UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EASTERN PARALYZED VETERANS ASSOCIATION

94 CV 0435 (GBD)

Plaintiff,

vs.

REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

THE CITY OF NEW YORK

Defendant

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Robert L. Burgdorf Jr., Special Master

July 31, 2017

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EXECUTIVE SUMMARY

For more than 20 years the City of New York (the "City") and the Eastern Paralyzed Veterans Association ("EPVA") have been involved in a legal action, the ultimate goal of which is to make City sidewalks and street crossings accessible to people with disabilities. This report describes the complicated legal wranglings, examines the convoluted federal statutory and regulatory provisions that apply, and recommends a path forward.

On January 26, 1994, EPVA (now called the United Spinal Association, see n. 357 on p. 132 *infra*), a non-profit membership organization representing veterans with "spinal cord injury or disease," filed a civil action lawsuit against the City in the United States District Court for the Southern District of New York, complaining that the City was violating Title II of the Americans with Disabilities Act (ADA) by failing to install pedestrian curb ramps along its streets, roads, and highways as required by provisions of Title II. On August 27, 2002, following extensive negotiations and mediation, the parties entered into a Stipulation of Settlement ("2002

Stipulation") that was so ordered by Judge Thomas P. Griesa on September 9, 2002. In the Stipulation, the parties agreed that they were "committed to the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs," and the City agreed to commit specified sums of money for curb ramp installations for the years 2003 to 2008 and beyond.

On January 28, 2016, the parties signed a new agreement titled "Stipulation Resolving Disputes" ("2016 Stipulation") that Judge Griesa so ordered on February 11, 2016. The 2016 Stipulation provided that it superseded corresponding provisions of the 2002 Stipulation, but that otherwise the latter remains in full force and effect. The 2016 Stipulation committed the City to provide additional specified sums of money for installation of curb ramps at unramped locations, and for upgrading existing ramps not compliant with ADA standards, plus specified funding for upgrading ramps in Lower Manhattan.

The case was reassigned to Judge George B. Daniels, who convened a Fairness Hearing on May 31, 2016. Prior to the hearing, eight grassroots disability rights organizations (the "Objectors") filed Objections to the 2016 Stipulation, and appeared at the hearing, along with counsel for the parties. At the hearing, Judge Daniels announced his intention to appoint a special master to produce a report providing him with information and recommendations to enable the court to make an educated and informed judgment in the case. On September 19, 2016, Judge Daniels appointed Professor Robert L. Burgdorf Jr. as Special Master.

Since that time, the Special Master has been:

- Meeting with counsel for the parties and the Objectors, and employees and officials of the New York Department of Transportation (DOT) including Commissioner Trottenberg;
- Reviewing voluminous submissions from the parties and the Objectors;
- Analyzing federal statutory and regulatory requirements on curb ramp accessibility, their development, and their complex, sometimes abstruse interplay;

- Reviewing litigation in other jurisdictions on curb ramp accessibility, with particular focus on statutory and regulatory standards, settlement agreements, and consent decrees;
- Visiting New York street corners in various stages of curb ramp installation and needed installation, and getting workers' explanations of the process and problems involved in the construction;
- Pursuing, compiling, synthesizing, and analyzing numerical data (proffered in the litigation or not previously provided) relating to curb ramp installations and upgrades, and the allocations of funds for them;
- Drafting findings based on the information obtained; and
- Formulating recommendations regarding the fairness, reasonableness, and adequacy of the 2016 Stipulation Resolving Disputes, and the future course of the proceedings.

This Report is the culmination of that work. The information is presented in 15 sections, as reflected on the Contents pages. Section XIII contains the Special Master's Detailed Findings, and Section XIV his Recommendations that are also reproduced in this Summary. The Master has collected, tracked down, waded through, and analyzed masses of data and other information, and the Report is awash with facts and figures that the Master has sought to synthesize and clarify.

The stakes in this case are enormous. Large numbers of people with disabilities – of all ages and circumstances – need ADA-compliant ramps to navigate the curbs in the City. Census data indicate that one in nine residents of the City (about 950,000) has a disability, 19% of which interfere with walking or climbing stairs; and that approximately 99,000 residents use wheelchairs.[1] Additionally, it is estimated that approximately 6.8 million visitors to the City each year have a disability.[2]

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[1] Mayor's Office for People with Disabilities, *New York City People with Disabilities Statistics: Updated 2016,* at pp. 2, 3,5, http://www.nyc.gov/html/mopd/downloads/pdf/selected-characteristics-disabled-population.pdf, based on U.S. Census Bureau, *2014 American Community Survey – Public Use Microdata Sample,* Population Division – New York City Department of City Planning.

[2] City of New York, *AccessibleNYC: Annual Report on the State of People with Disabilities Living in New York City* (2017 Edition) at p. 9, http://www.nyc.gov/html/mopd/downloads/pdf/accessiblenyc2017.pdf.

On July 26, 1990, President George H.W. Bush closed his remarks at the signing of the Americans with Disabilities Act with the following words: "I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful walls of exclusion finally come tumbling down."[3] Though often not recognized as such, our cities' curbs can be dire "walls of exclusion" for many people with disabilities. The immediate direct effect of inaccessible pedestrian crossings is to make it difficult and frequently impossible for a person with a mobility disability to use public walkways to get from one place to another – a particular address, residence, park, transportation station, taxi stand, hospital, coffee shop, restaurant, museum, gym, place of worship, government building, etc. – giving verity to the old humorous quip that "you can't get there from here," and negating whatever work, business, social contact, recreation, medical treatment, creative endeavors, and so on, that would have occurred at the destination.

Awareness that inaccessible corners are a problem discourages people with mobility disabilities from moving to or taking a job in the City, or even visiting. Friends, relatives, employers, business associates, and others are reluctant to invite people with disabilities for a visit, a date, a job, a graduation, a wedding, a conference, a concert, or other purposes, if they cannot be sure that the person will be able to have access to the goings-on. In addition to violating rights under the ADA, all of these consequences have a substantial economic impact in limiting tourism, networking, shopping, and job opportunities.

Attempting to traverse pedestrian crossings in the face of unramped curbs, or non-compliant or defective ramps can have severe results, involving serious injuries and even death. A significant percentage of wheelchair-related injuries in the U.S. are from tipping over or falls,

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[3] George H.W. Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990,* 2 (July 26, 1990).

and many of these involve ramps.[4] Trying to maneuver over or around unramped curbs can lead to tipping over or precipitant crashing into an obstacle, stopping the wheelchair and dislodging its user. Unramped curbs or improper slopes on ramps can cause wheelchairs to tip over backwards, forwards, or sideways. For people who use mobility aids other than wheelchairs, curbs can provoke various kinds of slips and falls. Any of these can lead to broken bones, head injuries and concussions, sprains, contusions, and other kinds of injuries, sometimes fatal.

Highly tragic are instances where the absence of curb ramps forces a person in a wheelchair to travel in the street, risking being run into by a motor vehicle. One ironic such incident involved a disability rights activist and wheelchair-user named Jack Achtenberg who was a vigorous advocate for curb ramps. Forced to proceed in the street on his way home due to the absence of curb ramps, Jack was struck by a hit-and-run driver and left to die in the street.[5] Unfortunately, such incidents are not rare.[6] People's lives, as well as their rights, are in the balance in this litigation, which underscores the urgency of addressing shortcomings of the Stipulations at issue.

According to the documents and information the Special Master has been provided or has collected, several serious concerns and problems with progress under the Stipulations have come to light, including the following:

- **Currently about 80% of the curb ramps in place in the City are not compliant with ADA Standards.**
  (See, *infra*, pp. 157, 172, 224; 244, Finding 51; 251, Finding 67; 278, Finding 126).
- **The yearly rates of ramp installations have decreased dramatically under the Stipulations.**

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[4] *See* p, 26, n. 15 *infra.*

[5] *See infra* p. 27, nn. 17 & 18 and accompanying text.

[6] *See infra* p, 28, n. 19.

(See, *infra*, pp. 166-167, 172; 247-248, Finding 61).

- **The 2002 Stipulation did not include a requirement that ramps installed under it comply with ADA Standards.**
  (See, *infra*, pp. 134, 178,189; 259, Finding 89).
- **Under the 2016 Stipulation as interpreted by the City, completing the upgrading of ramps would be delayed by up to 20 more years.**
  (See, *infra*, pp. 148, 158, 184, 185, 202, 215-216; 241, Finding 39; 256, Finding 81; 272-273, Finding 115).
- **The City has never carried out a comprehensive survey of the compliance with ADA Standards of ramps at all City corners.**
  (See, *infra*, pp. 169, 180, 202, 213-214, 250, Finding 64).
- **Neither of the Stipulations adopts existent, valid, accurate, applicable "ADA Standards" with which City pedestrian ramps must comply.**
  (See, *infra*, pp. 11-12, 137-139, 190, 209, 219, 237-238, Finding 28; 259-260, Finding 89; 268, Finding 107; 275, Finding 119).

In 1994, the City made a projection that "**by FY2012** DOT could construct or let contracts to construct pedestrian ramps on all of the New York City corners then remaining to be ramped." (New York City Department of Transportation, TRANSITION PLAN FOR THE INSTALLATION OF PEDESTRIAN RAMPS ON NEW YORK CITY STREETCORNERS (May 13, 1994), EX. 1 at 17; see p. 109 *infra*). In 2002, the City projected that, "based on current assumptions, the funding described above will result in curb ramp installations" at the remaining 62,695 corners needing them **by the end of FY2010.** (*Curb Ramps – Amended Transition Plan* (2002), EX. 2, at 9 & Attachment A; see pp. 120-121, Table C *infra*). In 2015, the City issued a *10 Year Plan to Upgrade All Ramps* that **projected upgrading all City ramps to comply with ADA standards by 2025**. (EX. 13; Dock., doc. # 56-3 (May 2, 2016); see *infra* at pp. 149-150, 211-212; 272-273, Finding 115). The expectations of people with disabilities, their families, friends, current or would-be employers, and others who benefit from accessible corners, have been repeatedly dashed as the City has continually moved the goalposts for full accessibility of the pedestrian network.

A major conclusion the Special Master has drawn is that, while some progress has been made, less has been done to improve the curb ramp situation in the City in the nearly 15 years since the 2002 Stipulation was signed than would have been expected or was legally required. A second key conclusion is that the 2016 Stipulation is not fair, reasonable and adequate in its current form. On the brighter side, a number of elements of a better settlement are within reach (See pp. 209-212 *infra*), and the parties are in a position to enter into a modified Stipulation that will make it possible for the class of individuals with disabilities to be accorded their rights under the ADA to readily accessible and fully usable pedestrian walkways and crossings of the largest City in America.

Recently, Mayor Bill de Blasio declared: "Creating a better and fairer New York for people with disabilities is an urgent mission for me" … "I want New Yorkers to know this administration will not rest until everyone has the access they deserve, the opportunity they deserve and the rights they deserve. That is our commitment."[7]

To induce the City and the Plaintiff to accomplish, at last, "the efficient and expeditious" delivery of fully accessible pedestrian crossings that they pledged in 2002, the Special Master makes the following recommendations:

Recommendation 1: The Court should not approve the 2016 Stipulation in its present form as fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e)(2).

Recommendation 2: The Court should approve the 2016 Stipulation only if it is modified in accordance with Recommendations 3-14.

[7] Letter of Mayor Bill de Blasio, City of New York, *AccessibleNYC: Annual Report on the State of People with Disabilities Living in New York City* (2017 Edition) at p. 5, http://www.nyc.gov/html/mopd/downloads/pdf/accessiblenyc2017.pdf.

Recommendation 3: The 2016 Stipulation should be modified to require the City to complete, within 90 days, a comprehensive survey, as described in XII.C.1 on pp. 213-215 *infra*, that provides an accurate, verifiable, up-to-date, and ongoing count, list, maps, and electronic database of all pedestrian crossings in the City, available to the public in user-friendly electronic and written forms.

Recommendation 4: The 2016 Stipulation should be modified to include a detailed plan, as described in XII.C.2 on pp. 215-216 *infra*, for installing, within five years, at all corners without ramps, ramps compliant with the ADA Standards.

Recommendation 5: The 2016 Stipulation should be modified to include a detailed plan, as described in XII.C.3 on pp. 216-219 *infra*, for upgrading, within eight years, all remaining ramps that are not fully compliant with the ADA Standards.

Recommendation 6: The 2016 Stipulation should be modified to designate the *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way* (PROWAG) as the "ADA Standards" under the Stipulation.

Recommendation 7: The 2016 Stipulation should be modified to require that all pedestrian ramps installed, repaired, or upgraded by the City or its contractors shall comply with the "ADA Standards."

Recommendation 8: The 2016 Stipulation should be modified to require that all ramps installed, repaired, or upgraded by the City or its contractors shall have detectable warnings.

Recommendation 9: The 2016 Stipulation should be modified to require the City to procure and provide the funding necessary to fulfill the obligations and meet the schedules set out in the modified Stipulation.

Recommendation 10: The 2016 Stipulation should be modified to add additional named organizational and other plaintiffs, and secure additional legal representation of the Plaintiff Class.

Recommendation 11: The 2016 Stipulation should be modified to include a provision ensuring that the Stipulation does not prevent people with disabilities from pursuing legal and other remedies for types or forms of inaccessibility of public sidewalks, pedestrian crossings, and public facilities other than those directly and explicitly addressed in the *EPVA v. City of New York* lawsuit.

Recommendation 12: Paragraph 10 of the 2016 Stipulation should be modified to add, after the words "The terms of this Agreement may be modified by the parties upon a written agreement signed by the attorneys for the parties," the words "after notice to the class and with the approval of the Court."

Recommendation 13: The 2016 Stipulation should be modified to require the appointment by the Court of a Monitor, as described, *infra,* on pp. 227-228, and in Finding 132 on pp. 280-281; the Monitor, preferably a licensed architect or registered civil engineer, should have experience evaluating and assisting public entities regarding accessibility, particularly of pedestrian ramps, and knowledge of current ADA accessibility standards; and be charged with reviewing progress in curb ramp installations and upgrades, assessing compliance with the Stipulation of Settlement, filing detailed reports to the parties and the Court on curb ramp progress and related issues, conducting field spot checks on pedestrian pathways and crossings, and performing related tasks agreed upon by the parties with the approval of the Court.

Recommendation 14: The 2016 Stipulation should be modified to require DOT and the City to issue, within 90 days of the Court's approval of the modified Stipulation, an updated Transition Plan reflecting the City's commitments under the modified Stipulation, available for public inspection, and describing the steps to be taken and a schedule for completing them.

I. INTRODUCTION

On January 28, 2016, the parties in *Eastern Paralyzed Veterans v. City of New York* presented Judge Thomas P. Griesa with a Stipulation Resolving Disputes in the case. Judge Griesa duly signed off on ("so ordered") the stipulation on February 11, 2016, in accordance with a degree of leeway afforded to parties to negotiate the terms of settling their lawsuits. The parties had, however, framed the suit as a class action, with a broadly defined Plaintiff Class of individuals with disabilities who use or seek to use curb ramps in New York City. Since December 1, 2003, federal procedural rules have required that a court can approve a settlement that applies to a class only after conducting a hearing and finding that the proposed settlement is "fair, reasonable, and adequate."[8] The responsibility for holding the fairness hearing and making the determination whether the stipulation is fair, reasonable, and adequate was subsequently assigned to Judge George B. Daniels. At the fairness hearing on May 31, 2016, Judge Daniels announced his intention to appoint a special master to provide him with a report describing what progress had been made during the litigation regarding curb ramps in New York City, what still needs to be done, and what is fair, reasonable, and adequate; and providing recommendations to enable him to make an educated, informed judgment on the stipulation.

This report is submitted by Special Master Robert L. Burgdorf Jr. in fulfillment of that charge. Its preparation involved, *inter alia,* the following activities by the special master:

- Reviewing the court docket and the documents filed in the case;
- Gathering extensive information and documents from the parties through meetings, phone conferences, and email exchanges;
- Meetings with Commissioner Polly Trottenberg and a number of employees of the New York DOT to discuss various aspects of their curb ramp responsibilities;

[8] F.R.C.P. 23(e)(1)(C), as amended on Mar. 27, 2003, effective Dec. 1, 2003.

