litigation

While many ADA lawsuits are genuinely concerned with accessibility for the good of the disabled public, the ADA has also become an abusive weapon serving special interest agendas. Now the credibility of the ADA and the accessibility rights movement, in the eyes of businesses and government entities on the receiving end of unexpected lawsuits, is at risk. Nationwide, accessibility suits have become so profitable that attorneys actively search out businesses with ADA infractions without the grievance of a disabled patron, an act known in the business community as "drive-by" lawsuits. In addition to California, Florida, Hawaii, and Pennsylvania, a number of other states around the country have started to see mass filings, including North Carolina, Tennessee, and Oregon. Very likely, an ambitious attorney in a city near you is studying the methods of these "disability advocates," and is getting ready to collect on his first payday.

Two provisions of the ADA have encouraged these ADA lawsuits. First, the ADA permits civil actions by individuals to be filed without first providing notice to the defendant that ADA violations may exist. Responding to business concerns, Representative Mark Foley (R-FL) introduced the ADA Notification Bill (HR 728), which attempted to remedy the ADA's lack of notice provision by requiring prospective plaintiffs to provide a 90-day notice to business owners prior to filing lawsuits for alleged ADA violations. The bill's supporters claimed giving business owners the opportunity to remove barriers prior to defending a lawsuit is a reasonable amendment to the ADA, but accessibility rights activists successfully achieved the bill's defeat in Congress, protesting that the bill weakens the disabled public's rights. Recently, there was another attempt by Congress to add a notification requirement to the ADA (The ADA Notification Act – H.R. 2804). It was introduced in June 2005, but appears to have died in committee.

The second provision that has encouraged ADA lawsuits is the provision awarding plaintiffs attorney's fees and costs in the event of a judicial decision against a defendant, or in the case of a settlement in which alterations result. 42 U.S.C. § 12205. Since most cases settle before trial, defendants usually bear the cost of all legal fees, and attorneys' fees often outweigh the cost of removing barriers. For example, a disabled guest at Clint Eastwood's historic Mission Ranch Hotel in Carmel, California alleged ADA violations after a visit. Eastwood fought the suit rather than settle when the plaintiff's attorneys demanded $577,000 in legal fees. The final cost of the accessibility alternations to the hotel was about $7,000.

U.S. District Judge Gregory Presnell of Orlando, Fla., noted in a ruling last year that Jorge Luis Rodriguez, a paraplegic, had filed some 200 ADA lawsuits in just a few years, most of them using the same attorney. "The current ADA lawsuit binge is, therefore, essentially driven by economics -- that is the economics of attorney's fees," Presnell wrote. He said Rodriguez's testimony left the impression that he is a "professional pawn in a scheme to bilk attorney's fees" from those being sued. *See Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, (M.D. Fla. 2004).

"Access Now" is a disability advocacy group headquartered in Florida that has filed more than 937 cases since its inception. "Access Now" September 2005 newsletter, http://www.adaaccessnow.org /sept05.htm. They have sued a significant number of government entities in recent years. The majority of these lawsuits end in settlement with significant attorney's fees and an obligation to allow continuous oversight by the plaintiffs. "Access Now" February 2005 newsletter, http://www.adaaccessnow.org/ feb05.htm. Some examples:

1. City of Miami Beach, Florida - The City was sued twice before by other groups and once prior by this group. The settlement encompassed all city parks and playgrounds, recreation facilities, curb cuts and sidewalks. The two actions together, along with voluntary compliance on some issues outside of the scope of the settlement, resulted in a comprehensive settlement covering ALL aspects of accessibility throughout the City of Miami Beach.

2. City of Miami, Florida - This case was filed on May 9, 2002, seeking access to public rights of way and other related areas relevant to pedestrian activity in commercial areas, and in and around parks, within the City of Miami. A settlement agreement was reached on April 3, 2003, where

the city agreed to pay attorney's fees of $500,000. The case is presently in the post-settlement stage, with at least 50% of ADA compliance to be completed by April 2008, with the remaining portion to be completed by April 2011. "Access Now" is monitoring the city's progress to see that it adheres to the settlement timetable.

3. Miami-Dade County, Florida - This case was filed on May 9, 2002, seeking access to public rights of way and other related areas relevant to pedestrian activity around county roads within the City of Miami. A settlement agreement was reached on May 19, 2003. The case is presently in the post-settlement stage with all A.D.A. compliance to be completed by May 2008. "Access Now" is monitoring the city's progress to see that it adheres to the settlement timetable.

4. City of Tallahassee and Leon County, Florida - This case was filed on March 2, 2001, seeking access to the streets, roads, highways, pedestrian walkways, and curbs owned and/or maintained by the Defendants. A settlement agreement was reached on November 11, 2002. The modifications have been scheduled for fifteen (15) particular geographic zones. The case is presently in the post-settlement stage, with all ADA compliance to be completed by November 2007. "Access Now" is monitoring the city's progress to see that it adheres to the settlement timetable.

5. City of Hollywood, Florida - This case was filed in April of 2000 seeking access to parks and public ways. A settlement agreement was concluded two years later. The city has until August 2007 to complete its alterations and modifications under the settlement agreement.

6. City of Sonora, California - The city agreed to a comprehensive review of all of its facilities, programs and services to make them ADA compliant. To this end, it will complete a Self-Evaluation form provided for by the ADA to identify non-compliance, no later than February 28, 2005. The self-evaluation will include such things as removal of physical barriers, changing policies and practices that limit participation by individuals with disabilities and considering if the city's communications with the disabled (such as its use of readers, interpreters, etc.) are as effective as its communications with the non-disabled. Based upon its self-evaluation, the city will prepare a transition plan by April 30, 2005, which will state how it will remedy all non-compliance. After "Access Now" reviews the transition plan and proposes changes or additions it believes are required, the parties will make a good faith effort to agree on a final plan that will enable Sonora to begin the required modifications or alterations by August 30, 2005. The city is to be ADA compliant by March 31, 2006.

7. City of Midfield, Alabama - This case involves modifications at the Midfield Recreation Center to bring it into ADA compliance. It was filed in May 2002, and a settlement agreement was reached eleven months later. The settlement required that all modifications agreed upon would be completed by February 2004.

In this new fad in litigation, governmental entities now face greater exposure for three reasons:

- It is less likely that the parties will reach an early negotiated settlement.
- The complexities of the ADA make 100% compliance difficult to attain.
- Remedial costs of compliance are going up.

8. The recurring script is:

a. The Ambush. When you receive the federal complaint regarding Title II accessibility issues, it will feel like an ambush. There is no pre-litigation notice requirement. But there are several indicators that a lawsuit is about to occur:

(1) Open records requests regarding the ADA self assessments, transition plan, curb cuts, or street alterations. If these come from someone located in California or Florida, you can safely bet someone is conducting pre-litigation discovery.

(2) An increase in complaints regarding accessibility issues from someone who doesn't have the disability related to complaint. For example, a sighted person requesting a copy of the transition plans in Braille.

(3) Numerous businesses in your city being sued by the same plaintiff for accessibility violations.

b. The ADA Shakedown. The ADA does not provide for compensatory damages to the plaintiffs, so what's in it for them? One method is for the plaintiff to incorporate as a nonprofit disability advocacy organization. The attorney runs up the legal fees by alleging numerous technical violations of the regulations, and then at the end of the litigation, the law firm writes a tax deductible donation to the nonprofit. Some disability advocates claim to earn a high six figure

income in the ADA industry. The Carmel Pine Cone, April 18, 2003, http://www.carmelpinecone.com/030418-2. When the City of Plantation, Florida exposed to the media that this same disability advocate had the ability to walk and had a prior criminal history, he sued for ADA retaliation and won judgments from the City and a City councilman. *Shotz v. City of Plantation*, 344 F.3d 1161, 1180 n.30 (11th Cir. 2003).

B. Government Entity Cases

THE MAJOR LITIGATION BATTLEGROUND OVER THE SCOPE AND MEANING OF THE ADA IS THE PUBLIC SIDEWALK, AND SEVERAL CASES ADDRESS SIDEWALK ACCESSIBILITY ISSUES.

1. Frame v. City of Arlington, 657 F.3d 215 (5th Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 1561 (2012). *See also Frame v. City of Arlington*, 575 F.3d 432 (5th Cir. 2009), *vacated*, 616 F.3d 476 (5th Cir. 2010), *vacated*, 632 F.3d 177 (5th Cir. 2001).

Five city residents with disabilities (who depend on motorized wheelchairs for mobility) brought suit under the ADA and the Rehabilitation Act against the City of Arlington, seeking injunctive relief, alleging harm by complaining of numerous city sidewalks, curb ramps and parking lots being in violation of ADA accessibility guidelines and requirements. The district court granted the city's Rule 12(b)(6) dismissal motion, holding that the plaintiffs' claims were barred by the applicable two-year statute of limitations. The district court also dismissed the plaintiffs' claims complaining of the city's transition plan and self-evaluation plan, finding that there is no private right of action to bring suit for alleged violations of the transition plan and self-evaluation plan regulations. The plaintiffs appealed the statute of limitations dismissal, but not the dismissal of their transition plan and self-evaluation claims.

The initial Fifth Circuit panel's divided opinion confirmed that ADA claims under Title II were subject to Texas' two-year statute of limitations, and that plaintiffs' claims accrued upon the city's completion of any non-compliant construction or alteration. *Frame*, 575 F.3d at 437-441. The court also held, as a matter of first impression in the Fifth Circuit, that curbs, sidewalks and parking lots constitute a city service, program or activity under the ADA. *Id.*, at 435-37. The court reversed the district court's judgment, however, and held that the city rather than the plaintiffs had the burden to prove accrual and expiration of any limitations period. *Id.*, at 441. The dissent complained that the majority's accrual determination was not in compliance with the broad remedial purpose of the ADA.

Both sides moved for rehearing, which was granted by the panel, and a new opinion was issued. *Frame*, 616 F.3d 476. In another divided opinion, the court reaffirmed application of the two-year statute of limitations, but held that plaintiffs' claims accrued when the plaintiff knew or should have known that he was being denied access to a service, program or activity. *Id.*, at 489. The court also reversed course by holding that sidewalks, curb ramps and parking lots are ***not*** a municipal service, program or activity. *Id.*, at 488. The court again remanded the case by continuing to hold that the city had the burden to prove the affirmative defense that the statute of limitations had expired. *Id.*, at 489.

Plaintiffs petitioned for a rehearing en banc, which was granted. After oral argument, a divided court (8-7) held that sidewalks, curb ramps and other municipal facilities are indeed a "service, program or activity" under the ADA, that a plaintiff has a private right of action to enforce the ADA by bringing suit in federal court, and that such suit is timely if it is brought within two years of accrual, *i.e.*, when the plaintiff knew or should have known he was being denied the benefits of a newly built or altered sidewalk. *Frame*, 657 F.3d 215. The Court of Appeals' meaning in that regard was specific:

> A city acts wrongfully when it builds an inaccessible sidewalk without adequate justification, but a disabled individual is not injured until he is actually deterred from using that sidewalk.

Frame, 657 F.3d at 238. So, the date a plaintiff encounters an inaccessible "newly built or altered sidewalk" triggers accrual of a cause of action rather than the date of construction or alteration. *Id.*

Frame made clear that existing sidewalks, curb ramps and parking lots are not necessarily subject to ADA requirements. *Frame*, 657 F.3d at 222. The phrase "newly built or altered sidewalks" means such facilities built or altered after January 26, 2992. *Id.* Such facilities are held to be a "service, program, or activity" of a local government to which the ADA applies. *Id.*, at 225-31. As a result, the Court of Appeals held that the standard is stated as follows: "[W]hen a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city unnecessarily denies disabled individuals the benefits of its services in violation of Title II." *Id.*, at 226.

The Fifth Circuit's standard adds the phrase "without adequate justification," and the exact

meaning and effect of that qualification is unknown; that part of the Fifth Circuit's standard is new to ADA enforcement jurisprudence. How that qualification aids cities in defending against ADA claims will be more clearly developed in future cases. For now, the Fifth Circuit provided the following guidance:

> [A] public entity is not 'required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.' [footnote omitted]. Thus, DOJ's regulations do not require cities to achieve accessibility at any cost. Instead, the regulations require only that when a city chooses to construct a new sidewalk or alter an existing one, the city must take reasonable measures to ensure that those sidewalks are readily accessible to individuals with disabilities.

Frame, 657 F.3d at 232. The Fifth Circuit's decision further relied upon established standards applicable to other issues. For example, a plaintiff must still have standing to sue:

> To be sure, Article III standing requires a plaintiff seeking injunctive relief to allege 'actual or imminent' and not merely 'conjectural or hypothetical' injury. Mere 'some day' intentions to use a particular sidewalk, 'without any description of concrete plans,' does not support standing. But 'imminence' is an 'elastic concept' that is broad enough to accommodate challenges to at least some sidewalks that a disabled person has not personally encountered. For example, a plaintiff may seek injunctive relief with respect to a soon-to-be-built sidewalk, as long as the plaintiff shows a sufficiently high degree of likelihood that he will be denied the benefits of that sidewalk once it is built. Similarly, a disabled individual need not engage in futile gestures before seeking an injunction; the individual must show only that an inaccessible sidewalk actually affects his activities in some concrete way. On remand, the district court will be able to apply established standing doctrine to weed out any hypothetical claims.

Frame, 657 F.3d at 235-36 (footnotes omitted). The court remanded the case so that the city is burdened with providing evidence to establish these and other affirmative defenses. *Id.*, at 240.

2. Kinney v. Yerusalim, 9 F.3d 1067, 1069 (3rd Cir. 1993).

A disabled citizens' group requested curb ramps to be installed during a resurfacing project being constructed upon a street by the city. The request came to the court in the form of injunctive relief, where the disabled citizens' group sought juridical enforcement of the provisions of the ADA. Specifically, the group claimed that the ADA required the ramp installation based upon alteration of the existing structure. The city claimed that the resurfacing project was only a repair and that it was not required to build the ramps in that instance. The city argued in the alternative that building the ramps would be an undue burden. The district court granted summary judgment for the disabled citizens' group, and the city appealed. The court of appeals affirmed the summary judgment and ordered the installation of the ramps. The court found that the applicability of the "undue burden" defense had been carefully limited to existing facilities and programs and was not available to the city where alterations were being made. Further, the resurfacing was considered by the court to be more than just a repair. It, therefore, fell under the regulation which required the installation of the ramps:

> The lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily life. Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors.

3. Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003). *SACRAMENTO* ASKED WHETHER MUNICIPAL SIDEWALKS ARE THE TYPE OF GOVERNMENT "PROGRAM, SERVICE OR ACTIVITY" THE LAW SAYS MUST BE MADE ACCESSIBLE TO THOSE WITH DISABILITIES. THE PLAINTIFF'S AIM WAS TO FORCE THE CITY TO REMOVE OBSTACLES FROM EXISTING SACRAMENTO SIDEWALKS — SUCH AS UTILITY POLES, BENCHES AND BROKEN CONCRETE — AS WELL AS TO INSTALL CURB RAMPS IN NEW SIDEWALKS. THE CITY AGREED TO THE DEMANDS FOR CURB CUTS WHEN IT BUILDS NEW SIDEWALKS, BUT BALKED AT THE COSTLY RENOVATION OF EXISTING WALKWAYS, ASSERTING THAT SUCH CHANGES WERE NOT COVERED BY THE ADA.