- Visiting New York street corners in various stages of curb ramp installation and needed installation, and getting workers' explanations of the process and problems involved in the construction;

- Seeking out, compiling, documenting, and clarifying numerical data (proffered in the litigation or not previously provided) relating to curb ramp installations and upgrades, and the allocations of funds for them;

- Analyzing federal statutory and regulatory requirements on curb ramp accessibility, their development, and their complex, sometimes convoluted interaction;

- Obtaining extensive input from the Objectors through submission of written materials and exhibits, and a face-to-face meeting and discussion with Objectors' counsel;

- Reviewing litigation in other jurisdictions on curb ramp accessibility, with particular focus on statutory and regulatory standards, settlement agreements, and consent decrees;

- Making findings based on the information obtained; and

- Formulating recommendations regarding the fairness, reasonableness, and adequacy of the 2016 Stipulation Resolving Disputes; and the future course of the proceedings.

CLARIFICATION REGARDING "ADA STANDARDS"

The term "ADA Standards" and related phrases such as "ADA-compliant" and "in compliance with the ADA" have been used repeatedly in the 2016 Stipulation at issue in this case and in documents and at proceedings over the years of this litigation. These phrases are used in this report as something of a term of art. "ADA Standards" are defined, however, only in a "Whereas" paragraph of the 2016 Stipulation – in a definition that, as explained, *infra*, on pp. 137-139, 189-190, 209, 219; 237-238, Finding 28; 259-260, Finding 89; 268, Finding 107; 275, Finding 119, is troublesome and misleading because it is inaccurate, erroneously cited, and out of date. When "ADA Standards," "ADA-compliant," "in compliance with the ADA," and the like are used in the report, they are intended to refer to the relevant provisions of current guidelines and regulations issued by federal government agencies for the implementation and enforcement of Title II of the Americans with Disabilities Act, particularly in regard to

accessibility of pedestrian walkways and crossings. ADA Title II regulations and guidelines are discussed in Subsubsection IV.D. 2, *infra*; and Recommendations 6 & 7, *supra* at p.8 and *infra* at pp. 282-283, address the standard to be used in a modified Stipulation.

CASE DOCUMENT REFERENCE ABBREVIATIONS

In this report, the following abbreviations are used in citing documents filed, or submitted in the Eastern Paralyzed Veterans Association v. City of New York Case

Dock.:	Civil Docket for Case # 1:94-cv-00435-GBD.
2002 Stip.	Stipulation Resolving Disputes, so ordered Sept. 9, 2002, Dock., #38.
2016 Stip.	Stipulation of Settlement, so ordered Feb. 11, 2016, Dock., #47.
Answer	Answer, 94 Civ. 0435. Dock., #4 (Mar. 18, 1994).
City Objection Response Letter	City of New York letter to Judge Daniels responding to Objection Letter of May 2, 2016 (May 26, 2016), Dock., #70.
Compl.	Civil Complaint, 94 Civ. 0435, Dock., #1 (Jan. 26, 1994).
EX.	Exhibit to this Report
ex.	Exhibit to a document other than this Report
FH Tr.	Transcript of May 31, 2016, Fairness Hearing, entered on June 15, 2016, Dock., #76.
Kurland Decl.	Declaration of Sherrill Kurland in Support of Defendants' Cross-Motion for Summary Judgement in *CIDNY v. City of New York*, Feb. 5, 2015, EX 6.
Objection Letter	Objectors' letter to Judge Griesa, Dock., #56 (May 2, 2016).
Objectors' Submission	Objectors' Submission to Special Master, Oct. 28, 2016.
Objector CIDNY Submission	Objector Center for Independence of the Disabled New York Submission to Special Master, (October 28, 2016).
Pf's FH MOL	Memorandum of Law of United Spinal Association (EPVA) in Support of Approval of 2016 Stip., Dock,. #72 (May 26, 2016).
Stulberg Decl.	Declaration of Robert B. Stulberg in Support of Approval of Stipulation Resolving Disputes, Dock., #71 (May 26, 2016).

II. PROCEDURAL HISTORY

On January 26, 1994, the Eastern Paralyzed Veterans Association ("EPVA"), a non-profit membership organization representing veterans with "spinal cord injury or disease," filed a civil action lawsuit against the City of New York (the "City") in the United States District Court for the Southern District of New York. (Compl,, ¶ 1-2). In the complaint, EPVA sought to compel the City to comply with Sections 202 and 204 of the Americans with Disabilities Act ("ADA"). (*Id.*). The complaint alleged that a substantial majority of intersections in the City where pedestrian walks crossed curbs were not in compliance with ADA requirements in that they lacked curb ramps and accordingly were not readily accessible to and usable by individuals with disabilities who use wheelchairs. (Compl., ¶16). Specifically, the complaint claimed that the City had violated Title II of the ADA by not promulgating a transition plan containing a schedule for installation of curb ramps; by not installing pedestrian curb ramps along streets, roads, and highways that it had caused, authorized, or permitted to be resurfaced or otherwise altered; and by failing to install curb ramps as expeditiously as possible. (Compl., ¶¶ 28, 34-38, 29; see Pf's FH MOL, p. 4). EPVA sought declaratory and injunctive relief, attorneys' fees, and other relief the Court deemed just. (Compl., pp. 13-15).

On March 18, 1994, the City of New York filed its Answer to the complaint, for the most part denying the allegations in the complaint or claiming lack of sufficient information to form a belief as to the truth of the allegations. (Answer, ¶¶ 1-24). The City asked the Court to dismiss the complaint in all respects. (*Id.*, p. 5).

On February 16, 1998, EPVA filed a motion for partial summary judgment seeking a declaration that the City had violated Section 202 of the ADA. (Dock., #17; see Pf's FH MOL, p. 4). On March 27, 1998, the City filed a cross-motion for summary judgment (Dock., #22; see

Pf's FH MOL, p. 4). On February 2, 2000, Judge Thomas P. Griesa denied both parties' summary judgment motions, and stated that "The court will at this juncture work with the parties to narrow the issues in this case with the hope of achieving a settlement." (Dock., #37; see Pf's FH MOL, p. 4).

On June 1, 2000, Judge Griesa announced that he had enlisted Honorable Irene J. Duffy, a former New York State judge and a member of the Mediation Panel of the U.S. District Court for the Southern District of New York, "to assist the court and the parties in working towards a settlement by meeting with the attorneys to arrive at a common understanding of the facts and further facilitating the negotiation process." (Memorandum from Judge Griesa to Counsel, p. 2; Stulberg Decl., ex. F).

On August 27, 2002, following extensive negotiations facilitated by Judge Duffy, the parties entered into a Stipulation of Settlement that was so ordered by Judge Griesa on September 9, 2002. (2002 Stip., Dock. #38; see Pf's FH MOL, p. 4; see City Objection Letter Resp., p. 3). In the 2002 Stipulation, EPVA and the City recognized that under the ADA the federal government "found that the installation of curb ramps at all locations in the City where pedestrian walkways cross curbs is essential to the integration of individuals with disabilities, particularly those who use wheelchairs, into the commerce of daily life." (2002 Stip. ¶ 1). The parties also agreed that they were "committed to the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs." (2002 Stip. ¶ 2). The Stipulation specified sums of money the City agreed to commit for curb ramp installations for the years from 2003 to 2008 and beyond. (2002 Stip. ¶¶ 6-18). Details of these commitments are examined *infra* at pp. 114-119. The parties agreed that the settlement of the lawsuit should proceed as a class action, with the class

defined as "qualified individuals with a disability, as defined in Section 201(2) of the ADA, 42 U.S.C. § 12131(2), who use or seek to use curb ramps in the City"; agreed that the standards for class action status were met; and stipulated to the entry of an order granting class certification. (*Id.* at ¶¶ 32-37).

On June 27, 2003, the court approved a stipulation and entered an order directing the City to pay attorney's fees and costs totaling $400,000 to co-counsel for EPVA. (Dock., #42).

From June 27, 2003, to August 1, 2014, no docket entries were made in the case.

On August 1, 2014, the City of New York sent a letter to Judge Daniels, noting that he had been assigned to the recently filed case of *Center for Independence of the Disabled New York, et al. v. City of New York* (14-cv-05884-GBD, filed on July 30, 2014), and suggesting that that case and the *EPVA v. City of New York* case had substantial overlap, making them related cases that should be assigned to the same judge. (Dock., #44).

The parties signed an agreement titled "So Ordered Stipulation Resolving Disputes" on January 28, 2016; Judge Griesa so ordered the Stipulation on February 11, 2016. (2016 Stip.; Dock. ## 44 & 45). The 2016 Stipulation provided that its provisions superseded corresponding provisions of the 2002 Stipulation, but that otherwise the latter shall remain in full force and effect. (2016 Stip., p. 3). The parties agreed that the City would commit specified sums of money for installation of curb ramps at unramped locations, and for upgrading existing ramps not compliant with ADA standards (including specified funding for upgrading ramps in Lower Manhattan). (2016 Stip., ¶¶ 2-7). These funding obligations and other provisions of the 2016 Stipulation are described and analyzed in Subsection VI.A of this report (funding commitments are detailed on pp. 114-119 *infra*). On February 25, 2016, Judge Griesa issued a "Notice of Scheduling of a Fairness Hearing before the Court" on the 2016 Stipulation, to be held on May

24, 2016. (Dock., #48). The date of the hearing was subsequently postponed to May 31, 2016. (Dock., #66).

On February 1, 2016, the plaintiffs in the *Center for Independence of the Disabled New York, et al. v. City of New York* wrote a letter to Judge Griesa requesting that the Court take no action on the 2016 Stipulation, because the stipulation was an attempt to circumvent progress in the CIDNY case. (Dock., #45).

On February 2, 2016, EPVA wrote a letter to Judge Griesa providing additional information on the 2016 Stipulation, asking the Court to schedule a fairness hearing regarding the Stipulation, and requesting the Court to disregard or reject the February 1 letter from the CIDNY plaintiffs. (Dock., #46).

On May 2, 2016, the American Council of the Blind, the Harlem Independent Living Center, the Center for Independence of the Disabled New York, the Bronx Independent Living Services, United for Equal Access, Inc., the Brooklyn Center for Independence of the Disabled, the American Council of the Blind of New York, and Disabled in Action of Metropolitan New York ("the Objectors") filed Objections to the 2016 Stipulation and notice of their intentions to appear at the Fairness Hearing. (Dock., ##56-65).

On May 3, 2016, the *EPVA v. City of New York* case was reassigned to Judge George B. Daniels, replacing Judge Griesa. (Dock., Notice of Case Reassignment, entered on May 3, 2016).

Judge Daniels convened the Fairness Hearing on May 31, 2016; present were Plaintiff Counsel: Robert B. Stulberg, Amy Schulman, and James Weisman; Defendant Counsel: Sherrill Kurland and David Gilbert Rossi; Objectors' Counsel: Michelle Anne Caiola, Rebecca Juliet Rodgers, and Darin P. McAtee: and a court reporter. (Dock., Minute Entry on May 31, 2016).

Judge Daniels comments and dialogue with counsel yielded a 156-page Transcript of Proceedings. (Dock., #76). Toward the end of the hearing, Judge Daniels announced his intention to appoint a special master to produce a report providing him with information and recommendations to enable the court to make an educated and informed judgment in the case. (FH Tr., Dock., #76, at 147-156).

On June 28, 2016, the Center for Independence of the Disabled New York, Dustin Jones, and Myra Driffin filed a Motion to Intervene in the lawsuit, accompanied by a memorandum of law supporting their intervention. (Dock., ##81 & 83; Dock., #84). On August 24, 2016, Judge Daniels denied the motion to intervene, declaring that "[t]he interests of disabled people using curb ramps throughout the entire City have been, and continue to be, adequately represented by Eastern Paralyzed Veterans Association and its attorneys." (Dock., #106, p. 3).

Counsel for EPVA sent a letter to Judge Daniels on July 15, 2016, advising the Court that the parties jointly proposed Professor Robert L. Burgdorf Jr. to serve as Special Master, and summarizing his credentials. (Dock., #88). The Objectors delivered a July 25, 2016, letter to the Court calling Burgdorf "well-qualified," but voicing concerns regarding the propriety of appointing a special master, the scope of duties for the master, and requesting a hearing on the proposed appointment. (Dock., #92). On September 19, 2016, Judge Daniels issued an Order of Appointment of Special Master in which he appointed Professor of Law Emeritus Robert L. Burgdorf Jr. to that position. (Dock., #111). On October 7, 2016, Judge Daniels signed an order rejecting the parties' request for modifications to the appointment order, and clarifying that the Special Master is entitled to "communicate ex parte with the Court, the Objectors, or any non-party." (Dock., #115).

On October 21, 2016, the Honorable Kevin Nathaniel Fox was designated as Magistrate Judge in the case. (Dock., Oct. 21, 2016). On November 2, 2016, Magistrate Judge Fox held a telephone conference with counsel in *EPVA v. City of New York* and in *Center for Independence v. City of New York*, at which he informed counsel of his involvement in both lawsuits and his charge of ensuring that the Special Master is able to go about his work in developing a timely report. (Tr. of Nov. 2, 2016, Telephone Conf.).

On November 17, 2016, the United States Attorney for the Southern District of New York submitted a Statement of Interest presenting the Department of Justice's perspectives on issues in the case, including its conclusion that the proposed settlement is not in compliance with the ADA. (Dock., #121).

On January 18, 2017, Judge Daniels extended the deadline for submission of the Special Master's report to March 31, 2017. (Dock., #122). It was subsequently postponed to August 2, 2017. (Dock., #132).

III. SPECIAL MASTER'S RESPONSIBILITIES

Authorized under Rule 53 of the Federal Rules of Civil Procedure, special masters serve a variety of functions to assist federal courts.[9] In the present case, Judge Daniels's order appointing the Special Master specified the following duties for the special master in pursuing general objectives of collecting and evaluating facts and making recommendations:

a. To review the pertinent documents and confer with the parties, including the City's employees and/or agents as appropriate;

b. To confer with the Objectors, as appropriate and consistent with the Court's order at the Fairness Hearing;

c. To report to the Court on the issues identified by the Court at the Fairness Hearing, namely: (i) what has been accomplished with regard to the 2002 Stipulation; (ii) what work remains to be done to accomplish the goals of the 2002 Stipulation and to resolve the disputes between the parties regarding implementation of the 2002 Stipulation; and

d. To make recommendations to the Court that will enable the Court to make an informed judgment as to whether the 2016 Stipulation, with or without modifications, is fair, reasonable, and adequate under Fed. R. C.P. 23(e).

(Dock., #111, ¶¶ (2) & 3).

Judge Daniels provided considerably more guidance during the Fairness Hearing on May 31, 2016. Indeed, he indicated that once he had appointed the special master the first thing he wanted to do was to provide the special master the transcript of the Fairness Hearing because it would provide "good guidance and will be helpful in determining where the problems lie and where the solutions will come from." (FH Tr. at 156). He stated that he wanted the special

[9] A study conducted by the Federal Judicial Center found: "Modern usage of special masters … covered a full spectrum of civil case management and fact-finding at the pretrial, trial, and post-trial stages. Judges appointed special masters to quell discovery disputes, address technical issues of fact, provide accountings, manage routine Title VII cases, administer class settlements, and implement and monitor consent decrees, including some calling for long-term institutional change." Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, & John Shapard, *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rule and Its Subcommittee on Special Masters*, p.4 (Federal Judicial Center, 2000), http://www.uscourts.gov/sites/default/files/specmast.pdf

master "to pull together succinctly the facts" and "evaluate the circumstances, what has been accomplished and what can be accomplished, how much it reasonably might cost and how long it reasonably would take." (*Id.* at p. 148). The report should say "what is reasonable and [be] based on a set of facts that indicate that this is a reasonable course of action to approve," and should "articulate exactly what results an independent evaluation would indicate and may have some suggestions with regard to something that is in the agreement or isn't in the agreement that the parties may want to adopt." (*Id.* at p. 154). He elaborated that he wanted the special master "to seek appropriate information from the parties and from the city" to provide "the information that is relevant to the issues and the questions … in terms of what has been done, is anticipated to be done, and what the reasonable expectations are with regard to the proposed agreement, and whatever other recommendations that the special master might have …." (*Id.* at p. 150).

Judge Daniels declared that he anticipated "full participation" in the fact-gathering process and that he anticipated being confident that he would know "where the facts are coming from that the parties are attempting to rely on, particularly if there is some dispute, to the extent there are some disputes about facts in determining the issue." (*Id.* at p. 151). He added that "we will at least have a process where one might be able to have a different opinion, but we will hopefully be working for the same set of facts or at least, if the facts are different, I will know where those facts are coming from." (*Id.* at p. 153). He assured the parties and the Objectors that "[y]ou will have the opportunity to give the master your input. I am not trying to turn this into a debate or an argument in a conference room, but you can expect that your view will be expressed to the master and you will have a full opportunity on the relevant issues to be able to express a view." (*Id.* at p. 152).