AFTER A DISTRICT JUDGE RULED FOR THE CITY, A UNANIMOUS PANEL OF THE NINTH CIRCUIT COURT OF APPEALS REVERSED AND RULED AGAINST SACRAMENTO, FINDING THAT PUBLIC SIDEWALKS ARE SUBJECT TO THE ACCESSIBILITY REQUIREMENTS OF THE ADA:

> Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless hair-splitting arguments. The focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity.

292 F.3D AT 1076 (CITATIONS OMITTED). BY THAT STANDARD, THE NINTH CIRCUIT HELD SIDEWALKS ARE CLEARLY COVERED BY THE ADA. THE COURT ALSO SAID ADA REGULATIONS REQUIRING CURB RAMPS "WOULD BE MEANINGLESS IF THE SIDEWALKS BETWEEN THE CURB RAMPS WERE INACCESSIBLE." *ID.*

SACRAMENTO, IN ITS CERTIORARI PETITION TO THE SUPREME COURT, ARGUED STRENUOUSLY THAT THE LAW DOES NOT COVER SIDEWALKS, AND THAT SERVICES ARE SOMETHING THAT CAN BE RECEIVED BY THE PUBLIC, AND PROGRAMS OR ACTIVITIES ARE THINGS THAT CITIZENS PARTICIPATE IN, REASONING THAT NO ONE RECEIVES OR PARTICIPATES IN A SIDEWALK. ADDITIONALLY, THE CITY ARGUED THAT CONGRESS DISTINGUISHED BETWEEN EXISTING AND NEW FACILITIES IN ENACTING THE ADA, MINDFUL OF THE COST OF REQUIRING CITIES TO DEMOLISH AND REBUILD THEIR ENTIRE INFRASTRUCTURE.

THE SUPREME COURT LET STAND THE NINTH CIRCUIT'S RULING THAT PUBLIC SIDEWALKS ARE A "SERVICE, PROGRAM, AND ACTIVITY" OF A CITY WITHIN THE MEANING OF THE ADA TITLE II, 42 U.S.C. §§ 12131-165, AND THE REHABILITATION ACT ("RA") § 504, 29 U.S.C. § 794. ACCORDINGLY, PLAINTIFFS WITH MOBILITY AND/OR VISUAL IMPAIRMENTS CAN NOW SUE A CITY FOR FAILING TO REMOVE ACCESSIBILITY BARRIERS FROM EXISTING SIDEWALKS. LOCAL GOVERNMENTS CAN EXPECT TO BE REQUIRED TO OVERHAUL EXISTING SIDEWALKS TO MAKE THEM MORE ACCESSIBLE TO THE DISABLED.

4. ***Utilla v. City of Memphis***, 1999 U.S. Dist. LEXIS 4667 (W.D. Tenn. 1999).

This case had a strange procedural posture and no final resolution, with the City admitting violating Title II. Plaintiffs, disabled individuals, brought a class action suit against defendant highway department, alleging defendant violated the ADA by failing to provide required accommodations such as wheelchair ramps. Defendant moved to dismiss, and the district court denied the motion. The city appealed, arguing that Congress improperly abrogated U.S. Const. amend. XI under the ADA. The court held the *Ex parte Young* doctrine created an exception to Eleventh Amendment immunity. The *Ex parte Young* doctrine provides that suits seeking prospective equitable relief against state officials were not barred. The court held the relief sought by plaintiff was prospective equitable relief, where plaintiff's sought to force defendant to comply with the requirements of the ADA and provide accommodations. Because the *Ex parte Young* doctrine applied, the court was not required to consider arguments that Congress improperly abrogated sovereign immunity under the Eleventh Amendment.

5. ***Dillery v. City of Sandusky***, 398 F.3d 562 (6th Cir. 2005).

In this case, a disabled woman filed suit against defendants, an Ohio city, the city's commissioners, and several city employees, asserting claims under the ADA, the Rehabilitation Act, 42 U.S.C. § 1983, and state law. The parties filed cross-appeals after the United States District Court granted partial summary judgment to defendants. Factually, the plaintiff was confined to a wheelchair. She filed the suit after she was repeatedly arrested for traveling in the street. She alleged that she was unable to travel on the city's sidewalks because the city had failed to install proper curb cuts, and had failed to properly install and maintain its sidewalks. The District Court initially granted defendants' summary judgment motion in its entirety. The woman moved for reconsideration after the city was found, in a different suit, to have violated the ADA. The District Court granted the motion and vacated only its grant of summary judgment as to the woman's ADA claim. It denied the woman's request for an award of attorney's fees under 42 U.S.C. § 12205.

The court of appeals found no error. The woman's 42 U.S.C. § 12132 intentional discrimination claim failed because the city's failure to install handicapped-accessible sidewalks and to provide ADA

training to its employees affected all disabled persons. The police had arrested her in response to citizen complaints; the woman was not arrested because she was disabled. The woman's attorney's fee request was properly denied; she had prevailed only on one ADA claim, due to the decision rendered in the other case. The court of appeals, therefore, affirmed the district court's partial grant of summary judgment to defendants, its partial grant of the plaintiff's motion for reconsideration, and its denial of the plaintiff's attorney's fees request.

6. ***Ability Ctr. of Greater Toledo v. City of Sandusky***, 385 F.3d 901 (6th Cir. 2004).

In a class action case, plaintiffs (a center and disabled individuals), sued defendants, a city and a city manager, alleging that defendants violated Title II of the ADA (42 U.S.C. §§ 12131-12165). The District Court granted summary judgment to plaintiffs as to a curb claim and to defendants as to a transition-plan claim. The parties cross-appealed.

Plaintiffs asserted that defendants violated Title II of the ADA in the process of replacing and repairing sidewalks and street curbs, by failing to install proper curb cuts and ramps in accordance with 28 C.F.R. § 35.151, and by failing to adopt a transition plan pursuant to 28 C.F.R. § 35.150(d). Defendants argued that since the district court found that they did not intentionally discriminate against plaintiffs, plaintiffs had no valid cause of action against them under Title II of the ADA to enforce the accessibility requirements of 28 C.F.R. § 35.151. The court of appeals determined that plaintiffs had a private cause of action against defendants for failing to comply with § 35.151. Section 202 (42 U.S.C. § 12132) of Title II of the ADA did not merely prohibit intentional discrimination; it also imposed on public entities the requirement that they provide qualified disabled individuals with meaningful access to public services. The regulation was enforceable through Title II of the ADA private cause of action available under § 203 (42 U.S.C. § 12133) of Title II of the ADA. The court of appeals held, however, that 28 C.F.R. § 35.150(d) (the transition plan requirement) was not enforceable under Title II of the ADA's private cause of action provision. The appellate court affirmed the district court's grant of partial summary judgment to plaintiffs, its denial of defendants' motion for reconsideration, and its grant of partial summary judgment to defendants.

7. ***Ross v. City of Gatlinburg***, 113 Fed. Appx. 113, 2004 WL 2413386 (6th Cir. 2004).

Plaintiffs appealed a judgment of the District Court, which granted summary judgment for defendant city in plaintiffs' class action on behalf of persons with disabilities who were mobility impaired, in which plaintiffs alleged that the city failed to provide access to public facilities and services in violation of Title II of the ADA and the Rehabilitation Act. Plaintiffs alleged, *inter alia*, that they were aggrieved by the city's lack of accessible parking, lack of accessible bathrooms, failure to keep sidewalks clear, inadequate procedures for filing grievances, failure to provide program access, failure to have an adequate transition plan, and lack of curb cuts at some intersections. The District Court held that plaintiffs lacked standing to bring an action against the city because they failed to identify any specific injury. On appeal, the court found that, in response to the city's summary judgment motion, plaintiffs failed to provide any evidence of concrete and particularized, actual or imminent injuries resulting from the city's actions or inactions. Specifically, plaintiffs did not identify any particular street, intersection, parking lot, or facility that purportedly did not comply with the ADA. They also did not specify any city service or program from which they were excluded, nor did plaintiffs specify any particular incident when they suffered discrimination as a result of the city's lack of services. Thus, plaintiffs failed to establish a triable fact issue with respect to standing, which was an essential element of their case. The court of appeals affirmed the judgment of the district court.