As to how the special master's report would be used, Judge Daniels said, "When I get that report, I will discuss it further with the special master or ask for more information if I think it is appropriate. Then we will discuss what those recommendations and conclusions are of that report, and I will make a judgment based on that, of what is the appropriate thing to do." (*Id.* at p. 149). He added that he would evaluate and choose from the recommendations in the report, and that the parties can evaluate those, either collectively or by the court's determination in terms of whether or not [he] should approve this settlement, either modified or adjusted, or reject it on some other basis." (*Id.* at p. 150). The report would help Judge Daniels "to figure out how we can utilize that either in coming to some agreement, if some adjustments are appropriate, or for me to make an independent judgment whether I should go on and approve this as fair and reasonable to the class with or without any modifications recommended by the special master." (*Id.* at pp. 149-150). He assured the parties and Objectors that they would "be able to react to whatever report that I get from the master before I make a final determination." (*Id.* at p. 152).

IV. STATUTORY, REGULATORY, AND JUDICIAL FRAMEWORK

A. The Problem with Curbs

On July 26, 1990, President George H.W. Bush closed his remarks at the signing of the Americans with Disabilities Act with the following words: "I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful walls of exclusion finally come tumbling down."[10] Though often not recognized as such, our cities' curbs can be dire "walls of exclusion" for many people with disabilities. The standard height of curbs in the United States is six inches and most curbs range between 4 to 8 inches (although some are shorter and some, including those serving special purposes such as containing flash-floods runoff, can be a foot or more in height). But these small-scale walls pose a huge obstacle for many people with mobility disabilities, especially those who use wheelchairs, and also for many who use walkers, braces and crutches, or other mobility aids to get around.

Though some wheelchair athletes in manual sports wheelchairs may be able to "jump" up or down small- and medium-height curbs (though often with risk of injury), for most wheelchair users, including those less athletically endowed and those using standard electric-powered wheelchairs or scooters, a curb is an impassable obstruction. People with disabilities and other commentators frequently resort to metaphorical references to the Berlin Wall and climbing Mount Everest to convey the dead end that curbs represent to people in wheelchairs.[11] Three

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[10] George Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990,* 2 (July 26, 1990).

[11] See, e.g., Charles Goldman, *Architectural Barriers: A Perspective on Progress*, 5 W. NEW ENG. L. REV. 465, 466 (1983) ("a six-inch curb may loom as large as the Berlin Wall"); Idaho Transportation Department, *Pavement Maintenance: Accessible for All?* 1 (Jul 8, 2014) ("a curb or steep ramp might as well be the Berlin Wall"); Francine Bell, *Moving PwD into the Mainstream* 2 (Dec. 17, 2015), https://www.linkedin.com/pulse/moving-pwd-mainstream-francine-bell ("For someone in a wheelchair, even a one-inch-high step can seem like Mount Everest"); Talor Kindig, *Disability Access Lacking on Campus* 2, (Sept. 25, 2012) http://thewichitan.com/disability-access-lacking-on-campus ("Remember, that tiny curb for you can be Mount Everest for them"); Teodor Mladenov, *Like Everest: Defamiliarization and Uncanniness in Media Representations of Inaccessibility,* 28(4) DISABILITY &

years after a Los Angeles police officer was shot by an assailant and paralyzed from the chest down, a report about her noted that "[t]he simple sidewalk curb, which many of us would just step right over without a thought, stops her cold." The woman spoke for many other wheelchair users, and people with other mobility disabilities, when she declared, "A six-inch curb is for me, in my chair, like Mount Everest for somebody else. As small as it seems, there's no way I'm getting over it by myself."[12] Such insurmountable obstructions to free use of the public sidewalks and street crossings by people who use wheelchairs or have other types of mobility disabilities have many detrimental consequences to such persons, and to the cities and towns in which they live or visit.

By purpose and definition, curbs are obstacles – obstacles to keep cars and trucks off the sidewalks, and to keep groundwater, and the trash and flotsam it carries with it, off the sidewalks and in the gutters. New York City's *Street Design Manual* declares: "Curbs serve three functions: a visual and physical limit to the vehicular roadbed; a gutter to convey rainwater and detritus from the road bed and sidewalks to the catch basin at the ends of the street; and aesthetically, curbs add a finished edge to sidewalks and roadbeds." (N.Y. City Dep't of Transp., STREET DESIGN MANUAL 118 (2d Ed., 2015)). Similarly, THE CIVIL ENGINEERING HANDBOOK, a definitive reference for road and sidewalk construction, states that "[c]urbs are used for several purposes, including drainage control, pavement edge delineation, esthetics, and delineation of pedestrian walkways." (W.F. Chen & J.Y. Richard Liew, THE CIVIL ENGINEERING HANDBOOK 63-22 (2d Ed. 2002)).

SOCIETY 542, 543 (June 2014) ("Now this curb, the 10 centimetre one, is for me the ceiling. Without a ramp or some other way, this for me is a wall – the Berlin Wall").

[12] Patricia Glynn, *Beyond the Headlines: Kristina Ripatti* 1 (Apr. 7, 2010), http://www.ihrsa.org/blog/2010/4/7/beyond-the-headlines-kristina-ripatti.html

New York City applies New York State law regarding the technical definition of a "curb" as "[a] vertical or sloping member along the edge of a roadway clearly defining the pavement edge." (N.Y. VEH. & TRAF. LAW § 111 (McKenny 2017); N.Y. City Dep't of Transp., STREET DESIGN MANUAL 118 (2d Ed., 2015)). Perhaps more to the point is the STREET DESIGN MANUAL description that "[a] curb is a step where the roadbed meets the sidewalk or other raised pathway." (N.Y. City Dep't of Transp., STREET DESIGN MANUAL 118 (2d Ed., 2015)). Characterizing it as a "step" conveys the impact of a curb as a barrier to persons with mobility disabilities in the same way that one or more steps can block their way in other contexts. The standard vertical curbs used in New York City streets are designed to prevent or at least discourage drivers from running their vehicles up onto sidewalks; many engineers characterize these as "barrier curbs."[13]

Despite their evident function as barriers and their similarity to steps, and despite the association of the word "curb" to restraining, holding back, confining, or keeping something in or out, for many years the fact that sidewalk curbs were obstructing the ability of people with mobility disabilities to navigate city walkways was either not noticed or was ignored. The result was that in most towns and cities, including New York City, accessible pedestrian crossings were the exception and unramped corners were the rule. Such obstacles have had numerous detrimental effects on individuals with mobility disabilities, their families and friends, and the cities in which they live or desire to visit.

The immediate direct effect of inaccessible pedestrian crossings is to make it difficult and frequently impossible for a person with a disability to use public walkways to get from one place

[13] See, e.g., W.F. Chen & J.Y. Richard Liew, THE CIVIL ENGINEERING HANDBOOK 63-22 (2d Ed. 2002) ("The two common types of curbs are barrier curbs and mountable curbs. Barrier curbs have relatively steep faces, designed to prevent vehicles from leaving the roadway.").

to another -- a particular address, residence, park, transportation station, taxi stand, hospital, coffee shop, restaurant, museum, gym, place of worship, government building, etc. – giving verity to the old humorous quip that "you can't get there from here." This not only prevents the individual from going to the place that she or he needs or desires to go, but also negates whatever work, business, social contact, recreation, medical treatment, creative endeavors, and so on, that would have occurred at the destination.[14] And, in cities where walking is a major means of getting around, not being sure that one will be able to get to particular destinations and attractions is a strong disincentive to trying. The Public Advocate for the City of New York has described it as "a uniquely pedestrian-oriented city," and declared:

> New Yorkers need easily navigable pedestrian routes to commute to work or school, to shop for groceries and other household items, to attend houses of worship, to visit friends and family, to vote, and to fully participate in their communities. For New Yorkers with mobility impairments or vision impairments, inaccessible pedestrian routes limit their ability to participate economically, politically and culturally in civic life.

(*Public Advocate Letitia James' Submission to the Special Master*, 2, 3 (February 28, 2017)). Thus, inaccessibility exacerbates and reinforces people with disabilities' isolation and feelings of not being welcome in society.

Secondarily, awareness that inaccessible corners are a problem discourages people with mobility disabilities from moving to or taking a job in such a city, or even visiting. Friends, relatives, employers, business associates, and others will be reluctant to invite people with disabilities to the city for a visit, a date, a job, a graduation, a wedding, a conference, a concert, or other purposes, if they cannot be sure that the person will be able to have access to the goings-

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[14] U.S. Justice Department attorney Liz Savage explained that the installation of curb ramps "has a ripple effect. It's not just a curb cut at the corner. The person gets out in the community, gets a job, goes to a restaurant." *Opening Doors for the Disabled Law Makes Headway in Improving Life for Many in WNY, Nation*, BUFFALO NEWS, August 31, 1997, p. 5, http://buffalonews.com/1997/08/31/opening-doors-for-the-disabled-law-makes-headway-in-improving-life-for-many-in-wny-nation/

on. All of these consequences have a substantial economic impact in limiting tourism, networking, and job opportunities.

Attempting to traverse pedestrian crossings in the face of unramped curbs, or non-compliant or defective ramps can have even more severe results, involving serious injuries and even death. A significant percentage of wheelchair-related injuries in the U.S. are from tipping over or falls, and many of these involve ramps.[15] Trying to maneuver over or around unramped curbs can lead to tipping over or precipitant crashing into an obstacle, stopping the wheelchair and dislodging its user. Unramped curbs or improper slopes on ramps can cause wheelchairs to tip over backwards, forwards, or sideways. For people who use mobility aids other than wheelchairs, curbs can provoke various kinds of slips and falls. Any of these can lead to broken bones, head injuries and concussions, sprains, contusions, and other kinds of injuries, sometimes fatal.

In its Complaint, the EPVA alleged that the lack of curb ramps routinely confronts people with mobility disabilities with "the Hobson's choice of traveling in the streets (with cars, buses, trucks and bicycles) or traveling, if possible, over uncut curbs (with attendant risk of injury ....)" (Compl., pp. 6-7, ¶ 17). The "Hobson's choice" characterization echoes a paragraph of the Third Circuit's influential opinion in *Kinney v. Yerusalim*:

> 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. At present, people using wheelchairs must often make the Hobson's choice between travelling in the streets

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[15] *See, e.g.,* C.J. Calder & R. Lee Kirby, *Fatal Wheelchair-Related Accidents in the United States*, AM. J. PHYS. MED. REHABIL., 1990 Aug; 69(4) 184; S. Ummat & R. Lee Kirby, *Non-Fatal Wheelchair-Related Accidents Reported to the National Electronic Injury Surveillance System,* AM. J. PHYS. MED. REHABIL., 1994 Jun.; 73(3) 163; R. Lee Kirby, S.A. Ackroyd-Stolarz, M.G. Brown, S.A. Kirkland, & D.A. MacLeod, *Wheelchair-Related Accidents Caused by Tips and Falls among Non-Institutionalized Users of Manually Propelled Wheelchairs in Nova Scotia,* AM. J. PHYS. MED. REHABIL., Sep.-Oct. 1994, 319.

– with cars and buses and trucks and bicycles – and travelling over uncut curbs which, even when possible, may result in the wheelchair becoming stuck or overturning, with injury to both passenger and chair.[16]

Highly tragic are instances where the absence of curb ramps forces a person in a wheelchair to travel in the street, risking being run into by a motor vehicle. A particularly dramatic and ironic example was provided by what befell Jack Achtenberg, a law professor and disability rights advocate, a wheelchair-user who fought long and hard for curb ramps.[17] In a law review article, his sister described what happened to him: "Last September, at age thirty-five, Jack Achtenberg was struck by a van in the street in front of his home. Jack was riding in the street in his wheelchair because, in that area, Los Angeles County had failed to provide sidewalks with usable curb cuts. The driver of the van sped away without summoning help for the man who lay dying in the street."[18]

In a similar vein, a 60-year-old man named Elias Gutierrez, who had complained repeatedly about the lack of curb ramps where he had to travel, was struck by a car and killed as

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[16] *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3d Cir. 1993), *cert. denied,* 511 U.S. 1033 (1994). The decision is discussed *infra* at pp. 69-73.

[17] In a 1976 law review article, Professor Achtenberg quoted Blackstone's *Commentaries* for the principle that "personal liberty consists in a power of locomotion, of changing situations, or removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law," and observed that "from the earliest times, it has been recognized that mobility is the key to social integration, job flexibility, and a vital ingredient to a productive and useful life." Jack Achtenberg, *Law and the Physically Disabled: An Update with Constitutional Implications,8* S.W.U.L. REV. 847, 865-866 (1976), quoting William Blackstone, *Commentaries*, 1:120-41 (1765). He added that, as to his local jurisdiction, because city officials interpreted "facilities" as excluding sidewalks, an amendment would be required to make accessibility requirements applicable to sidewalks. *8* S.W.U.L. REV.at 855 and nn. 25-27.

[18] Roberta Achtenberg, *Dedication,* 50 TEMPLE L.Q. 941 (1977).

he traveled in his power wheelchair in the street, next to the curb. There were no curb ramps to permit him to get onto the sidewalk.[19] Unfortunately, such incidents are not rare.[20]

In 1994, frustrations with the "primary obstacles" to people with mobility and other disabilities that inaccessible curbs constitute, the denials of opportunities to navigate around the City that they cause, the interruption of ordinary commercial and social participation they engender, and the risks of injury and even death they entail, led, according to its Complaint, EPVA to initiate the present lawsuit. (Compl., pp. 6-7, ¶ 17).

B. Pre-1973 Law

Many scholars and activists trace the formal beginning of the disability rights movement to the opening paragraph of a 1966 law review article by renowned constitutional scholar, civil rights activist, international humanitarian, and blind professor of political science, Jacobus tenBroek:

> Movement, we are told, is a law of animal life. As to man. in any event, nothing could be more essential to personality, social existence, economic opportunity – in short, to individual well-being and integration into the life of the community – than the physical capacity, the public approval, and the legal right to be abroad in the land.[21]

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[19] Mary Johnson, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE AND THE CASE AGAINST DISABILITY RIGHTS 251 (2003); *Lack of Curb Cuts Bring Death, Highlight National Problem*, Accessible Society E-Letter, May 1, 2001, http//www.accessiblesociety.org/e_letters/eletter050101.htm

[20] *See, e.g.*,Sarah Jones, Note, *Walk this Way: Do Public Sidewalks Qualify as Services, Programs, or Activities under Title II of the Americans with Disabilities Act?*, 79 Fordham L. Rev. 2259, 2261 (2011) ("In November 2005, Elizabeth 'Lisi' Bansen died when an SUV hit her as she traveled in her wheelchair from the corner store to her home. Bansen was relegated to the street because the sidewalk was not wheelchair accessible."). *See, also,* various instances collected in Mary Johnson, *Dying in the Streets: Wheelchair Users Face Tragic Choices Nationwide,* RAGGED EDGE ONLINE, November 16, 2005, http//www.raggededgemagazine.com/departments/closerlook/000619print.html

[21] Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts 54* CAL. L. REV. 841 (1966).

In advocating for this "right to be abroad in the land" for people with disabilities, Dr. tenBroek pointed to a common law principal that individuals with disabilities are entitled to proceed on public thoroughfares.[22] He argued that people with disabilities have a constitutional and legal right to live in the world, to freedom of movement within that world, and to equal access to places of public accommodation; and that artificial barriers that keep such individuals from moving about throughout society are or should be illegal.[23] Along the way, he identified "full participation" and "integration" as "the policy of the nation" adopted by Congress and state legislatures in numerous laws and programs,[24] that serves as the ultimate objective of disability rights advocacy. In the "Conclusion" of his article, tenBroek declared: "The right to live in the world … entails at least a right of free and safe physical access to it through the use of streets and sidewalks, roads and highways, and the common modes of transportation, communication, and interchange."[25]

TenBroek's writings would have a major long-term impact in inspiring persons with disabilities, other advocates for disability rights, and social policymakers, including some legislators, to push for equal access to all avenues to society for those with disabilities. A significant advance in regard to accessibility occurred with the enactment of the Architectural

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[22] Id. at 851 & n. 67, quoting William Prosser, THE LAW OF TORTS § 32, at 155 (3d ed. 1964) ("The man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world."). See, also, tenBroek, *supra,* 54 CAL. L. REV. at 863, quoting *Weinstein v. Wheeler*, 127 Ore. 406, 413, 271 Pac. 733, 734 (1928), rehearing denied, 135 Ore. 518, 296 Pac. 1079 (1931) ("Public thoroughfares are for the beggar on his crutches as well as the millionaire in his limousine."); and *Garber v. City of Los Angeles*, 226 Cal. App. 2d 349, 358, 38 Cal. Rptr. 157, 163 (1964), quoting David, *Municipality Liability in Tort in California*, 7 SO. CAL. L. REV. 372, 452 (1934) ("The ordinary purpose of sidewalks and streets includes their use by the blind, the very young and the aged, the cripple and the infirm, and the pregnant woman.").

[23] TenBroek, *supra,* at 848–52, 910–18.

[24] *Id.* at 843-847, 913.

[25] *Id.* at 917-918.

Barriers Act of 1968, which established a broad requirement that all buildings or facilities constructed, altered, or financed by the U.S. government must be accessible to and usable by individuals with physical disabilities, in accordance with accessibility standards set by the federal government.[26] However, although the Act covered "facilities" as well as "buildings" and its language encompassed federally grant-funded construction, and federal standards issued to enforce it included a definition of, and specifications for "curb ramps,"[27] its focus was on newly constructed or leased federal government buildings and "facilities" connected to them,[28] and it appears not to have been applied in the context of municipal sidewalks and crossings.

Jacobus tenBroek's analysis and his articulation of a "right to be abroad in the land" for people with disabilities inspired a GEORGETOWN LAW JOURNAL Note, titled *Abroad in the Land*, that was published in January of 1973.[29] In it, the author discussed the development of strategies for fighting discriminatory practices disadvantaging people with disabilities in the areas of education, transportation, public buildings, private employment, and public employment. She observed that persons with disabilities are excluded "by architectural barriers ranging from monumental staircases to six-inch curbs."[30] She suggested that a government entity that discriminated against people with

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[26] 42 U.S.C.§§ 4151-57.

[27] The Uniform Federal Accessibility Standards ("UFAS") 3.5 defined "curb ramp" as "A short ramp cutting through a curb or built up to it"; UFAS 4.7 set out technical requirements for curb ramps. 49 Fed. Reg. 31,528, 31,535, 3.5; 31,563-565, 4.7 (Aug. 4, 1984). Regarding UFAS and other early federal accessibility standards and guidelines, see nn. 75 & 77 *infra* and accompanying text.

[28] 42 U.S.C.§ 4151. Existing structures are covered only if they undergo alterations for federal use or are funded by federal funds. See Ann Powers, Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 Geo. L.J. 1501, 1509 n. 58 (1973) ("Only existing structures which are altered for federal use or with federal funds are included in the legislation.").

[29] Ann Powers, Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 Geo. L.J. 1501 (1973).

[30] *Id.* at 1509.

disabilities "by constructing physical barriers[,] … created their exclusion," though it "had the alternative when building its facilities to use designs which would have made them fully accessible at similar cost," could be subject to challenge on constitutional grounds.[31] She added a final admonition, however, that "[l]egislation ensuring the rights of [people with disabilities] would be the most uniform and far reaching solution to the problems presented."[32]

C. 1973 Legislation: The Rehabilitation Act and the Federal-Aid Highway Act

The same year that the *Abroad in the Land* article was published, Congress enacted the Rehabilitation Act of 1973. Section 504 of that statute[33] was a ground-breaking disability nondiscrimination statute, and a primary precursor of the ADA. As passed in 1973, Section 504 prohibited discrimination against any "otherwise qualified individual with handicaps" in any program or activity that receives federal financial assistance.[34] The proscription of discrimination in Section 504 is a single sentence, but it gave rise to a great number of regulations, much scholarly and popular media commentary, and extensive litigation.[35] It applies to a wide range of areas in which the federal government conducts or funds activities and programs, including employment, education, housing, transportation, health services, recreation programs, and others. Upon its passage, disability advocates hailed Section 504 as landmark legislation; one called it "the single

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[31] *Id.* at 1511-12.

[32] *Id.* at 1522.

[33] Pub. L. No. 93-112, §504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. §794(a)).

[34] Pursuant to 1978 amendments, the prohibition of discrimination also applies to programs and activities conducted by any federal executive agency or the U.S. Postal Service. Pub. L. No. 95-602, §119(2), 92 Stat. 2955, 2982 (1978).

[35] *See, e.g., Alexander v. Choate*, 469 U.S. 287 (1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

most important civil rights provision ever enacted on behalf of disabled citizens in this country,"[36] a designation that was accurate until the ADA was enacted.

The nondiscrimination mandate of Section 504 is straightforward, providing that no qualified individual with a disability in the United States shall, by reason of disability, "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance…." A natural reading of this language encompasses all programs or activities of a municipality that are supported by federal money. Thus, if a city or one of its agencies operates a program or activity of installing and maintaining sidewalks and pedestrian crossings, and receives federal funding in connection with it, such a program would be subject to Section 504. This logical conclusion would eventually be endorsed in federal regulations and the overwhelming weight of judicial authority in the context of the ADA. A strong argument can be made that from the date that Section 504 took effect cities were required to provide accessible sidewalks and pedestrian crossings.

After considerable delay; marches, sit-ins, and other acts of civil disobedience by demonstrators with disabilities; and a lawsuit demanding prompt issuance,[37] a regulation for enforcement of Section 504 was promulgated on April 28, 1977,[38] by the Secretary of the Department of Health, Education, and Welfare (HEW), the designated point agency for Section 504 enforcement in the administration. HEW's initial Section 504 regulation applied to recipients of financial assistance from the Department, but HEW was also responsible for spearheading

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[36] Frank Bowe, HANDICAPPING AMERICA 205 (1978).

[37] *Cherry v. Matthews*, 419 F. Supp. 922 (D.D.C. 1976).

[38] 42 Fed. Reg. 22,676 (1977) (codified as reissued at 45 C.F.R. §§ 84.1–.99).

implementation of Section 504 by other federal agencies.[39] The original HEW regulation established standards and procedures governing compliance with Section 504 by programs and activities that received financial assistance from HEW. The regulation contained a general prohibition of discrimination based on disability and identified types of practices that constituted such discrimination.[40]

The 1977 Section 504 regulation was tailored to programs & activities HEW funded, but became the model for regulations issued by other federal agencies. It raised disability rights analysis to a new level, and pioneered several critically important approaches and concepts that became part and parcel of future Section 504 jurisprudence, and had considerable impact on the future language and interpretation of the ADA.[41] These included a three-prong definition of disability ("handicap" at the time), a list of forms of proscribed discrimination, a "reasonable accommodation" requirement, restrictions on preemployment inquiries regarding disability, a "most integrated setting" requirement, and a "Program Accessibility" mandate.

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[39] In April 1976, President Gerald R. Ford issued an executive order that directed HEW to coordinate government-wide enforcement of Section 504 under its Office of Civil Rights and to issue standards for other departments to follow in promulgating their Section 504 regulations. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976). The so-called "coordination guidelines" of HEW, which were based heavily on HEW's own regulation under Section 504, established minimum requirements for all federal agencies and departments to follow when issuing their own regulations and carrying out their administrative enforcement activities. 43 Fed. Reg. 2132 (1978) (originally codified at 45 C.F.R. pt. 85; recodified at 28 C.F.R. pt. 41). The coordination responsibility was transferred to HHS when HEW was divided and was subsequently reassigned to the U.S. Attorney General. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980) (codified at 28 C.F.R. 674 (app. A to pt. 41) (1993)). Coordination guidelines of the Justice Department, in substantially the same form as issued by HEW, are currently codified at 28 C.F.R. pt. 41.

[40] 42 Fed. Reg. 22,678; 45 C.F.R. § 84.4. In addition to its general provisions, the regulation included sections specifically addressing employment; program accessibility; preschool, elementary, and secondary education; postsecondary education; health, welfare, and social services; and enforcement procedures. *Id.* pt. 84, subpts. B–G.

[41] The Supreme Court underscored the considerable influence of the HEW regulation in interpreting and applying Section 504 by declaring it "an important source of guidance on the meaning of §504." Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985); School Bd. of Nassau County v. Arline, 480 U.S. 273, 279, (1987). The Court also declared that "these regulations were drafted with the oversight and approval of Congress" Arline, 480 U.S. at 279 (citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634–35, & nn.14–16 (1984)). and that they are "of significant assistance" in resolving issues under Section 504. Id. at 279.

The regulation did not mention accessibility of sidewalks and crossings directly, but included a definition of "facility" as "all or any portion of buildings, structures, equipment, roads, ***walks***, parking lots, or other real or personal property or interest in such property."[42] This, coupled with the Program Accessibility provision mandating that no person with a disability shall be excluded from participation in, denied benefits of, or otherwise subjected to discrimination under, any program or activity subject to Section 504, "because a recipient's facilities are inaccessible to or unusable by" people with disabilities, implies that sidewalks of a recipient of federal financial assistance have to be readily accessible to and usable by individuals with disabilities.

Months after Section 504 was signed into law, Congress enacted the Federal-Aid Highway Act of 1973,[43] Title II of which was the Highway Safety Act of 1973.[44] Under the heading "Curb Ramps for the Handicapped," Section 228 inserted a new provision to criteria for Secretary of Transportation approval of state highway safety programs; it declared that the Secretary may not approve any program which does not "provide adequate and reasonable access for the safe and convenient movement of physically handicapped persons, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, ***at all pedestrian crosswalks throughout the State.***"[45] When the U.S. Department of Transportation (DOT) issued its regulation implementing Section 504 as it applies to recipients of federal financial assistance from the Department, it included the following ringing declaration in its provisions dealing with

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[42] 45 C.F.R. § 84.3(i)1 (emphasis added).

[43] Pub. L. No. 93-87, 87 Stat. 250 (Aug. 13, 1973).

[44] *Id.* at 87 Stat. 282.

[45] *Id,* at § 228, 87 Stat. 293, codified as redesignated at 23 U.S.C. § 402(b)(1)(D) (emphasis added).

the Federal Highway Administration: "*Curb Cuts.* ***All pedestrian crosswalks constructed with Federal financial assistance shall have curb cuts or ramps to accommodate persons in wheelchairs***, pursuant to section 228 of the Federal-Aid Highway Act of 1973."[46] The language of section 228 requiring "adequate and reasonable access," and "safe and convenient movement" of wheelchair users and others with disabilities applies to "curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks" was forward-looking. It does not address curbs constructed before July of 1976.

The 1977 HEW Section 504 regulation began its section on "program accessibility" with a strong and broad requirement that no qualified person with a disability could be denied participation, excluded from participation, or otherwise discriminated against "because a recipient's facilities are inaccessible to or unusable by" people with disabilities.[47] It then drew a distinction in standards of accessibility for existing facilities and for new facilities and alterations. In regard to new facilities, the HEW regulation stated that facilities whose construction begins after the effective date of the regulation must be designed and constructed so that the facility is "readily accessible to and usable by" individuals with disabilities.[48] As to alterations to existing facilities, each facility or part of a facility that is altered by, on behalf of, or for use of, a recipient of federal financial assistance in a manner that affects or could affect the accessibility of the facility or part of the facility is required, "to the maximum extent feasible," to ensure that the alteration be done "in such a manner that the altered portion of the facility is

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[46] 44 Fed. Reg. 31,422, 31,477, § 27.75(a)(2) (May 31, 1979), codified at 49 C.F.R. § 27.75(a)(2) (emphasis added).

[47] 42 Fed. Reg. 22,681 § 84.21 (May 4, 1977) (codified as reissued at 45 C.F.R. § 84.21).

[48] 42 Fed. Reg. 22,681 § 84.23(a) (codified as reissued at 45 C.F.R. § 84.23(a)).

readily accessible to and usable by" persons with disabilities.[49] For existing facilities that are not being altered, the regulation provides that recipients must operate each covered program or activity "so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons."[50] Thus, the HEW Section 504 regulation requires a substantial level of accessibility for covered facilities whether they are: (1) newly constructed, (2) being altered, or (3) existing but not being altered.

Coupled with the expansive condemnation of inaccessibility with which the program accessibility subpart begins (described at the beginning of the prior paragraph), the regulation represented a resounding mandate for accessibility of covered facilities. And DOT and the other federal agencies providing federal financial assistance followed HEW's lead by including the same or very similar provisions in their Section 504 regulations.[51]

To the requirement that in regard to existing facilities, recipients must operate each covered program or activity "so that the program or activity, when viewed in its entirety, is readily accessible,"[52] the HEW regulation added a clarification regarding methods for achieving program accessibility in existing facilities by declaring that, as to such facilities, the regulation "does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by" individuals with disabilities.[53] In lieu of mandating full accessibility of all facilities and all parts of a recipient's facilities, the regulation afforded a list of methods for

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[49] 42 Fed. Reg. 22,681, § 84.23(b) (codified as reissued at 45 C.F.R. § 84.23(b)).

[50] 42 Fed. Reg. 22,681, § 84.23(a) (codified as reissued at 45 C.F.R. § 84.23(a)).

[51] See, e.g., 44 Fed. Reg. 31,473 (May 31. 1979), §§ 27.63, 27.67(a)&(b), & 27.65(a) (DOT); 45 Fed. Reg. 37,622, §§ 42.520, 42.522(a), & 42.521(a) (Dep't of Justice).

[52] 42 Fed. Reg. 22,681, § 84.23(a) (codified as reissued at 45 C.F.R. § 84.23(a)).

[53] *Id.*

fulfilling accessibility requirements in existing facilities that included moving services and programs to accessible buildings and reassigning classes or other services, redesigning equipment, assigning aides to beneficiaries, providing home visits, delivering social services at alternate accessible sites, making alterations to existing facilities or constructing new accessible facilities, or "any other methods that result in making [the recipient's] program or activity accessible."[54] HEW emphasized that a recipient was not required to make structural changes in existing facilities if other methods are effective in achieving program accessibility, and directed recipients to give priority to methods that offer programs and activities to people with disabilities "in the most integrated setting appropriate."[55] In an Appendix providing guidance on its regulation, HEW cited, as an example of the application of the program accessibility standards, that

> a university does not have to make all of its existing classroom buildings accessible to [students with disabilities] if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required.[56]

The HEW regulation provided that if structural changes in existing facilities were necessary to achieve accessibility, they were to "be made within three years of the effective date of this part, ***but in any event as expeditiously as possible***," and required the recipient to develop a transition plan, available for public inspection, describing the steps to be taken and a schedule

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[54] *Id.*, § 84.23(b).

[55] *Id.*

[56] 42 Fed. Reg. 22,689, App. A, Subpt. C, ¶ 10.

for completing them.[57] Most other federal agencies replicated HEW's language regarding timeframes for completing necessary structural changes and the transition plan requirement.[58] DOT's regulation made a slight variation by calling for structural changes to be made "***as soon as practicable***" instead of "as expeditiously as possible," although it retained the three-year absolute deadline.[59] In its Section-by-Section Analysis of the regulation, DOT offered no explanation for the variation.

DOT made an additional subtle, but perhaps significant, change from the HEW language when it stated that its program accessibility provision "does not ***necessarily*** require a recipient to make each of its existing facilities or every part of an existing facility accessible."[60] The word "necessarily" did not appear in the HEW formulation. It emphasizes that full facility accessibility ***is*** required when other methods cannot achieve ready accessibility and usability of the recipient's program, activity, or service; if alternative methods, such as moving a program to a different part of a facility, are not sufficient to make the program accessible, the recipient must do what it takes, including making structural alterations to its facilities. This point is significant in the analysis of pedestrian crossings and the necessity for curb ramps, because, in that context, the HEW portrayal of methods for achieving program accessibility, exemplified by moving classes to an accessible classroom or building, is not analogous to accessibility of city sidewalks and crossings. A student with a disability whose classes are moved to an accessible building or classroom obtains full and equal access to the education program. But a city does not assure full

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[57] 42 Fed. Reg. 22,681, §§ 84.23(d) & (e) (emphasis added).

[58] See, e.g., 45 Fed. Reg. 37,622, § 42.521(d) (Dep't of Justice).

[59] 44 Fed. Reg. 31473, § 27.65(c)(2) (emphasis added).