8. ***Parker v. Universidad de P.R.***, 225 F.3d 1 (1st Cir. 2000).

Plaintiffs (a husband, wife, and their daughters), sued defendant university and state officials, seeking compensatory damages under the ADA, and P.R. Laws Ann. tit. 31, § 5141, for injuries suffered by plaintiff husband when his wheelchair overturned during a visit to defendant university's botanical garden. The district court granted defendants judgment as a matter of law, concluding that plaintiffs failed to present sufficient evidence to establish that plaintiff husband was discriminated against by reason of his disability. The court of appeals held the district court's ruling was erroneous, because the university was required to provide at least one route that a person in a wheelchair could use to reach the botanical garden safely, and a jury could conclude that the drop-off at the end of the paved path (a point to which plaintiff had been directed by the university's staff) denied plaintiff husband safe access to the botanical garden, and the inadequately designed path caused his fall and injury. The District Court's judgment was therefore vacated because the evidence was sufficient to make out a *prima facie* case under the ADA; the case was remanded to the district court for further proceedings.

9. ***Wood v. Town of Falmouth***, 419 F.Supp. 2d 3 (D. Mass. 2006).

Plaintiff resident filed an action against defendant town alleging that the town violated state and federal

law by failing to maintain accessible public sidewalks, crosswalks, and ramps, alleging a violation of 28 C.F.R. § 35.105, promulgated under Title II of the ADA. The resident was confined to a wheelchair or a motorized scooter for mobility. The resident alleged that the town violated the ADA, and other federal and state laws, when it failed to maintain accessible public sidewalks, crosswalks, and ramps. Specifically, the third count of the resident's complaint alleged that the town violated 28 C.F.R. § 35.105, a regulation that required the town to perform self-evaluations of their access-related services, policies, and practices and to provide an opportunity for interested individuals to participate in the evaluation process. The town filed a motion to dismiss, and the court held that the resident did not have an independent right of action to enforce 28 C.F.R. § 35.105. The court found that such a separate action would enlarge the statutory right of action that Congress intended for enforcement of rights under the ADA. Private enforcement of Title II of the ADA was limited to claims alleging discrimination in violation of 42 U.S.C. § 12132. The provisions of 28 C.F.R. § 35.105 imposed obligations on the town that went beyond the scope of 42 U.S.C. § 12132. The court granted the town's motion to dismiss the third count of the resident's complaint that was based on enforcement of a regulation promulgated under Title II of the ADA.

10. ***Alford v. City of Cannon Beach***, 2000 U.S. Dist. LEXIS 20730, 2000 WL 33200554 (D. Or. 2000).

Plaintiffs, wheelchair or motorized scooter users, sued defendants regarding architectural barriers, seeking reasonable accommodation. Plaintiffs asserted state-law claims and violations of the ADA and the Rehabilitation Act. Defendant businesses moved for summary judgment. Defendant city moved for partial summary judgment. All three defendants moved to strike some of plaintiffs' evidence. The court granted summary judgment to defendant businesses on the Or. Rev. Stat. ch. 447 claims, the state law claims, and the negligence claims. The court concluded that § 4 of the standards on accessibility under the ADA, 28 C.F.R. pt. 35, app. A, did not apply to defendant businesses, and that if removal of the challenged barriers was not readily achievable, defendant businesses offered adequate alternative measures under the statute. Summary judgment was denied to defendant businesses, however, on whether the elimination of the entry steps to each business by provision of a ramp was "readily achievable" and whether the rearrangement of aisles was also "readily achievable."

Regarding the claims against defendant city, the three relevant events about which plaintiffs complained were not a city service, activity, or program since defendant city was not the actual sponsor. 28 C.F.R. pt. 36, app. A, stand. 4.3.2.(1), read with the proper definitions of "accessible route" and "site," requires the provision of a continuous, unobstructed path, within the boundary of a parcel of land, from such places as a public transportation stop, accessible parking, or a public street or sidewalk, to the accessible building entrance. "Site" does not include city streets. The regulation does not require blanket construction of new sidewalks along city streets. The court rejected plaintiffs' claim that defendant city violated the ADA by approving building permits that were not ADA compliant. The court further held that the city was not a proper defendant in the Rehabilitation Act claim.

11. ***Deck v. City of Toledo***, 29 F. Supp. 2d 431 (D. Ohio 1998).

Plaintiffs were disabled persons who sought a preliminary injunction in their class action lawsuit against defendants (City of Toledo Division of Transportation and the mayor), alleging the failure by defendants to install numerous curb ramps in compliance with the statutory requirements under Title II of the ADA, 42 U.S.C. § 12132, the ADA Accessibility Guideline, 28 C.F.R. pt. 36, app. A, and the city's own standards. The plaintiffs alleged that the city's noncompliance made it hazardous and difficult for them to traverse the city streets, and prevented them from being able to participate in normal and daily life activities. The court ruled that the disabled persons had demonstrated the appropriateness of the case for a preliminary injunction. In providing substantial proof that several curb ramps were not in compliance with the ADA and the ADAAG regulations, and in establishing the existence of irreparable and immediate harm to themselves and other handicapped persons, the plaintiffs established the likelihood that they would succeed on the merits. Further, the preliminary injunction would serve the public interest in eliminating discrimination against persons with disabilities. Therefore, the court granted the motion for preliminary injunction and ordered the city to comply with the ADA and ADAAG regulations within 60 days of the next year's construction season.

12. ***Schonfeld v. City of Carlsbad***, 978 F. Supp. 1329 (D. Cal. 1997).

Plaintiffs (disabled residents) brought an action against defendant city alleging violations of the ADA. The residents sought, on behalf of a proposed class, damages and attorneys' fees. Both parties filed cross-motions for summary judgment. The residents alleged that, on different dates in 1996, they were unable to access specific buildings or use the city's parking facilities, ramps, and streets because of the city's failure to comply with the ADA. The residents brought claims for denial of full and equal access to the city's facilities and services, and discrimination on the basis of their disabilities. The court held that (1) the

residents were "qualified individuals with disabilities" within the meaning of the ADA, and had standing to bring the action; (2) the residents' action was timely filed; and (3) the residents failed to come forward with persuasive evidence to show there was a genuine issue for trial in support of their claims that the city's self-evaluation failed to comply with ADA regulations, that the city failed to establish a curb ramp schedule, and that specifically challenged facilities, when each was viewed in its entirety, discriminated against or provided inadequate access for individuals with disabilities. Summary judgment was granted against the plaintiffs, in part, because they moved from the state and lacked standing, and in part because the state had begun to insure compliance after the lawsuit was filed.

13. ***Tyler v. City of Manhattan***, 857 F. Supp. 800 (D. Kan. 1994).

Plaintiff filed suit against defendant municipality alleging that defendant had violated Title II of the ADA by failing to prepare and complete a self-evaluation as required by 28 C.F.R. § 35.105, and by failing to prepare and complete a transition plan as required by 28 C.F.R. § 35.150(d), Plaintiff further claimed that defendant had discriminated against him in a variety of ways in violation of 42 U.S.C. § 12132. The court denied defendant's motion for summary judgment and ordered defendant to complete a self-evaluation of its current services, policies and practices. The court concluded that defendant's self-evaluation conducted ten years before (for purposes of complying with the Rehabilitation Act) was insufficient to determine whether defendant's current services met the requirements of Title II. The court found defendant's plan did not provide a schedule for providing curb ramps, and the court enjoined defendant to adopt such a schedule and determined that alterations to existing city facilities would not pose an undue burden on defendant. The court ordered modifications to a park's entrance and ordered the relocation of city-sponsored ball games to fields accessible to plaintiff.