[60] 44 Fed. Reg. 31,473, § 27.65(a) (DOT) (emphasis added).

and equal access to its sidewalks and pedestrian crossings by installing curb ramps at one or some of its crossings. To a person using a wheelchair trying to get to a particular address who is prevented from doing so by unramped corners, or wanting to know she or he can travel on public thoroughfares from point A to point B, it is no consolation that there are curb ramps somewhere else in the city. Pedestrian walkways are a system for which partial or piecemeal accessibility is not the accessibility required under Section 504. Logically, this means that all federally funded sidewalks and crossings are required to be accessible, a point that is driven home by the provision of DOT's Section 504 regulation, discussed previously, which declared: "*Curb Cuts. **All pedestrian crosswalks constructed with Federal financial assistance shall have curb cuts or ramps to accommodate persons in wheelchairs*** ...."[61]

The analysis of standards regarding curb ramps under Section 504 is important not only because it provided the legal criteria up to the enactment of the ADA, but also because Title II of the ADA replicated most of the Section 504 requirements, which, up to that time, applied to entities that received or benefitted from federal financial assistance, and applied them to all activities of such government entities whether or not they are federally funded.

D. The Americans with Disabilities Act

1. Overview

The Americans with Disabilities Act of 1990 (ADA), captioned "An Act to establish a clear and comprehensive prohibition on the basis of disability,"[62] has been variously characterized as an "historic new Civil Rights Act, ... the world's first comprehensive declaration

[61] 44 Fed. Reg. 31,422, 31,477, § 27.75(a)(2) (May 31, 1979), codified at 49 C.F.R. § 27.75(a)(2) (emphasis added).

[62] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, long title, 104 Stat. 327.

of equality for people with disabilities"[63]; "an emancipation proclamation" and a "bill of rights" for people with disabilities;[64] "landmark legislation"[65]; "the most comprehensive civil rights measure in the past two and a half decades"[66]; "historic legislation" [67]; "a transformation in our Nation's public policies toward people with disabilities"[68]; "that groundbreaking law"[69]; and "a landmark commandment of fundamental human morality."[70] In establishing the "clear and comprehensive prohibition" of disability discrimination announced in the long title, a stated purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[71]

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[63] George H.W. Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990,* 2 (July 26, 1990).

[64] 135 Cong. Rec. S10,789 (daily ed. Sept. 7, 1989) (remarks of Senator Edward M. Kennedy); Helen Dewar, *Disability Legislation Approved,* WASH. POST, Sept. 8, 1989, at A1, col. 6 (quoting Senator Edward M. Kennedy).

[65] Senator Robert Dole, quoted in National Council on Disability, RIGHTING THE ADA, p. 34 (2004).

[66] Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, quoted by Nathaniel C. Nash, *Bush and Senate Leaders Support Sweeping Protection for Disabled,* N.Y. TIMES, Aug. 3, 1989, at A1, col. 4.

[67] Senator Orrin Hatch, quoted in National Council on Disability, RIGHTING THE ADA, p. 34 (2004).

[68] President Clinton, quoted in National Council on Disability, RIGHTING THE ADA, p. 34 (2004).

[69] Barack Obama, *Remarks by the President on The Americans with Disabilities Act,* July 20, 2015, https://obamawhitehouse.archives.gov/the-press-office/2015/07/20/remarks-president-americans-disabilities-act

[70] Justin Dart, *ADA: Landmark Declaration of Equality,* 3 WORKLIFE, Fall, 1990, at 1; quoted in Michael H. Fox & Robert A. Mead, *The Relationship of Disability to Employment Protection under Title I of the ADA in the United States Circuit Courts of Appeal,* 13 Kan. J.L. & Pub. Pol'y 485 (2003-2004). Dart, who occupied disability policy positions in the Reagan, Bush, and Clinton administrations, was a prominent disability leader and advocate, who labored mightily for enactment of the ADA.

[71] 42 U.S.C. § 12101(b)(2).

Of the five Titles that comprise the body of the ADA,[72] Subpart A of Title II[73] is the portion that is relevant to pedestrian curb ramps, under which, along with regulations implementing it, the Plaintiff brought its action in the case at bar. (Compl., pp. 3-15, ¶¶ 5-42). Unlike other parts of the ADA, which delineate in considerable detail the elements of nondiscrimination requirements for the particular Title, Subpart A of Title II consists of only five fairly short sections, including a Definition section and an Effective Date provision. Subpart A applies to "public entities," and "public entity" is defined to include any state or local government, and any department, agency, or instrumentality of a state or local government.[74]

The central nondiscrimination mandate of Title II is articulated in a single sentence, patterned on Section 504, as follows: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[75] The remaining two provisions of the subpart address "Enforcement" and "Regulations." The former provides that the remedies, procedures, and rights under Title II shall be those applied under Section 504,[76] while the latter directs the Attorney General to promulgate regulations to implement the subtitle[77] – regulations that are to

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[72] Title I of the ADA addresses "Employment" (42 U.S.C. §§ 12111-12117); Title II "Public Services" (*Id.* at §§ 12131-12165); Title III "Public Accommodations and Services Operated by Public Accommodations" (*Id.* at §§ 12181-12189); Title IV "Telecommunications" (47 U.S.C. §§ 225 & 611); and Title V "Miscellaneous Provisions" (42 U.S.C. §§ 12201-12213).

[73] 42 U.S.C. §§ 12131-12134.

[74] 42 U.S.C. § 12131(1).

[75] 42 U.S.C. § 12132.

[76] 42 U.S.C. § 12133.

[77] 42 U.S.C. § 12134(a).

be consistent with Section 504 regulations,[78] and with minimum guidelines and requirements issued by the Access Board.[79]

In lieu of providing more detailed and innovative requirements, standards, and procedures, Subpart A of Title II simply legislated by cross-reference to existing provisions of Section 504 and the regulations, standards, and guidelines issued under it. Prior to the ADA, state and local government entities had been prohibited by federal law from discriminating on the basis of disability only if they received or benefited from federal financial assistance. The ADA expanded the scope of that prohibition to all state and local government agencies whether they do or do not receive federal funding. As the House Judiciary Committee's ADA report put it, "Title II extends the protections of Section 504 of the Rehabilitation Act to cover all programs of state or local governments, regardless of receipt of federal financial assistance," and added that "[t]he purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that Title II work in the same manner as Section 504."[80] It is noteworthy that many, if not most, programs and activities of state and local governments were already recipients of financial assistance from Federal agencies and, accordingly, were already covered by Section 504 of the Rehabilitation Act of 1973.[81]

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[78] 42 U.S.C. § 12134(b). Specifically, the ADA regulations were required to be consistent with the Section 504 coordination regulation issued by HEW in 1978 (28 C.F.R. pt. 41) and redesignated by the Department of Justice in 1981 (46 Fed. Reg. 40686, 40687 (Aug. 11, 1981)); and with certain provisions – "program accessibility, existing facilities" and "communications" – of the Section 504 regulation for programs and activities conducted by the Department of Justice (28 C.F.R. pt. 39).

[79] 42 U.S.C. § 12134(c). Regarding the Access Board and guidelines and standards it had issued, see p. 45 *infra*.

[80] H.R. REP. NO. 101-465, pt. 3, at 49-50 (1990).

[81] See Access Board, *About the ADA Standards: Background, Statutory Background,* https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/ada-accessibility-guidelines-for-state-local-government-facilities/background ("Most programs and activities of State and local

2. ADA Regulations and Guidance

A thorough examination of the intricate and extensive history of ADA pedestrian ramp regulations and standards, from the issuance of the ADA Title II regulations and the Standards for Accessible Design in July of 1991 to the present, is well beyond the scope of this Report. This subsubsection purports only to provide a synopsis of key developments in the evolution of ADA curb ramp regulatory requirements over the past quarter century, outlining how the regulations and guidelines flesh out the rights of people with disabilities to accessibility and ready use of pedestrian crossing that are at the heart of the *EPVA v. City of New York* case.

The ADA directed the federal agencies charged with implementing it to issue regulations not more than a year after the law's enactment on July 26, 1990. Impressively, the federal agencies met that ambitious deadline. On July 26, 1991, the U.S. Department of Justice issued regulations for implementation of Title II – State and Local Government Services – and Title III – Public Accommodations and Commercial Facilities – of the ADA. The Title II regulation contained provisions establishing a general rule prohibiting inaccessibility of facilities, a program accessibility standard for existing facilities, and a provision on new construction and alterations. In accordance with the statutory mandates of Subpart A of Title II of the ADA, these regulatory provisions tracked the corresponding provisions of HEW and Department of Justice Section 504 regulations discussed previously. (See, *supra*, pp. 32, n. 39; & 32-34). In addition, the 1991 Title II regulation of the Department of Justice included a subsection headed "Curb Ramps" that read as follows:

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governments are recipients of financial assistance from one or more Federal agencies and are already covered by section 504 of the Rehabilitation Act of 1973.").

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

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.[82]

According to the prefatory "Supplementary Information" to the regulations, this curb ramp provision did not appear in the proposed rule, but was inserted in the final regulation in response to comments to a statement in the preamble to the proposed rule that all newly constructed or altered streets, roads, and highways must contain curb ramps at any intersection having curbs.[83]

In regard to the development of accessibility standards, the ADA built upon a guideline and regulatory process developed previously under Section 504. The provision in the 1977 HEW Section 504 regulation addressing new construction and alterations contained a subsection declaring that designing, constructing, or altering facilities in compliance with accessibility standards issued by the American National Standards Institute ("ANSI")[84] would constitute compliance with the program accessibility requirement under the regulation.[85] ANSI A117.1 provided the basis, touchstone, and format for federal accessibility standards, including the

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[82] 56 Fed. Reg. 35,694, 35,721, § 35.151(e) (July 26, 1991), codified at 28 C.F.R. 35.151(e).

[83] *Id.* at 56 Fed. Reg. 35,711.

[84] *The American National Specifications for Making Buildings and Facilities Accessible to and Usable by, the Physically Handicapped*, ANSI A117.1. As the federal government's standard-setting agencies explained in 1984, "ANSI is a private, national organization that publishes recommended standards on a wide variety of subjects. ANSI's standards for barrier-free design are developed by a committee made up of 52 organizations representing associations of handicapped people, rehabilitation professionals, builders and manufacturers." (General Services Administration, Department of Defense, Department of Housing and Urban Development, and the U.S. Postal Service, Uniform Federal Accessibility Standards, 49 Fed. Reg. 31,528 (Aug. 7, 1984)). ANSI A117.1 was initially published in 1961 and reaffirmed unchanged in 1971; subsequent editions were issued in 1986, 1992, and 1998. See, Federal Highway Administration, *Disability Rights Legislation and Accessibility Guidelines and Standards in the United States*, Chapter 1, § 1.1.1, of DESIGNING SIDEWALKS AND TRAILS FOR ACCESS, https://www.fhwa.dot.gov/environment/bicycle_pedestrian/publications/sidewalks/chap1.cfm.

[85] 42 Fed. Reg. 22,681, § 84.23(c) (codified as reissued at 45 C.F.R. § 84.23(c)).

Minimum Guidelines and Requirements for Accessible Design (1982) ("MGRAD") and the Uniform Federal Accessibility Standards (1984) ("UFAS").[86]

Title V of the ADA included a directive that the Access Board issue minimum guidelines supplementing MGRAD for purposes of ADA Titles II and III.[87] In fulfillment of that obligation, on July 26, 1991, the Access Board published ADA Accessibility Guidelines ("ADAAG"); that same day, the Department of Justice adopted them as Standards for Accessible Design, and appended them to the Department's ADA Title III regulation.[88] These Standards for Accessible Design would be in effect for new construction and alterations under Titles II and III until March 14, 2012.

In the preamble to its proposed ADA Title II regulation, the Justice Department included a statement that Title II's legislative history made it clear that "state and local governments are required to provide curb cuts on public streets"[89]; and indicated that, accordingly:

> Section 35.151, which establishes accessibility requirements for new construction and alterations, will apply to any curbing on a public street, road or highway that is to be constructed or altered by a public entity, and would require the entity to install ramps at any intersection having curbs or other barriers to entry onto the street or road from a

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[86] Section 502 of the Rehabilitation Act of 1973 established the Architectural and Transportation Barriers Compliance Board ("Access Board") to facilitate compliance with the Architectural Barriers Act. In 1982, the Access Board promulgated MGRAD (47 Fed. Reg. 33,862 (Aug. 4, 1982), currently codified at 36 C.F.R. pt. 1190), after which the four standard-setting agencies under the Architectural Barriers Act (the General Services Administration, the Department of Defense, the Department of Housing and Urban Development, and the U.S. Postal Service) jointly issued UFAS, which established a single set of standards for accessibility of all buildings and facilities subject to the Act's requirements. 49 Fed. Reg. 31,528, Aug. 4, 1984.

[87] 42 U.S.C. §§ 12204(a) & (b).

[88] 56 Fed. Reg. 35,592, 35,605, App. A (July 26, 1991), 28 C.F.R. pt. 36, App. A ("ADAAG"). See, Access Board, *About the ADA Standards: Background,* https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background.

[89] 56 Fed. Reg. 8538, 8546 (Feb. 28, 1991), quoting H.R. Rep. No. 101-485, pt. 2 at 84 (1990) (Education and Labor Committee).

> sidewalk. The general requirement for program accessibility would apply to the provision of curb cuts at existing crosswalks.[90]

The final regulation included a provision that made explicit the requirements alluded to in the proposed regulation by adding the following:

> *Curb ramps.* (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
>
> (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to street, roads, or highways.[91]

In concert with the provisions requiring curb ramps in the Department of Justice's ADA Title II regulation, the ADAAG/Standards for Accessible Design included a definition of "curb ramp" as "a short ramp cutting through a curb or built up to it,"[92] and a group of scope and technical requirements regarding curb ramps.[93] These require that, to comply with the standards, curb ramps "shall be provided wherever an accessible route crosses a curb."[94] Other provisions set maximum slopes for curb ramps,[95] set a minimum width of 36 inches,[96] and set standards for the surfaces, sides, and other attributes and aspects of curb ramps.[97] Of considerable significance, ADAAG 4.7.7 mandated that curb ramps have detectable warnings complying with

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[90] 56 Fed. Reg. 8538, 8546 (Feb. 28, 1991).

[91] 28 C.F.R. § 35.151(e)(1), recodified as amended at 28 C.F.R. § 35.151(i).

[92] ADAAG, 3.5. This definition is identical to that in UFAS, 3.5, 49 Fed. Reg. 31,535, 3.5 (Aug. 4, 1984); see p. 30 and n. 27 *supra*.

[93] ADAAG, 4.7. The provision is nearly identical to that in UFAS, 4.7, 49 Fed. Reg. 31,535, 3.5.

[94] ADAAG, 4.7.1.

[95] ADAAG, 4.7.2, 4.8.2, & 4.1.6(3).

[96] ADAAG, 4.73.

[97] ADAAG, 4.7.4 (surface); 4.7.5 (sides of curb ramps); 4.7.6 (built-up curb ramps); 4.7.8 (avoiding obstruction by parked vehicles); 4.7.9 (ramps at marked crossings); 4.7.10 (diagonal curb ramps); and 4.7.11 (raised islands).

another provision requiring that such warnings must consist of "raised truncated domes" of specified diameter, height, and spacing, that contrast visually with adjoining surfaces.[98]

On December 21, 1992, the Access Board published a notice of proposed rulemaking to add four special application sections to ADAAG regarding certain types of buildings and facilities covered by Title II of the ADA; one of those special applications was "14. Public Rights-of-Way."[99] The section-by-section analysis of the proposed section 14 endorsed the need for accessibility of "[p]edestrian circulation systems in the public right of way"; and called for "connection of individual pedestrian elements such as the public sidewalks, curb ramps, and street crossings of a jurisdiction into an accessible network," which it termed the pedestrian circulation network."[100] Among its provisions were a definition of "sidewalk"[101] and a subsection on "Sidewalk Curb Ramps and Other Sloped Areas," with paragraphs on Location, Slope, Width, Landings, sides of Curb Ramps or Other Sloped Areas, Surface, Adjacent Surfaces, Location at Marked Crossings, Obstructions, Built-up Curb Ramps, Diagonal Curb Ramps, and Islands.[102] A heading was provided for "Detectable Warnings," which had been required under the ADA since the adoption of the Standards for Accessible Design by the Justice Department's Title II regulation in 1991, but in the proposed regulation the section was simply

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[98] ADAAG, 4.7.7 & 4.29.2. The latter provision, titled "Tactile Warnings on Walking Services," mandated that "Detectable warnings shall consist of truncated domes with a diameter of nominal 0.9 in. (23mm.), a height of nominal 0.2 in. (5mm.) and a center to center spacing of nominal 2.35 in. (60 mm.) and shall contrast visually with adjoining surfaces, either light-on-dark, or dark-on-light. The material used to provide contrast shall be an integral part of the walking surface."