14. ***Lonberg v. City of Riverside***, 2000 U.S. Dist. LEXIS 22758, 20-21 (D. Cal. 2000).

Plaintiff sued because the city's transition plan did not include sidewalks. Instead, defendant city offered a policy statement. The policy statement did not satisfy the city's affirmative obligations under 28 C.F.R. § 35.150(d)(3), which sets forth "minimum" requirements for a municipality's transition plan. First, the city failed to identify by catalogue, inventory, or list, the physical obstacles in the city streets which limit the accessibility of the city's programs and activities to those persons like plaintiff who use wheelchairs for mobility. Further, given that "the time period of the transition plan is longer than one year" the plan must (but did not) "identify steps that will be taken during each year of the transition period." Rather, the policy simply stated the city's intention to complete curb cuts and other wheelchair related improvements on arterial and commercial streets by the year 2008. Similarly, the policy did not indicate when the city's residential streets would be made wheelchair accessible. These failures caused the transition plan to be in violation of section 35.150(d)(3)(iii). Finally, the plan failed to comply with section 35.150(d)(3)(iv) because it did not identify the individual responsible for implementing the plan. Rather, the Memorandum stated that the Public Works Department would implement major aspects of the plan, and identified a particular Public Works Department senior engineer as the individual to whom individual requests for curb cut installation should be directed. The plan did not indicate whether this individual — or any other individual — has overall responsibility for ensuring that the plan is actually implemented. This arrangement was found inadequate by the court.

C. Other Programs and Facilities

1. ***Tennessee v. Lane***, 541 U.S. 509 (2004).

The duty to accommodate under Title II of the ADA is perfectly consistent with the well-established due process principle that, within the limits of practicability, a state must afford to all individuals a meaningful opportunity to be heard in its courts. Courts recognize a number of affirmative obligations that flow from this principle: the duty to waive filing fees in certain family-law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants. Each of these instances makes it clear that ordinary considerations of cost and convenience alone cannot justify a state's failure to provide individuals with a meaningful right of access to the courts. Judged against that backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end. In this case, therefore, the United States Supreme Court held that the abrogation of state sovereign immunity under the ADA, insofar as it required states to provide disabled persons with reasonable access to courts, was a valid exercise of congressional authority to enforce substantive constitutional guarantees.

2. ***Klingler v. Dir***., 433 F.3d 1078 (8th Cir. 2006).

Plaintiffs, disabled persons who purchased windshield placards allowing disabled people to park in reserved spaces, sued defendant, the Director of the Department of Revenue, State of Missouri, pursuant to the ADA, claiming that an annual fee for the use of windshield placards was a discriminatory surcharge prohibited by the ADA and its regulations. This is a surcharge that violates 28 C.F.R. § 35.130(f), said the court of appeals, and the court of appeals invalidated the fee-for-placard system. Plaintiffs' request for declaratory and injunctive relief was granted.

3. ***Jones v. City of Monroe***, 341 F.3d 474 (6th Cir. 2003)

This case dealt with the city's failure to provide accommodations to a person with multiple sclerosis, under the ADA. The court of appeals upheld the district court's denial of a preliminary injunction to plaintiff with multiple sclerosis, who sued under Title II of the ADA. Title II provides that no qualified individual with a disability shall by reason of such disability be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. The plaintiff, Helen Jones, suffers from multiple sclerosis, which prevents her from walking except for short distances; she therefore relies on a wheelchair. Jones works for the Salvation Army in downtown Monroe, Michigan, as a substance abuse counselor for deaf and hard-of-hearing clients. The City of Monroe maintains free all-day parking spaces in several downtown locations, but they are too far from Jones's workplace for her to use them. The city also has free one-hour parking spaces adjacent to Jones's workplace. Jones, who has a handicapped parking permit, had often parked her car all day in the one-hour spaces when she was at work, and had been ticketed for exceeding the one-hour parking limit. Jones sued the city, claiming that its refusal to modify its municipal parking program constituted unlawful and intentional discrimination on the basis of disability in violation of federal law. The district court denied her motion for a preliminary injunction, holding that she had failed to establish a likelihood of success on her claim.

The Sixth Circuit concluded that Jones had not been denied the benefits of the city's parking system:

> Access to the one-hour and all-day parking places is facially neutral. The one-hour limit applies to individuals with disabilities and those without disabilities. Similarly, both disabled and able-bodied persons may park in all-day parking. . . Jones has equal access to the free downtown parking, and she can park there if she chooses. The majority accepted the city's argument that the one-hour limit on the closer parking spaces was needed to encourage people to shop at downtown businesses, and that altering the time limit would be a "fundamental alteration of the parking scheme.

Id. at 478, 480 n.9.

4. ***Melton v. Dallas Area Rapid Transit***, 391 F.3d 669 (5th Cir. 2004).

Plaintiffs, a disabled adult child's parents and an advocacy group, filed an action against defendant rapid transit authority seeking an injunction requiring the authority to provide the same paratransit pick-up service that it had previously provided to the child. Plaintiffs' appeal arose from the District Court's grant of summary judgment to the authority and denial of their motion for a new trial. Factually, the authority previously picked the child up in an alley behind his home. Citing safety concerns, the authority changed the pickup location to a city street, one block away. Plaintiffs filed their suit several years after the change had been made. They contended that the authority's refusal to restore the original pickup location violated Title II of the ADA, and § 504 of the Rehabilitation Act. The authority moved for summary judgment, successfully arguing that it was not required to make reasonable modifications in its paratransit services to meet the child's individual needs.

The court of appeals found no error. The Federal Transit Administration had approved the authority's paratransit plan as being compliant with Title II of the ADA. Once it was approved, the authority's only obligation was to provide paratransit services in accordance with the plan. The authority was not required by either the ADA or the Rehabilitation Act to make reasonable modification to its paratransit service. Plaintiffs had, therefore, failed to establish a *prima facie* case of discrimination. The court of appeals, therefore, affirmed the district court's grant of summary judgment to the authority.

5. ***Chaffin v. Kan. State Fair Bd***., 348 F.3d 850 (10th Cir. 2003).

Disabled persons sued defendants as a result of various problems they had in attending a state fair, including viewing concerts, reaching restrooms and food facilities, and parking. The district court identified numerous deficiencies at fair facilities, and ordered defendants to prepare a self-evaluation and a transition plan. Defendants, state, state fair board, board members, and the fair's general manager, appealed the judgment of the District Court granting plaintiff disabled persons partial summary judgment in their action under Title II, and directing defendants to prepare a self-evaluation and a transition plan under 28

C.F.R. §§ 35.105 and 35.150. On appeal, the court of appeals affirmed. The court found that the disabled persons' attempts to enforce the ADAAG and other regulations was not precluded. The court held that the disabled persons' mere physical presence on the fairgrounds, when coupled with being effectively trapped in a handicapped section, unable to leave for food or to use the restroom, unable to view the stage, and subjected to being climbed over by others, amounted to a denial of the fair's benefits. The court determined that defendants were required to comply with the ADAAG regulations and prepare a transition plan because the fair was not in compliance with the ADA, where portions of the fair's grandstand, 22 public restrooms, and many buildings were not wheelchair accessible.

6. ***Young v. City of Claremore***, 411 F. Supp. 2d 1295 (N.D. Okla. 2005).