UFAS had included a heading for a standard on "Tactile Warnings on Walking Services" that was listed as "Reserved," with no text. UFAS, 4.29.2, 49 Fed. Reg. 31,590 (Aug. 4, 1984).

[99] 57 Fed. Reg. 60,612, 60,640-60,650, 60,664-60,674 (Dec. 21,1992).

[100] *Id.* at 60,640.

[101] *Id.* at 60,664.

[102] *Id.* at 60,666-60,668, § 14.2.5.

marked "Reserved."[103] On April 12, 1994, the Access Board, the Department of Justice, and DOT issued a joint final rule suspending detectable warning requirements until July 26, 1996, to permit the Board to conduct additional research on the need for such warnings and the best design for them. The suspension was extended in 1996 and again in 1998. The federal agencies permitted the suspension to expire on July 26, 2001. On May 6, 2002, the Federal Highway Administration issued a memorandum underscoring that as of the expiration of the suspension on July 26, 2001, detectable warnings were again required.[104]

On June 20, 1994, the Access Board issued an interim final rule that included the section 14 provisions,[105] and, on that same day, the Department of Justice issued a notice of proposed rulemaking announcing its plan to adopt the Board's Title II guidelines when they became final.[106] The Board issued Title II guidelines in 1998, but it did not include requirements for pedestrian facilities in the public right-of-way (section 14), because of, according to the Board, concerns of the transportation industry and because comments submitted on the proposed and interim guidelines demonstrated a need for additional education and outreach."[107]

The Board updated the Architectural Barriers Act (ABA) and ADA Accessibility Guidelines (ADAAG) on July 23, 2004.[108] The 2004 guidelines, sometimes referred to as "New

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[103] *Id.* at 60,667, § 14.2.5(7).

[104] Memorandum from Dwight A. Horne, Director of the Office of Program Administration, Federal Highway Administration, May 6, 2002, http://c.ymcdn.com/sites/www.apbp.org/resource/resmgr/dpfa/fhwa_memos_re_detectable_war.pdf

[105] 59 Fed. Reg. 31,676, 32,751 (June 20, 1994).

[106] 59 Fed. Reg. 31,808 (June 20, 1994).

[107] 63 Fed. Reg. 2000, 2013 (January 13, 1998).

[108] United States Access Board, *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines*, 69 Fed. Reg. 44,084, July 23, 2004, https://www.access-board.gov/attachments/article/412/ada-aba.pdf

ADAAG," took effect as of September 21, 2004. New ADAAG contained provisions addressing curb ramps[109] based primarily on those in the prior ADAAG. The new guidelines did not include, however, any requirement of detectable warnings at curb ramps, pending issuance of separate public rights-of-way regulations. On July 30, 2004, the Federal Highway Administration sent out a memorandum underscoring that: (1) the New ADAAG would not become ADA standards until the Departments of Justice and Transportation proceeded through notice-and-comment rulemaking to adopt the new guidelines into standards under the ADA; (2) "in the interim, agencies must continue to use current ADA standards – including those for detectable warnings at curb ramps and blended transitions – when building new and altering pedestrian facilities"; and (3) "[t]herefore, there have been no changes to the existing requirements (since July 26, 2001) that detectable warnings must be applied to curb ramps in new construction and alterations."[110]

On October 30, 2006, the U.S. Department of Transportation issued a regulation adopting the new ADAAG as its regulatory standards,[111] with what it termed "minor modifications."[112] One of those modifications was adopting language to continue in effect the requirements of the

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The Access Board published correcting amendments to the revised guidelines in 2005. 70 Fed. Reg. 45,308, August 5, 2005. The revised guidelines and correcting amendments were codified in the July 1, 2006 edition of the Code of Federal Regulations (36 C.F.R. pt. 1191).

[109] *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines*, at 184-186, § 406; 180-181, 183, §§ 405.2-405.5, 405.10.

[110] Memorandum from Dwight A. Horne, Director of the Office of Program Administration, Federal Highway Administration, July 30, 2004, https://www.fhwa.dot.gov/environment/bicycle_pedestrian/resources/dwm04.cfm

[111] Department of Transportation, *Transportation for Individuals with Disabilities: Adoption of New Accessibility Standards*, 71 Fed. Reg. 63,263-63,267 (October 30, 2006), https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/final-rule-adopting-new-accessibility-standards-effective.

[112] *Id.* at 63,263.

prior ADAAG regarding detectable warnings at curb ramps.[113] The Department explained its reasoning at some length as follows:

> Detectable warnings in curb ramps have long been required by ADAAG and DOT and DOJ regulatory standards that have long been, and remain, in effect. Currently, the Access Board is working on new public rights-of-way (PROW) guidelines, the current proposed version of which would retain a detectable warnings requirement. Because the Access Board is proposing this requirement in the PROW document, the July 2004 ADAAG did not include a parallel detectable warning requirement. The unintended consequence of the relationship between the Access Board's timing with respect to the ADAAG and PROW issuances is that, if the Department adopts the new ADAAG, the current detectable warnings requirement for curb ramps would disappear, only to reappear in a few years if the current Access Board PROW proposal is adopted.[114]

The Department of Justice published a revised Title II regulation on September 15, 2010, that took effect on March 15, 2011.[115] The 1991 ADA Standards for Accessible Design, printed as Appendix A of the title III regulation in the Code of Federal Regulations, July 1, 1994, could be used for new construction and alterations under Titles II and III until March 14, 2012.[116] The 2010 regulation reiterated verbatim the provision addressing the requirement of curb ramps in the 1991 regulation but redesignated it, from § 35.151(e) in the 1991 rule to § 35.151(i) in the 2010 version, as follows:

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

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[113] *Id.* at 63,266, § 37.131, modifying § 406.8 of App. D to 36 C.F.R. pt. 1181.

[114] *Id.* at 63,264.

[115] Department of Justice, *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 Fed. Reg. 56,164 (September 15, 2010), 28 C.F.R. pt. 35, https://www.federalregister.gov/documents/2010/09/15/2010-21821/nondiscrimination-on-the-basis-of-disability-in-state-and-local-government-services

[116] 28 C.F.R. pt. 36, cover page (revised as of July 1, 1994).

> (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.[117]

It also retained the provision in the 1991 regulation regarding the transition plan obligation relating to curb ramps:

> (2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.[118]

In conjunction with issuing its 2010 Title II and III regulations, the Department of Justice simultaneously "adopt[ed] standards consistent with ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, naming them the 2010 ADA Standards for Accessible Design."[119] The Department combined its new Title II and Title III regulations, and the 2004 ADAAG in a single publication titled *2010 ADA Standards for Accessible Design*,[120] that it describes as "an official online version of the 2010 Standards to bring together the information in one easy-to-access location."[121] Regarding state and local government entities, the Justice Department directed that they "must follow the requirements of

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[117] It appears that § 35.151(i) was somehow omitted from the place in the Federal Register where it should have appeared, 75 Fed. Reg. at 56,183, but was in the Section-by-Section Analysis of the regulatory guidance appendix, *id.* at 56,217, in the Code of Federal Regulations, 28 C.F.R. § 35.151(i), and subsequent versions of the regulation, https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#title2regs.

[118] 28 C.F.R. § 35.150(d)(2).

[119] 75 Fed. Reg. at 56,165.

[120] Department of Justice, *2010 ADA Standards for Accessible Design* (September 15, 2010), https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf.

[121] https://www.ada.gov/2010ADAstandards_index.htm.

the 2010 Standards, including both the Title II regulations at 28 C.F.R. 35.151; and the 2004 ADAAG at 36 C.F.R. part 1161, appendices B and D.[122] The Department's description of the 2010 Standards, as well as a discussion of the public comments on specific sections of the 2004 ADAAG, is found in Appendix B of the final Title III rule, *Analysis and Commentary on the 2010 ADA Standards for Accessible Design,* codified as Appendix B to 28 C.F.R. part 36.

Key provisions of the 2004 ADAAG regarding curb ramps found in the *2010 ADA Standards for Accessible Design* publication include specifications and diagrams on "Counter Slope," "Sides of Ramps," "Landings," "Location," "Diagonal Curb Ramps," and "Islands"[123]; and additional more general specifications regarding "Slope," "Cross Slope," "Floor or Ground Surfaces," "Clear Width," and "Wet Conditions."[124] The Justice Department's adoption of the 2004 ADAAG standards, meant that the *2010 ADA Standards for Accessible Design* required detectable warnings only on transit platform edges, but not on curb ramps.

On July 26, 2011, the Access Board issued a Notice of Proposed Rulemaking (NPRM), titled *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way,* proposing Public Right-of-Way Accessibility Guidelines (commonly known as PROWAG). The Board published PROWAG in two formats. One version, prepared as a Word document without any images or drawings other than the International Symbol of Accessibility, was published in the Federal Register.[125] The other version, with illustrative figures and advisory sections in shaded boxes, was made available on the Access Board website.[126]

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[122] *Id.* at 3.

[123] *2010 ADA Standards for Accessible Design* at pp. 131-133, § 406.

[124] *Id.* at pp. 127-128 and 130, §§ 405.2-.5 and 405.10.

[125] 76 Fed. Reg. 44,664 (July 26, 20122), https://www.gpo.gov/fdsys/pkg/FR-2011-07-26/pdf/2011-17721.pdf.

[126] https://www.access-board.gov/attachments/article/743/nprm.pdf.

The NPRM specified that "[w]hen the proposed guidelines are adopted, with or without additions and modifications, as accessibility standards by other federal agencies in the regulations implementing Title II of the Americans with Disabilities Act, Section 504, and the Architectural Barriers Act, the accessibility standards will apply to units of state and local government that construct streets and highways."[127] An "Overview of Proposed Guidelines" section began with the simple declaration that "[t]he proposed guidelines apply to pedestrian facilities in the public right-of-way"; it then went on to state that the guidelines ensure that 11 listed types of "facilities for pedestrian circulation and use located in the public right-of-way are readily accessible to and usable by pedestrians with disabilities," including, *inter alia*:

- "Sidewalks, pedestrian overpasses and underpasses, and other pedestrian circulation paths";
- "Pedestrian street crossings, medians, and pedestrian refuge islands, including requirements for curb ramps or blended transitions, and detectable warning surfaces";
- "Pedestrian street crossings at roundabouts …";
- "Pedestrian at-grade rail crossings …"; and
- "Ramps …."[128]

The substantive provisions relating to curb ramps clarify and augment provisions in the earlier guidelines and regulations. Guideline R105.5 defines "curb ramp" as "A ramp that cuts through or is built up to the curb. Curb ramps can be perpendicular or parallel, or a combination of parallel and perpendicular ramps."[129] In the "Scoping Requirements" section, guideline R207.1 provides: "A curb ramp, blended transition, or a combination of curb ramps and blended transitions complying with R304 shall connect the pedestrian access routes at

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[127] 76 Fed. Reg. at 44,668.

[128] *Id.*

[129] *Id.* at 44,688, § R105.5.

each pedestrian street crossing. The curb ramp (excluding any flared sides) or blended transition shall be contained wholly within the width of the pedestrian street crossing served."[130] Guideline R208.1 requires that "detectable warning surfaces … shall be provided" at listed categories of locations including "1. Curb ramps and blended transitions at pedestrian street crossings; 2. Pedestrian refuge islands; 3. Pedestrian at-grade rail crossings not located within a street or highway; …"[131] An advisory guidance for the provision described its purpose: "On pedestrian access routes, detectable warning surfaces indicate the boundary between pedestrian and vehicular routes where there is a flush rather than a curbed connection."[132] The advisory made a point of distinguishing between this purpose – making it clear where the sidewalk or curb ramp ends and the street begins – and what it called "wayfinding"[133]: "Detectable warning surfaces are not intended to provide wayfinding for pedestrians who are blind or have low vision."[134] The advisory then described various methods for making wayfinding easier for people who are blind or have low vision.

Among the general "Technical Requirements," found in Chapter R3 of PROWAG that apply to curb ramps are provisions that require surfaces to "be firm, stable, and slip resistant"; that "[g]rade breaks shall be flush"; and that "objects such as utility covers, vault frames, and gratings should not be located on curb ramp runs, blended transitions, turning spaces, or other

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[130] *Id.* at 44,690, § R207.1.

[131] *Id.* at 44,690, § R208.1.

[132] *Id.* at 44,690, Advisory R208.1.

[133] The term "wayfinding" was coined by Kevin Lynch, in his 1960 book, THE IMAGE OF THE CITY (MIT Press), to refer, roughly, to using available environmental and other cues to orient oneself and figure out a path to get from here to there.

[134] 76 Fed. Reg. at 44,690, Advisory R208.1.

areas within the pedestrian access route" (which "may not always be possible in alterations, but should be avoided whenever possible").[135]

Section 304 of PROWAG addresses "Curb Ramps and Blended Transitions." An Advisory at the beginning describes the difference between perpendicular and parallel curb ramps:

> There are two types of curb ramps:
> - Perpendicular curb ramps have a running slope that cuts through or is built up to the curb at right angles or meets the gutter break at right angles where the curb is curved.
> - Parallel curb ramps have a running slope that is in-line with the direction of sidewalk travel and lower the sidewalk to a level turning space where a turn is made to enter the pedestrian street crossing.[136]

That is followed by provisions establishing separate turning space, running slope, and flared sides requirements for perpendicular curb ramps and for parallel curb ramps, and a running slope requirement for blended transitions.[137] Guideline R304.5 sets out common requirements for perpendicular and parallel curb ramps and blended transitions regarding width, grade breaks, cross slope, counter slope, and clear space.[138]

Guideline R305 provides the technical requirements for detectable warning surfaces, beginning with a general directive that "[d]etectable warning shall consist of truncated domes aligned in a square or radial grid pattern...."[139] Subsequent guidelines provide technical specifications as to dome size, spacing, and contrast ("[d]etectable warning surfaces shall

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[135] *Id.* at 44,692, R302.7, § R302.7.1, Advisory R302.7.2.

[136] *Id.* at 44,691, Advisory § R304.1.

[137] *Id.* at 44,692-44,693, §§ R304.2, R304.3, & R304.4.

[138] *Id.* at 44,693, § R304.5.

[139] *Id.* at 44,693, § R305.1.

contrast visually with adjacent gutter, street or highway, or pedestrian access route, either light-on-dark or dark-on-light"), and surface area size.[140] Also provided are specifications as to the placement of the domes depending upon whether they are on a perpendicular curb ramp, a parallel curb ramp, a blended transition, a pedestrian refuge island, or a pedestrian at-grade rail crossing.[141]

The Access Board has underscored that "[t]he proposed guidelines [PROWAG] include requirements for detectable warnings (§ R208) which are especially important along public streets and sidewalks due to the hazards vehicle traffic pose to pedestrians with vision impairments."[142] The Section-by-Section Analysis in PROWAG provided considerable guidance on the application of its detectable warnings requirements, and the application of prior regulations and guidelines on that issue. The regulatory context was described as follows:

> When the Department of Justice adopted the DOJ 2010 Standards, those standards included the 2004 ADA and ABA Accessibility Guidelines which do not contain a requirement for detectable warning surfaces on curb ramps. The Department of Transportation regulations implementing Section 504 require state and local governments that receive federal financial assistance directly or indirectly from the Department to use accessibility standards that include the 2004 ADA and ABA Accessibility Guidelines, as modified by the Department, or UFAS. See 49 CFR 27.3(b). The Department of Transportation modified the 2004 ADA and ABA Accessibility Guidelines by retaining certain requirements from the 1991 ADAAG, including the requirement for detectable warning surfaces on curb ramps. See 406.8 in Appendix A to 49 CFR part 37.[143]

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[140] *Id.* at 44,693, §§ R305.1.1-R305.1.4.

[141] *Id.* at 44,693, § R305.2.

[142] U.S. Access Board, "Detectable Warnings Update," Mar. 2014, https://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/guidance-and-research/detectable-warnings-update

[143] 76 Fed. Reg. at 44,673-44,674.

Thus, the responsibilities of state and local transportation departments in regard to detectable warning surfaces are determined by which accessibility standards they are subject to. In PROWAG, in a section headed "*Governmental Units Affected*," the Access Board indicated that it divided "State and local transportation departments … into four groups for the purpose of evaluating the impacts of the requirement in the proposed guidelines for detectable warning surfaces on curb ramps…"[144] Two of the groups listed are irrelevant to current analysis. One of them consisted of state and local governments that used UFAS as the standard for its curb ramps, which the Justice Department had prohibited on or after March 15, 2012, so that the group "ceased to exist as of March 15, 2012."[145] Another group, whose inclusion in the analytical framework was problematic and illogical, consisted of "state and local transportation departments that do not comply with accessibility standards for curb ramps in the public right-of-way," on the conjectural possibility that "there may be state and local transportation departments that do not comply with the standards."[146] One might have thought that the question in this context was which standards are applicable, not whether there were some non-compliant covered entities.

In any event, excluding the group that had ceased to exist (Group 1) and the group that was not complying with the regulations at all (Group 4), leaves two groups under the PROWAG analysis, designated by the Access Board as Group 2 and Group 3. Group 3, it turns out, comprised local transportation departments that "do not receive federal financial assistance

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[144] *Id.* at 44,674.

[145] *Id.*

[146] *Id.* at 44,674-44,675.

directly or indirectly from the Department of Transportation,"[147] another category that does not include New York City and manifestly is not the subject of this report. That leaves only Group 2, which PROWAG describes as "state and local transportation departments that receive federal financial assistance directly or indirectly from the Department of Transportation." [148]

PROWAG describes the ADA obligations of such entities as follows:

> State and local transportation departments in Group 2 are required to comply with the accessibility standards in the Department of Justice regulations implementing Title II of the Americans with Disabilities Act and the Department of Transportation regulations implementing Section 504. ***Where the requirements in the accessibility standards in the Department of Justice and Department of Transportation regulations differ, the more stringent requirement must be used.*** … [S]tate and local transportation departments in Group 2 must comply with the requirement for detectable warning surfaces on curb ramps in the Department of Transportation regulations because it is the more stringent requirement. ***All state transportation departments and most local transportation departments are in Group 2 and specify detectable warning surfaces on curb ramps in their standard drawings. The requirement in the proposed guidelines for detectable warning surfaces on curb ramps will not have any impacts on state and local transportation departments in Group 2.***[149]

The Access Board added that it had reviewed the standard drawings for the design of curb ramps on state transportation department websites and found that "the transportation departments in all 50 states and the District of Columbia specify detectable warning surfaces on curb ramps in the standard drawings," and that "most local transportation departments used standard drawings for the design of curb ramps that are consistent with the standard drawings maintained by their state transportation departments."[150] Moreover, the Board observed:

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[147] *Id.* at 44,674.

[148] *Id.* at 44,674.

[149] *Id.* (emphasis added).

[150] *Id.*

> These state and local transportation departments use either the DOJ 1991 Standards, which include the 1991 ADAAG requirement for detectable warning surfaces on curb ramps, or the Department of Transportation accessibility standards, which include the 2004 ADA and ABA Accessibility Guidelines as modified by the Department to include the requirement from the 1991 ADAAG for detectable warning surfaces on curb ramps.[151]

This analysis makes clear that the detectable warnings requirements have applied and continue to apply to New York City and its Department of Transportation.

PROWAG itself has not yet been finally adopted, but it has become a source of guidance in many jurisdictions around the country.[152] The U.S. Department of Transportation identified the 2005 draft PROWAG as "the currently recommended best practices [that] can be considered the state of the practice that could be followed for areas not fully addressed by the present ADAAG standards."[153] The Public Rights-of-Way Access Advisory Board, has noted that "[t]he DOT has already indicated its intent to adopt the PROWAG, when completed, into its [Section] 504 standard."[154]

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[151] *Id.*

[152] See, e.g., Oklahoma Dep't of Transp., *American with Disabilities Act Compliance Plan* (2014) at 28, http://www.okladot.state.ok.us/civil-rights/ada-504-508/pdfs/cvr_ada_sec-504_compliance-plan2014.pdf; Ohio Dep't of Transp., "Curb Ramps Required in Resurfacing Plans," Policy No. 21-003(P) (Apr. 17, 2015) at 2, https://www.dot.state.oh.us/policy/PoliciesandSOPs/Policies/21-003(P).pdf; Iowa Dep't of Transp., DESIGN MANUAL, Chapter 12 – Sidewalks and Bicycle Facilities, *Accessible Sidewalk Components* (July 17, 2014) at 1, https://www.iowadot.gov/design/dmanual/12A-02.pdf; California Dep't of Transp., Memorandum of Timothy Craggs, Chief of Division of Design, Oct. 1, 2013, *Design Information Bulletin*, at 1, http://www.dot.ca.gov/hq/oppd/dib/dib82-05.pdf.

[153] Memorandum from Frederick D. Isler, Associate Administrator for Civil Rights, U.S. Dep't of Transp., Federal Highway Administration, Jan. 23, 2006, www.fhwa.dot.gov/environment/bikeped/prwaa.htm; or https://www.scribd.com/document/24734061/us-dot-federal-highway-administration-memorandum-public-rights-of-way-access-advisory-january-23-2006-prowaa.

[154] Public Rights-of-Way Access Advisory Bd., SPECIAL REPORT: ACCESSIBLE PUBLIC RIGHTS-OF-WAY PLANNING AND DESIGN FOR ALTERATIONS (July 2007) at 3, https://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/guidance-and-research/accessible-public-rights-of-way-planning-and-design-for-alterations/chapter-1%E2%80%94introduction.

The starting points of the 1991 Title II regulations provisions established some clear principles:

- Individuals with disabilities shall not be denied the right to use or benefit from services, programs, or activities of a public entity because the service, activity, or benefit is not readily accessible to and usable by individuals with disabilities;[155]
- Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers from a street level pedestrian walkway;[156]
- In regard to existing services, programs, and activities, public entities must operate them so that they are readily accessible to and usable by individuals with disabilities, but this does not necessarily require public entities to make each facility accessible, if other means are effective in rendering the program, service, or activity readily accessible to and usable by individuals with disabilities;[157]
- If no other methods can be effective in achieving compliance with the program access requirement, public entities are required to achieve compliance by alteration of existing facilities or construction of new facilities;[158]
- In making alterations to existing facilities, public entities shall meet accessibility requirements of the regulations, including provisions requiring installation of curb ramps;[159]
- If structural changes are required, a public entity with responsibility over streets, roads, or walkways (with 50 or more employees) must develop a transition plan that includes a schedule for providing curb ramps or other sloped areas where pedestrian walkways cross curbs;[160] and
- Where structural changes are undertaken to comply with the program access requirement, the changes shall be made by January 26, 1992, but in any event as expeditiously as possible.[161]

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[155] 56 Fed. Reg. 35,716, 35,719-35,720 (July 26, 1991, 28 C.F.R. §§ 35.149-.150(a).

[156] 56 Fed. Reg. at 35,721, 28 C.F.R. § 35.15(e).

[157] 56 Fed. Reg. at 35,719-35,720, 28 C.F.R. § 35.150.

[158] 56 Fed. Reg. at 35,719-35,720, 28 C.F.R. §§ 35.150(a)(1) & 35.150(b).

[159] 56 Fed. Reg. at 35,720, 28 C.F.R. § 35.150(b).

[160] 56 Fed. Reg. at 35,720, 28 C.F.R. § 35.150(d).

[161] 56 Fed. Reg. at 35,720, 28 C.F.R. § 35.150(c).

The last provision listed is stated with clarity, but it was ridiculously unrealistic. It might have been expected that the regulatory agencies would have subsequently developed a more realistic timeframe for various kinds of structural changes, or perhaps a process for negotiating reasonable deadlines with individual jurisdictions. The 1991 regulations nowhere say, nor suggest in any way, that public entities are not required to make changes to existing facilities, or that structural changes only have to be made in conjunction with resurfacing. In general, the other basic elements of the 1991 regulation are still reflected in current federal regulations and guidelines.

3. Judicial Precedents

A review of relevant court decisions reveals that, had the case at bar not resulted in a Settlement Agreement, most of the legal issues that the Court would have needed to resolve are largely settled in case law. This subsection contains a methodical summary of relevant court decisions in the following order: (a) leading U.S. Circuit Court curb ramp cases, (b) other related and informative Circuit Court cases, and (c) a few notable federal District Court decisions. Before proceeding in that order, however, useful perspective is provided by noting and describing the outcome in a class action lawsuit by people with disabilities seeking sidewalk accessibility that: (1) was resolved by settlement agreement; (2) is the most recent major such settlement; (3) requires the defendant city to spend at least $1.367 billion to make pedestrian crossings and sidewalks accessible, which attorneys for the plaintiffs claimed makes it "the largest disability access settlement in U.S. history"[162]; included rulings by a federal judge on key

[162] Dakota Smith, *Los Angeles to Spend $1 Billion on Sidewalk Repairs to Settle ADA Lawsuit*, LOS ANGELES DAILY NEWS, April 1, 2015, http://www.dailynews.com/government-and-politics/20150401/los-angeles-to-spend-1-billion-on-sidewalk-repairs-to-settle-ada-lawsuit (quoting plaintiffs' attorney Guy Wallace).; Office of Los Angeles Mayor Eric Garcetti, *Willits v. City of L.A. Sidewalk Settlement Announced*, April 1, 2015, https://www.lamayor.org/willits-v-la-sidewalk-settlement-announced (quoting plaintiffs' attorney Guy Wallace as follows: "This $1.4 billion

issues of whether sidewalks are a "service, program, or activity" covered by Title II of the ADA and Section 504 of the Rehabilitation Act of 1973, and whether an undue burden defense is applicable to construction or alterations of pedestrian ramps; and (5) dealt with the second largest city in the United States, with numbers of intersections and corners comparable to those in New York City[163]: *Willits v. City of Los Angeles*, 925 F.Supp.2d 1089 (C.D. Cal. 2013); Order Granting Final Approval of Class Action Settlement, No. 10-cv-05782-CBM-MRW, Dock. Doc. # 415 (Aug. 25, 2016).

Three individual plaintiffs and a disability independent living organization, Communities Actively Living Independent and Free (CALIF), filed the *Willits* case in the United States District Court for the Central District of California on August 4, 2010, as a class action on behalf of "individuals with mobility impairments in the City of Los Angeles who have been denied access to pedestrian rights of way."[164] The plaintiffs alleged violations of the ADA and Section 504 of the Rehabilitation Act by the City of Los Angeles.[165] The alleged "discrimination and denial of meaningful access" by the City alleged by the plaintiffs included the following:

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settlement is the largest disability access class action settlement in U.S. history. It will make the City's sidewalk system accessible to people with mobility disabilities. It will install curb ramps throughout the City ....").

[163] Jia-Rui Chong, *Hahn Targets Problem Intersections*, LOS ANGELES TIMES, July 7, 2004, http://articles.latimes.com/2004/jul/07/local/me-traffic7 ("40,000 intersections"); Public Justice, *Public Justice Announces Finalists for 2017 Trial Lawyer of the Year*, https://www.publicjustice.net/tloy2017/ ("approximately 40,000 intersections and 160,000 potential curb ramp locations"); Bob Pool, *L.A.'s Street Signs Have Been at the Intersection of Time and Place*, LOS ANGELES TIMES, Aug. 15, 2014), www.latimes.com/local/la-me-street-signs-20140816-story.html ("40,000 intersections); Robert Reinhold, *LOS ANGELES JOURNAL - Parking - Even an Angel Would Cry*, NEW YORK TIMES, http://www.nytimes.com/1989/08/16/us/los-angeles-journal-parking-even-an-angel-would-cry.html ("40,000 intersections").

[164] *Willits v. City of Los Angeles*, Order on Plaintiffs' Motion for Class Certification, 2011 WL 7767305, at *1 (C.D. Cal. Jan. 3, 2011).

[165] 925 F.Supp.2d at 1091. The plaintiffs also made claims under three California statutes; on December 10, 2010, the court dismissed the state law claims without prejudice, to be pursued in state court. *Id.* at 1091; Dock. Docs. ## 53, 57.

- The failure to install curb ramps at intersections in the City that are necessary to provide meaningful access to the pedestrian rights of way;
- The failure to develop and implement a process for identifying intersections and corners throughout the City at which curb ramps are necessary to provide meaningful access to the pedestrian rights of way;
- The failure to install accessible curb ramps at locations where no curb ramps exist, or where inaccessible curb ramps exist, within the time required by applicable state and federal disability access laws or on any other reasonable schedule;
- The failure to install accessible curb ramps within the time permitted by statute or within any other reasonable time frame, after receiving a request to do so or otherwise being notified of the need for a curb at a particular location;
- With respect to intersections on streets that are resurfaced or otherwise altered or newly constructed, the failure to install accessible curb ramps at those intersections;
- With respect to newly constructed curb ramps, the failure to adopt and utilize or require and enforce the utilization of a design standard that complies with acceptable federal design guidelines and/or applicable state building code standard[s].[166]

In addition, claims in the *Willits* action, unlike in the *EPVA v. City of New York* case, went beyond curb ramp issues and addressed "mid-block barriers to access on City sidewalks"; "obstacles placed in the path of travel"; procedures for "inspecting, repairing and maintaining the pedestrian rights of way"; "the failure to repair or eliminate mid-block barriers to access" when streets are resurfaced, otherwise altered, or newly constructed; and "the failure to ensure that pedestrian rights of way are kept free of temporary or permanent obstructions"[167] – matters that the Objectors have raised in the instant case. (See pp. 122-123 *infra*). The *Willits* court certified the class on January 3, 2011.[168]

On February 25, 2013, the court granted partial summary judgment in favor of the plaintiffs on three issues. First, citing Ninth Circuit precedent, the court ruled that a public

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[166] Complaint in *Willits v. City of Los Angeles*, 2010 WL 3299495, ¶¶ 5.a - .f (C.D. Cal., filed Aug. 4, 2010).

[167] *Id.* at ¶¶ 5.g – .i.

[168] 2011 WL 7767305, at *5.

sidewalk is "a 'program, service, or activity' within the meaning of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973."[169] The court also quoted another Ninth Circuit ruling, *Barden v. City of Sacramento*, discussed on pp. 72-75 *infra*, for the following proposition: "[M]aintaining public sidewalks is a normal function of a city and without a doubt something that the [City] does. Maintaining their accessibility for individuals therefore falls within the scope of Title II."[170] Second, the court in *Willits* ruled that Los Angeles could not rely on defenses of "undue financial burdens" as to "newly constructed or altered" pedestrian rights of way, sidewalks, and curb ramps as defined under Title II of the ADA and Section 504.[171] Third, the court found that "no undue burden defense exists as to pedestrian rights of way, sidewalks, and curb ramps that were constructed prior to and have not been altered since June 3, 1977, and therefore constitute existing facilities under Section 504 of the Rehabilitation Act."[172]

The Parties entered into a Settlement Agreement and Release of Claims that was filed with the court on January 8, 2016.[173] It is a fairly hefty document of 46 pages, excluding signature pages. Highlights of the settlement include:

- Thirty-Year Period of "Program Access Improvements."

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[169] 925 F.Supp.2d at 1093, quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001). The *Willits* court also relied on the following quotation from the *Lee* decision: "[t]he ADA's broad language brings within its scope "'anything a public entity does.,'" 250 F.3d at 691 (quoting *Yeskey v. Penn. Dep't of Corr.*, 118 F.3d 168, 171 & n. 5 (3d Cir. 1997)).

[170] *Willits*, 925 F.Supp.2d at 1093, quoting *Barden v. Sacramento,* 292 F. 3d 1073, 1076 (9th Circ. 2002) *cert. denied*, 539 U.S. 958 (2003).

[171] *Willits*, 925 F.Supp.2d at 1094.

[172] *Id.* at 1095.

[173] *Willits v. City of Los Angeles*, No. 10-cv-05782-CBM_MRW, Settlement Agreement and Release of Claims, Dock. Doc. # 348-1 (Jan. 8, 2016).

The parties agreed that the City of Los Angeles shall implement a program to improve access to pedestrian facilities for people with mobility impairments that shall continue for a "Compliance Period" in effect for 30 years.[174]

- Types of Program Access Improvements.

The agreement set out a non-exclusive list of access improvements required, including "installation of missing curb ramps," "upgrading of existing curb ramps" to comply with accessibility standards, repairing "excessive gutter slopes at the bottom of curb ramps leading into crosswalks," and "elimination of curb ramp lips on curb ramps," along with various other repairs, installations, improvements, and remedial actions to achieve pedestrian accessibility of sidewalks, streets, and crossings.

- Access Improvements Related to Resurfacing, Etc.

The agreement acknowledges the requirement that the City perform curb ramp installations and upgrades related to: the resurfacing of streets or roadways; widening of streets or roadways; creation of new streets or reconstruction of an existing street; construction of new buildings, parks, or other facilities; repair or installation of sewer or storm drains; construction or repair of bridges, viaducts, or tunnels; installation or repair of street lighting; and repair or installation of bus pads. It provides, however, that funding for such installations and upgrades "shall not count" toward the City's monetary commitments required under the agreement.