Plaintiff resident sued defendant city, alleging violations of the ADA, 42 U.S.C. § 1983, the Equal Protection Clause of the Fourteenth Amendment, and the Rehabilitation Act. The resident sought injunctive relief, declaratory relief, compensatory damages, costs, and fees. The resident had cerebral palsy, a condition which limited his mobility, and he used a golf cart to travel around the city. The resident received numerous citations for violations of Oklahoma law prohibiting operation of golf carts on public streets. The resident was found guilty in municipal and state court on one citation, but he never appealed. The other citations were held in abeyance. The city moved for summary judgment, and also that the district court should abstain from ruling given the status of the criminal cases. The federal court determined that abstention was inappropriate because there was no ongoing state proceedings and the resident did not ask the federal court to overturn his conviction in the state court proceedings. The court determined that the city was entitled to summary judgment as to the resident's claims. The ADA reasonable modification claim failed because: (1) the resident was not being deprived all access to transportation on the city's roads by reason of his disability, since he was able to operate an automobile; (2) his request for unlimited access to operate his golf cart on all types of roads at all times of day was not a reasonable modification; and (3) the city provided evidence that the requested modification would result in a "direct threat" to the safety of others. As a result, the district court granted the city's summary judgment motion.

7. ***Kasten v. Port Authority of New York & New Jersey***, 2002 U.S. Dist. LEXIS 17888, 2002 WL 31102689 (E.D.N.Y. 2002).

Plaintiffs, a parent and a child (through her parents) sued defendant agency for failing to make terminals at an international airport accessible to disabled people. The agency moved for summary judgment.

After taking their oldest daughter to an airport terminal for a departing flight, the parents, who had plaintiff child with them in a stroller, experienced difficulty returning to their car. The stroller was necessary because of the child's disability. Having the stroller made it difficult for plaintiffs to get back into a busy elevator, however, and, due to airport regulations, prevented them from using an escalator. Based on that experience, plaintiffs alleged that the terminal was not readily accessible to disabled people. Plaintiffs did not specify the legal bases for their claim, so the agency assumed they intended to invoke both the ADA, and § 504 of the Rehabilitation Act. The court construed the complaint as raising claims under those statutes. Resolution of the ADA claim would also resolve the Rehabilitation Act claim. The court concluded that 28 C.F.R. § 35.150 governed the ADA claim and that no reasonable jury applying that regulation could conclude, on the facts plaintiffs relied upon, that the airport terminal failed to be readily accessible to the disabled in July 1997. As a result, the court granted the agency's motion.

D. Defenses to ADA Accessibility Claims

When confronted with a complaint that the governmental entity's facilities (sidewalks, curb ramps, parking lots, etc.) are not accessible, consider the following defenses:

1. Lack of Standing

A good starting point is to challenge the opponent. Is the plaintiff/complainant an individual or an advocacy group "representing" many individuals? The first element of legal standing is injury personal to the plaintiff. General claims, absent allegations of harm that are concrete and particularized, actual or imminent, should be dismissed. *Dillery v. City of Sandusky*, 398 F.3d 562, 568 (6th Cir. 2005); *Ross v. City of Gatlinburg*, No. 03-5916, 113 F. App'x 113 (6th Cir. 2004). General allegations of disparate impact on disabled persons, absent allegations of specific acts of intentional discrimination against plaintiffs, are insufficient. *Tyler v. City of Manhattan*, 118 F.3d 1400 (10th Cir. 1997). The plaintiff must identify a particular street, intersection, parking lot, or facility that impeded his access to a program, and he must indicate intent to return. *Id. See also Rodriguez*, 305 F. Supp. 2d at 1285; Adam A. Milani, *Wheelchair Users Who Lack Standing, Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 Wake Forest L. Rev. 69 (2004). If the advocacy group does not have a member in your city, it may lack associational standing. *Lamp v. Charlotte County*, 429 F. Supp. 2d 1302, 1311 (M.D. Fla. 2006).

2. Transition Plan and Self-Evaluation Plan

Because they impose obligations beyond that which are imposed by the ADA statutory mandate, courts have declined allowing plaintiffs a private cause of action for violations of certain technical regulations (*i.e.*, a lawsuit cannot be brought to complaint about these matters). *See Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004). This authority supports the argument that violations of the technical construction specifications of ADAAG may not be privately enforceable without a showing that denial of access to a program. *See also Alford v. City of Cannon Beach*, No. CV-00-303-HU, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) (No duty under the ADA to construct new sidewalks.) Also, for example, in 36 C.F.R. 1191 (2009) (Final Rule) the technical standards for the public rights-of-way were reserved for a long time. New regulations have been issued. *See* DOJ 2010 ADA Standards for Accessible Design: http://www.ada.gov/regs2010/ 2010ADA Standards/ADAstandards.htm.

3. Insufficient Alteration

Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections or streets, roads, or highways. 28 C.F.R. § 35.151. Alterations must involve more than minor repairs or maintenance and "[a]t a minimum, it requires, the laying of a new asphalt bed spanning the length and width of a city block" to trigger a city's duty under this regulation. *Kinney v. Yerusalim*, 9 F.3d 1067, 1073 (3d Cir. 1993). *See also Reichenbach v. City of Columbus,* No. 2:03-CV-1132, 2006 U.S. Dist. LEXIS 57705 (S.D. Ohio, Aug. 16, 2006). Routine maintenance, such as filling potholes, does not trigger curb ramp requirements. U.S. Department of Justice, Civil Rights Division, Disability Rights Section, The ADA & City Governments: Common Problems, http://www.ada.gov/comprob.pdf (last visited May 28, 2010).

4. Fundamental Alteration

A city need not take action resulting in a fundamental alteration to the nature of its program. 28 C.F.R. § 35.150(a)(3) (2009). For example, a one-hour limit on downtown parking is facially neutral since it applies to all individuals, whether or not disabled. Similarly, the absence of free all-day parking within the immediate downtown area requires disabled and able-bodied persons to park further away. *Id.; see also Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003). Where a city claimed that it currently provides no sidewalk construction and maintenance, however, the court did not accept that at face value. *Culvahouse v. City of LaPorte*, 679 F. Supp. 2d 931 (N.D. Ind. 2009).

5. Undue Burden

A city need not incur undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3) (2009). This determination is made by the head of the municipality or by its designee, including an accompanying written statement of the reasons for reaching that conclusion. *Id.* The "undue burden" determination is based on all resources available for use in the program, including the availability of federal funds. *Id.* When an alteration to existing improvements or new construction triggers the duty to install a curb ramp the "undue burden" defense does not apply. *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3d Cir. 1993). A court will carefully limit the applicability of the "undue burden" defense to existing facilities and programs. *Id.* Courts have been unsympathetic to cities' budget concerns when reviewing this issue, however, even when the sidewalk repair and maintenance budget would exceed the entire city's annual operating budget. *Culvahouse*, 679 F. Supp. 2d at 931.

6. The Program is Accessible When Viewed in its Entirety

Consistent with Title II's emphasis on "program accessibility," the regulatory scheme generally does not require public entities to retrofit all existing facilities. 28 C.F.R. § 35.150(a)(1) (2009). Rather, the regulations permit a public entity to select from among a number of alternatives for accomplishing program accessibility, including relocation of services, reassignment of personnel and structural modification of existing facilities. *Id.* § 35.150(b)(1). For example, the First Circuit Court of Appeals held that a university was required to provide *at least one route* that a person in a wheelchair could use to reach the botanical garden safely. *Parker v. Universidad de P.R.*, 225 F.3d 1 (1st Cir. 2000). Thus, even if sidewalks are deemed to be a "program," the ADA's reasonable program access requirement may be satisfied if some, but not all, routes are accessible. *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1339 (S.D. Cal. 1997).

7. Is it a Facility or a Program

Both the regulations and decisions from the First, Third and Sixth Circuits explicitly refer to walks and roadways as "facilities," rather than as "activities, programs, or services." *See* 28 C.F.R. § 35.104 (2009) (defining "facility" as "all or any portion of buildings, structures, . . . roads, walks, passageways, parking lots, or other real or personal property"); *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 911 (6th Cir. 2004); *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 n.3 (3d Cir. 1993) (noting that streets and walkways are "facilities" given particular priority in the regulations). The distinction between a facility and

a program is important because it guides the city's obligation to guarantee accessibility. While entities may not exclude "qualified individual with disabilities from participation in or benefits of services, programs, or activities," the regulations do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) & (a)(3) (2009); *N.J. Prot. & Advocacy, Inc. v. Twp. of Riverside*, No. 04-5914, 2006 U.S. Dist. LEXIS 56478 (D.N.J. Aug., 2, 2006). The Ninth and Fifth Circuit Courts of Appeals have held that public sidewalks are subject to the program accessibility requirements of the ADA. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002); Frame v. Arlington, 657 F.3d 215 (5th Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 1561 (2012). The focus of their inquiry was whether a particular public function is a normal function of a governmental entity. *Barden*, 292 F.3d at 1076; *Frame*, 657 F.3d at 226-31. This expansive view means that cities must be mindful of ADA issues in almost all of their activities.

8. Statute of Limitations

Under Title II, there are two ways a city can violate the ADA: (1) deny access to a service, program or activity, or (2) commit an act of discrimination. It is an "act of discrimination" to construct new facilities that are inaccessible. *See, e.g.*, 42 U.S.C. § 12146 (2009); *Voices for Independence v. Pa. Dep't of Transp.*, No. 06-78, 2007 WL 2905887 (W.D. Pa. Sept. 28, 2007). The Fifth Circuit Court of Appeals defines "newly built and altered sidewalks" to be sidewalks built or altered after January 26, 1992. *Frame*, 657 F.3d at 222. Under federal accrual rules, a plaintiff's cause of action accrues (to begin the running of the two-year statute of limitations) when the plaintiff knew or should have known that he was being denied the benefits of the city's newly built or altered sidewalk. *Id.*, at 238. This becomes a fact-intensive inquiry. A disabled individual has no standing to challenge an inaccessible sidewalk until he can show actual, concrete plans to use that sidewalk, and his cause of action (ability to sue) does not accrue until that time. *Id.* The Fifth Circuit held: "A city acts wrongfully when it builds an inaccessible sidewalk without adequate justification, but a disabled individual is not injured until he is actually deterred from using that sidewalk." *Id.*

9. Make the Claim Moot by Repair

After a lawsuit is filed, it is recommended that the city get underway with an ADA compliance plan as quickly as possible (if it has not done so already). Consider making a comprehensive Rule 68 Offer of Judgment to shift the attorney fee burden. Fed. R. Civ. P. 68(d). Occasionally cities are awarded attorney's fees in ADA litigation. *See Access Now, Inc. v. Town of Jasper*, No. 1:02-CV-059, 2004 U.S. Dist. LEXIS 905 (E.D. Tenn. Jan. 7, 2004). Being underway with barrier removal work provides several other potential defenses.

- There are no barriers to access.
- The city complies with the regulations regarding the removal of barriers.
- Even if the city has not yet completed the barrier removal plan, an injunction would not be appropriate where the city is affirmatively taking action.

If a city comes into compliance with the ADA during the pendency of the lawsuit, and prior to the court granting the plaintiff relief, the court loses subject matter jurisdiction based on mootness, and the plaintiff will not be a prevailing party. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001); *see also Fradera v. Municipality of Mayaguez*, 440 F.3d 17, 20 (1st Cir. 2006).

10. Mere Difficulty is Not Enough

A case helps to illustrate this option: A parent and child sued an airport agency for failing to make terminals accessible to disabled people. Having a stroller for their disabled child made it very difficult for them to get into a busy elevator, and prevented them from using an escalator. Based on that experience, they alleged that the terminal was not readily accessible to disabled people. The court concluded that the ADA regulations (28 C.F.R. § 35.150) governed the ADA claim and that no reasonable jury applying that regulation could conclude, on those facts, that the airport terminal failed to be readily accessible to the disabled. *Kasten v. Port Auth.*, No. 98-CV-4988, 2002 U.S. Dist. LEXIS 17888, (E.D.N.Y. Sept. 10, 2002); *see also Melton v. Dallas Area Rapid Transit*, 391 F.3d 669 (5th Cir. 2004).

11. Constitutional Problems

The authority of Congress to pass remedial legislation is limited. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). Legislation that reaches beyond the scope of actual constitutional guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Id.* at 520. No support exists in the ADA for the expansive obligations some plaintiffs would impose on cities to have only wide, level, and unobstructed sidewalks and curb ramps everywhere in the city. It has been held that such an approach has nothing to do with discrimination, but rather creates "an affirmative accommodation obligation on the part of public entities that far exceeds the constitutional

boundaries." *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001). Moreover, in *Tennessee v. Lane*, the Supreme Court held that the onerous provisions of Title II of the ADA were valid **only when** a deprivation of a fundamental right would result from a lack of accommodation, in that case, a right of access to judicial services. *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). While use of public sidewalks and curb ramps is beneficial to all residents, there is no authority establishing this benefit as a fundamental right. *Flores*, 521 U.S. at 507; *see also Lane*, 541 U.S. at 509.

12. Miscellaneous Defenses

There are, of course, other defenses that may be applicable: (1) persons with disabilities are afforded an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services, through public transportation or other alternatives 28 C.F.R. § 35.150(b) (2009); *Young v. City of Claremore*, 411 F. Supp. 2d 1295 (N.D. Okla. 2005) (the ADA reasonable modification claim requesting unlimited access to operate his golf cart on all roads at all times failed because the resident was not being deprived all access to transportation on the city's roads by reason of his disability, since he was able to operate an automobile.); (2) there are no duties or regulations regarding this alleged violation. *See Alford v. City of Cannon Beach*, No. CV-00-303-HU, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) (no duty under the ADA to construct new sidewalks.). Also, for example, in 36 C.F.R. 1191 (2009) (Final Rule) the technical standards for the public rights-of-way are reserved; (3) it is a threat to health and safety or would compromise the essential eligibility criteria for the program. *Young*, 411 F.Supp.2d at 1295; and (4) public entities are not required to retrofit all existing facilities. 28 C.F.R. § 35.150(a)(1) (2009); *Iverson*, 452 F.3d at 94 (Title II's emphasis is on "program accessibility,"). *See also Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004).

13. Historically Significant Property

While asserting that a property's historical significance prevents a requirement to make substantive changes, in Texas even historic buildings are expected to comply with the requirements for altered buildings to the fullest extent possible. If full compliance with the Texas Accessibility Standards would threaten or destroy the historic or architectural significance of the building, then alternative minimum requirements can still apply to that item or feature. Texas requires a letter from the Texas Historical Commission with a variance application. Other variances may be available from Texas Department of Licensing and Regulation if compliance is economically infeasible, generally considered to be more than twenty percent of the project cost. Variances are also possible if compliance is technically infeasible when, for example, structural members are in the way, or the space is not large enough to meet the requirements. Make alternative means of access (such as video presentations) available in an accessible area to address inaccessible features of historic buildings. *See* Elimination of Architectural Barriers Act, Tex. Gov't Code Ann., ch. 469 (Vernon 2004 & Supp. 2009-2010); *see also* 28 C.F.R. § 35.150(a)(2) (2009).

E. Department of Justice Litigation

Remember that Title II requires all programs, services, and activities of State and local governments to be accessible to the disabled. The DOJ has taken an active role in the enforcement of these provisions.

1. Enforcement

Through lawsuits and both formal and informal settlement agreements, the DOJ has achieved greater access for individuals with disabilities in thousands of cases. Under general rules governing lawsuits brought by the Federal Government, the DOJ may not file a lawsuit unless it has first unsuccessfully attempted to settle the dispute through negotiations.

a. Litigation

The Department may file lawsuits in federal court to enforce the ADA and may obtain court orders including compensatory damages and back pay to remedy discrimination. Some litigation is resolved at the time the suit is filed or afterwards by means of a negotiated consent decree. Consent decrees are monitored and enforced by the federal court in which they are entered.

b. Formal Settlement Agreements

The Department sometimes resolves cases without filing a lawsuit by means of formal written settlement agreements. The Project Civic Access initiative is a wide-ranging effort to ensure that cities, counties, towns, and villages throughout the United States comply with the ADA. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. Departmental investigators, attorneys, and architects survey State and local government facilities and programs across the country for the purpose of identifying modifications needed to comply with ADA requirements. Depending on the circumstances in each community, the agreements address specific areas where access can be improved. To date, more than 113 communities have signed Project Civic Access agreements. Each community has agreed to take specific steps, depending on local circumstances,

to make core government functions more accessible to people with disabilities. The agreements have improved access to many aspects of civic life including, courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, and emergency preparedness and response.

c. Other Settlements

The Department of Justice resolves numerous cases without litigation or a formal settlement agreement. In some instances, the public accommodation, commercial facility, or state or local government promptly agrees to take the necessary actions to achieve compliance. In others, extensive negotiations are required.

d. Certification of State and Local Accessibility Requirements

The Justice Department is authorized to certify that State and local accessibility requirements, which are often established through building codes, meet or exceed the ADA's accessibility requirements. In any lawsuit that might be brought, an entity that complies with a certified State or local code can offer that compliance as rebuttal evidence to show its compliance with the ADA. The States of Texas, Maine, Florida, and Maryland currently have accessibility codes certified by the DOJ.

e. Technical Assistance

The ADA requires the DOJ to provide technical assistance to businesses, state and local governments, and individuals with rights or responsibilities under the law. The Department provides education and technical assistance through a variety of means to encourage voluntary compliance: through their ADA Website (www.ada.gov); ADA Information Line; and ADA Fax on Demand; developing and disseminating technical assistance materials to the public; undertaking outreach initiatives; and coordinating ADA technical assistance government wide.

2. What can you do?

Study the Justice Department settlement agreements that are posted online at www.doj.gov.

1. Make sure your city has an ADA coordinator who understands the need to coordinate the city's efforts to comply with and carry out the ADA mandates. 28 C.F.R. § 35.107(a);
2. Make sure your city has established a grievance procedure for resolving complaints of violations of Title II, 28 C.F.R. § 35.107(b);
3. Confirm that a self-evaluation was conducted.
4. Confirm the implementation of a transition plan.

F. Zoning Cases

There has also been judicial expansion of the ADA into traditional municipal affairs such as zoning. Several federal circuits now hold that the ADA applies to local zoning issues. *See Innovative Health Systems, Inc. v. City of White Plaints*, 931 F.Supp. 222 (S.D.N.Y. 1996); *Musko v. McClandless*, 1995 WL 262520 (E.D. Pa. 1995); *Oak Ridge Care Ctr. v. Racine County*, 896 F.Supp. 867 (E.D.Wis. 1995); and *Pack v. Clayton County, No. 1*, 1993 WL 837007 (N.D. Ga. 1993), *aff'd*, 47 F.3d 430 (11th Cir. 1995). In other words, a decision whether to grant a variance or to deny a certificate of occupancy or other zoning decision can be challenged based on whether the party denied is disabled. If a disabled person is seeking a zoning variance or other municipal action, these courts have held that the municipality has a duty to accommodate the individual by modifying its policies, practices or procedures in order to allow that individual to occupy whatever dwelling or business the individual has applied for. *See* 28 C.F.R. § 35.130(b)(7). This provision is viewed by some as an affirmative mandate by the federal government to a local government that the local government must change its rules when dealing with a disabled person. If a locality refuses to change its rules, a disabled person could simply file suit for discrimination and a municipality must then show that it had non-discriminatory reasons for making its decision. *See, e.g., MX Group v. Covington*, 293 F.3d 326 (6th Cir. 2002). This approach could pose problems if the court determines that what used to pass for traditional legitimate governmental interests may be insufficient in light of the DOJ's "accommodation" regulations.

Although several circuits have ruled that the ADA applies to zoning issues, a few circuits have rejected the idea that the ADA applies to zoning decisions. Specifically, courts in the Third, Fourth and Fifth Circuits have held that zoning is not a "public service, program, or activity" within the meaning of 42 U.S.C. § 12132. *See Cox v. Tp. of Upper St. Clair*, 14 A.D.D. 1297, 1994 WL 902369 (W.D. Pa. 1994); *Kessler Institute for Rehabilitation v. Mayor and Council of Borough of Essex Falls*, 876 F.Supp. 641 (D.N.J. 1995); *U.S. v. City of Charlotte, N.C.*, 904 F.Supp. 482 (W.D.N.C. 1995); and *Robinson v. City of Friendswood*, 890 F.Supp. 616 (S.D. Tex. 1995).

In § 12132, disabled persons cannot be "denied the benefits of the services, programs, or activities of a public entity . . . ." What is included in the phrase

"services, programs, or activities"? The plain language of the ADA would indicate that zoning does not fall within those terms. Zoning is an administrative or legislative function, not a service or program. The legislative history of the ADA notes that its purpose was to expand the class of public entities from those covered by the Rehabilitation Act, *i.e.,* those who do not receive federal funding, and not to expand the type of conduct covered. *See* House Report No. 101-485(II), p. 84, 1990 USCCAAN 366. Further, the Senate Report accompanying the ADA lists the two purposes of the Act: "(1) to make the provisions of the Rehabilitation Act applicable to all public entities, regardless of whether they receive federal funding," and "(2) to clarify the Rehabilitation Act with respect to public transportation." *See* S. Rep. 116, 101st Cong., 2d Sess., at 12 (1989). As summarized by the *Cox* decision, cited above: "Thus the ADA expanded the class of public entities that are covered under the act to those that do not receive federal funds; the ADA did not expand the type of conduct covered." *Cox*, 1994 WL 902369 at *4. In other words, Congress did not debate forcing localities to change their laws and zoning rules; instead, it imagined localities building handicapped ramps and installing elevators, not affect zoning actions. *See, e.g.,* House Rep. No. 101-485(II), p. 36, 1990 USCCAAN 317. Despite the rationale provided by the legislative history of the ADA, some courts nonetheless simply assume that the ADA bestows an unfettered power over local governments. *See, e.g., MX Group v. Covington*, 293 F.3d 326 (6th Cir. 2002).

As a result, be on the lookout for allegations that attempt to usurp Texas' strict zoning laws by judicial fiat. *See* Chapters 211 and 212, Texas Local Government Code. Such attempts to overturn state laws should be vigorously resisted in court, and the focus of the case instead should be upon compliance with the terms of the ADA.

IV. CONCLUSION

Although no amount of risk prevention can completely eliminate the risk of ADA litigation, the first step in prevention is to proactively understand both the requirements of the ADA and the regulations, as well as the existing accessibility issues, through a complete self-evaluation of the city's physical assets and programs. The history and language of the ADA speaks to its scope. The ADA was passed to enable the disabled to participate in society without discrimination. Recent judicial attempts to increase the scope of the ADA vis-à-vis local governments indicate a growing trend in this area of litigation, one that most cities have not experienced to date. The ADA can fulfill its purpose of ending discrimination against those who are disabled by local government compliance with its provisions. As recent history indicates, the ADA has also become a source of increased litigation burdens on local governments. This relatively new area of municipal litigation must be taken seriously. With the examples provided in this paper, it is hoped that you will not be caught completely off guard when this type of lawsuit comes to your city.