- Accessibility Standards.

The parties agreed that all program access improvements under the agreement shall comply with the 2010 ADA Standards for Accessible Design or with the California Building Code (CBC), "whichever provides greater protection or access to persons with mobility disabilities." "In the event that the City constructs any new pedestrian facilities or alters any such existing pedestrian facilities, those facilities shall fully comply in all aspects with the ADA Standards or CBC requirements for new construction or alterations."[175]

- Funding Commitments.

The agreement called for the City to expend a total of nearly $1.4 billion dollars – $1,367,142,684 – during the compliance period, escalating in five-year increments, beginning at $31,000,000 per year for the first five years, and growing to $63,169,615 per year for the final five years. Such funds are to be spent for installation, repair, remediation, construction, design, inspection, monitoring, and support costs required for implementation of the Settlement Agreement.[176]

- Access Request Program.

Throughout the compliance period, the City is required to operate and maintain a policy and procedures for members of the plaintiff class to submit (by telephone, standard mail, electronic mail, accessible electronic form made available on a website, or otherwise) requests

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[174] *Id.* at 21, ¶ 12.2.

[175] *Id.* at 30, ¶ 12.9; *id.* at 320, ¶ 13.

[176] *Id.* at 20-28, ¶ 12.

for program access improvements at particular locations. Program access requests are to be acknowledged within 10 days of receipt, and the City is to use its best efforts to conduct an investigation and make a determination within 30 days, and to remove or address the access barrier within 120 days of receipt of the access request.[177]

- ADA Coordinator.

The agreement requires the City to hire an "ADA Coordinator for the Pedestrian Right of Way" who must "have substantial experience in evaluating or assisting public entities in evaluating the accessibility of facilities under Title II of the ADA"; "be knowledgeable in current federal and state accessibility standards"; "have a minimum of three years' experience in providing ADA services related to accessible facilities"; and "be licensed either as an architect or as a registered civil engineer." She or he will have the authority and responsibility to perform a long list of specified duties centered on: reviewing program access improvements for compliance with the Settlement Agreement and filing detailed reports to the parties; consulting with, and providing training for, appropriate City personnel; conducting field spot checks on pedestrian facilities; and reviewing program access requests. In addition, the Coordinator is expressly given authority to respond to inquiries and complaints from plaintiff class members, to recommend changes to the City's policies and procedures, and to "ensure the City's adoption of written policies and procedures concerning the maintenance of accessible paths of travel, and keeping such pathways accessible."[178]

- Access and Construction Database.

The agreement required the City to create a database containing: lists and maps of all locations where curb ramps and other pedestrian facilities have been installed, repaired, or upgraded since the Settlement Agreement went into effect; a list of the pending program access requests submitted; a list and map of access requests processed and completed by the City; a list and map of all locations of pedestrian Facilities about which the City received access grievances or complaints; and a list and display of the City's street construction and resurfacing or repaving projects involving alterations or improvements to pedestrian pathways. The database is to be available to the public in electronic form on or through the City's official website, and in written form through the office of the ADA Coordinator. The information on the database will also be made available to the public upon request in multiple accessible formats.[179]

- Grievance and Complaint System.

The City agreed to establish, with input of Class Counsel, a process for class members to submit, and the City to respond to, grievances regarding access to the City's pedestrian rights of way for persons with mobility disabilities.[180]

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[177] *Id.* at 28-30, ¶ 12.8.

[178] *Id.* at 34-37, ¶ 15.

[179] *Id.* at 32-34, ¶ 14.

[180] *Id.* at 38, ¶ 17.

- Monitoring.

The agreement assigns class counsel the responsibility for monitoring the City's implementation of the Settlement Agreement. Throughout the compliance period, the City is required to provide Class Counsel with regular reports about the City's compliance with the terms of the agreement, and the City and Class Counsel are to meet periodically to discuss the City's efforts to implement and comply with the Settlement Agreement. Class Counsel is expressly authorized to conduct inspections of both the City's drawings and designs for program access improvements, and pedestrian facilities themselves, for the purpose of monitoring the City's compliance with the agreement.[181]

- Dispute Resolution Procedures.

In the event one of the parties believes that a dispute exists regarding violation of the agreement's provisions or failure to perform its requirements, that party is required to notify the other party in writing. The other party is to provide a written response within ten business days. Unless the problem is resolved, the parties must meet and confer, and attempt to resolve the dispute informally. If the parties are unable to resolve their dispute, the parties are required to go to mediation, and must engage in good faith efforts to resolve the dispute through mediation. If mediation is unsuccessful, either party may make a motion to the district court to enforce the Settlement Agreement and resolve the dispute.[182]

The court held a Fairness Hearing on the *Willits v. City of Los Angeles* settlement on August 2, 2016.[183] During the hearing, Judge Consuelo Marshall stated that she did not have all the evidence she needed to grant final approval of the agreement, particularly in light of certain findings the parties requested in the settlement agreement – evidence as to: (1) the effect of implementation of the settlement in making the City's pedestrian facilities readily accessible to and usable by individuals with mobility disabilities; (2) the reasonableness of time periods and expenditures of funds in the agreement; (3) the absence of evidence that the City had intentionally discriminated or acted with deliberate indifference; and (4) that compliance with

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[181] *Id.* at 38-39, ¶ 18.

[182] *Id.* at 40-41, ¶¶ 19.1 - .3.

[183] *Willits v. City of Los Angeles,* No. 10-CV-5782-CBM, Transcript of Aug. 2, 2016, Fairness Hearing, filed on Aug. 15, 2016, Dock., #407 ("*Willits* FH Tr.").

agreement would put the City in compliance with its legal obligations to provide program access for individuals with mobility disabilities.[184] Judge Marshall indicated that she would need such additional evidence in the form of stipulations or declarations before she could submit an order of final approval.[185]

One publication described this development as follows: *LA's Record $1.4B Sidewalk Access Deal Hits Speedbump*,[186] but on August 17, 2016, the parties filed a Stipulation in Support of Request for Final Approval of Class Action Settlement and Requested Findings,[187] along with declarations from two City Officials,[188] after which, on August 25, 2016, Judge Marshall granted final approval of the Class Action Settlement[189] and entered Final Judgment in the lawsuit, while retaining jurisdiction for "implementation, enforcement, construction, and interpretations of the Settlement Agreement."[190]

Though the *Willits* action was a recent curb ramps case resolved by settlement agreement, resulted in the defendant city being required to spend at least $1.367 billion to make pedestrian crossings and sidewalks accessible, included rulings by a federal court on some key legal issues, and involved the second largest city in the United States, with comparable numbers of

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[184] *Id.* at 29-33, referring to *Willits v. City of Los Angeles*, No. 10-cv-05782-CBM_MRW, Settlement Agreement and Release of Claims, Dock. Doc. # 348-1, at 9 (Jan. 8, 2016).

[185] *Willits,* Fairness Hearing Transcript at 32-33.

[186] David Siegal, *LA's Record $1.4B Sidewalk Access Deal Hits Speedbump*, LAW360 (AUG. 2, 2016), https://www.law360.com/articles/824412/la-s-record-1-4b-sidewalk-access-deal-hits-speedbump.

[187] *Willits v. City of Los Angeles,* No. 10-CV-5782-CBM, Stipulation in Support of Request for Final Approval of Class Action Settlement and Requested Findings, filed on Aug. 17, 2016, Dock., #409.

[188] *Id.* at Dock. ##409-1 & 409-2.

[189] *Willits v. City of Los Angeles,* No. 10-CV-5782-CBM, Order Granting Final Approval of Class Action Settlement, filed on Aug. 25, 2016, Dock., #415.

[190] *Willits v. City of Los Angeles,* No. 10-CV-5782-CBM, Judgment, 2016 WL 5107642 (C.D. Cal. Aug. 25, 2016).

intersections and corners to those in New York City; and although its settlement provides some safeguards and procedures not found in the *EPVA v. City of New York* Stipulations, and some components present in both settlement agreements are more fleshed out in *Willits* than in the case at bar, *the Willits settlement certainly is not a model.* When the *Willits* case was filed in 2010 (16 years after *EPVA v. City of New York* was filed), Los Angeles had already had 19 years to comply with the ADA's requirement of program access at pedestrian crossings. Nothing in the 2016 agreement indicates any basis for giving L.A. 30 more years to come into compliance, when bringing corners into compliance with ADA standards when resurfacing would almost certainly have taken less than the 30 years. And the agreement could have been more rigorous as to identifying and tracking numbers of corners with and without compliant ramps.

Its flaws aside, however, the settlement in *Willits v. City of Los Angeles* is certainly a significant comparative touchstone for contemporary curb ramp settlement agreements.

a. Circuit Court Curb Ramp Cases

At the Circuit Court of Appeals level, the leading cases include:

(1) ***Kinney v. Yerusalim***, 9 F.3d 1067 (3d Cir. 1993), *cert. denied* 511 U.S. 1033 (1994), was a class-action lawsuit brought by Disabled in Action of Pennsylvania, a non-profit organization, and twelve Philadelphia residents with "ambulatory disabilities," against the Commissioner of the Philadelphia Streets Department and the Secretary of the Pennsylvania Department of Transportation.[191] The plaintiffs sought to "compel the installation of curb cuts on all streets resurfaced since the effective date of the ADA."[192] The U.S. District Court for the Eastern District of Pennsylvania granted the plaintiffs' motion for summary judgment and

[191] 9 F.3d at 1069.

[192] *Id.* at 1070.

ordered the City of Philadelphia to "install curb ramps or slopes on every City street, at any intersection having curbs or other barriers to access, where bids for resurfacing were let after January 26, 1992."[193]

On appeal, the Court of Appeals for the Third Circuit cited findings of Congress in the ADA regarding isolation and segregation of people with disabilities, discrimination in access to public services, and the discriminatory effects of architectural, transportation, and communication barriers;[194] and indicated that "[t]hese general concerns led to a particular emphasis on the installation of curb cuts."[195] The court quoted the ADA report of the House Committee on Education and Labor regarding Title II that "under this title, local and state governments are required to provide curb cuts on public streets," and that "[t]he employment, transportation, and public accommodations sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets."[196] The Third Circuit then turned to a discussion of the Department of Justice's regulation for the implementation of Title II of the ADA. This and other ADA regulations relating to curb ramps were discussed in detail in subsubsection IV.D.2 *infra*. The Court of Appeals observed that, "[c]onsistent with the emphasis on architectural barriers, the installation of curb cuts is specifically given priority in both the 'existing facilities' and 'new construction and alterations' sections of the regulations."[197] It added that "because of the importance attributed to curb cuts,

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[193] *Kinney v. Yerusalim,* 812 F.Supp. 547, 553 (E.D.Pa. 1993).

[194] 9 F.3d at 1071, citing 42 U.S.C. § 12101.

[195] *Id.* at 1071.

[196] *Id.*, quoting H.R. REP. NO. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C. A.N. 267, 367.

[197] *Id.*

the regulations direct public entities to fashion a transition plan for existing facilities, containing a 'schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs ....'"[198] Given that "the regulation mandates the installation of curb cuts when the City 'alters' a street," the question remaining on appeal was whether the resurfacing of a street constitutes an alteration.[199] The court concluded that "an alteration ... is a change that affects the usability of the facility involved,"[200] and undertook to "determine whether resurfacing a street affects its usability."[201] It assessed the essential nature of streets: "Both physically and functionally, a street consists of its surface; from a utilitarian perspective, a street is a two dimensional, one-plane facility. As intended, a street facilitates smooth, safe, and efficient travel of vehicles and pedestrians – ... this is its primary function."[202] Based upon this analysis, the Court of Appeals agreed with the district court that "resurfacing a street affects it in ways integral to its purpose.... [R]esurfacing involved more than minor repairs or maintenance. At a minimum, it requires the laying of a new asphalt bed spanning the length and width of a city block. The work is substantial, with substantial effect."[203]

The Third Circuit also addressed the defendants' contention that the ADA is always subject to a "requirement of reasonableness" that entails a "to the maximum extent feasible"

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[198] *Id.*

[199] *Id.* at 1072.

[200] *Id.*

[201] *Id.* at 1073.

[202] *Id.* (internal quotation marks omitted).

[203] *Id.* (internal footnote and quotation marks omitted." The Third Circuit quoted with approval the following language from the district court opinion: "Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel. The surface of a street is the part of the street that is "used" by both pedestrians and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way." *Id.* at 1073-1074.

limit.[204] The court ruled, however, that by promulgating the Title II regulation, "the Attorney General has already determined … that the installation of curb cuts is feasible during the course of alterations to a street."[205]

Finally, the Court of Appeals considered the defendants' argument that, even if resurfacing is an alteration requiring the installation of curb ramps, the City is entitled to assert an "undue burdens" defense excusing compliance.[206] The court ruled that such a defense is available only in regard to existing facilities that are not being altered, and that once a municipality undertakes to alter a street "the accompanying curbs are no longer to be considered as existing facilities, and "the 'undue burden' defense is no longer available."[207] Accordingly, the Third Circuit applied the relevant provisions of the Title II regulation to find that "resurfacing of the city streets is an alteration within the meaning of 28 C.F.R. 35.151(b) which must be accompanied by the installation of curb cuts under 28 C.F.R. 35.151(e)," and affirmed the decision of the district court granting summary judgment to the plaintiffs and directing the City of Philadelphia to install curb ramps at intersections when it resurfaces city streets.[208]

As the initial Circuit Court of Appeals ruling on curb ramp installation requirements under the ADA, the opinion in *Kinney v. Yerusalim* was highly influential. On key questions of cities' obligation under Title II to install curb ramps, the existence of a private right of action under the ADA to challenge cities' failure to fulfill that obligation, and whether resurfacing of

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[204] *Id.* at 1074.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 1074-1075.

[208] *Id.* at 1075, 1069.

streets is an alteration that triggers the mandate to install curb ramps, no final decisions by Courts of Appeals in curb ramp cases in other Circuits have reached a result different from that in *Kinney v. Yerusalim.*[209]

(2) ***Barden v. Sacramento,*** 292 F. 3d 1073 (9th Circ. 2002) *cert. denied*, 539 U.S. 958 (2003), was a class action suit brought by a group of named plaintiffs with mobility or vision impairments who regularly used the pedestrian rights of way in Sacramento, California. The plaintiffs' complaint alleged both that the City had failed to install curb ramps in newly-constructed or altered sidewalks, and that it had not maintained sidewalks in an accessible condition.[210] After the district court granted a partial summary judgment motion for the City, holding that public sidewalks in the City are not a service, program, or activity of the City and, therefore, are not subject to program access requirements under the ADA or the Rehabilitation Act, the plaintiffs appealed.[211] The parties stipulated to an injunction regarding the curb ramps, but the principal issue in the ongoing proceedings was whether or not sidewalks are a service, program, or activity – a determination that is critical to the application of the curb ramps requirement as well. [212]

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[209] In 2010, a panel of the Fifth Circuit issued an opinion in which it ruled that sidewalks and curbs are facilities and not services, programs, or activities under Title II, and that a plaintiff's right of action depends upon a showing that the plaintiff demonstrates a denial of access to "actual services, programs, or activities." *Frame v. City of Arlington,* 616 F.3d 476 (5th Cir. 2010). However, the panel's decision was subsequently rejected by the Fifth Circuit after rehearing *en banc. Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011). The *Frame v. City of Arlington* case is discussed infra at pp. 82-84. A panel of the Sixth Circuit subsequently expressed strong disagreement with aspects of the Fifth Circuit's ruling in *Frame v. City of Arlington. Babcock v. State*, 812 F.3d 531, 536-538 (6th Cir. 2016). The *Babcock* case, however, involved a state employer's workplace facilities and not municipalities' responsibility for installing curb ramps. *Id.* at 532-533.

[210] *Barden v. Sacramento,* 292 F.3d at 1075.

[211] *Id.*

[212] *Id.*

The Ninth Circuit described its task on appeal as "decid[ing] whether public sidewalks in the City of Sacramento are a service, program, or activity of the City within the meaning of Title II of the Americans with Disabilities Act or § 504 of the Rehabilitation Act. We hold that they are and, accordingly, that the sidewalks are subject to program accessibility regulations promulgated in furtherance of these statutes."[213] In reaching its conclusion, the Court of Appeals noted the ADA Title II regulation provision requiring that "newly constructed or altered roads and walkways contain curb ramps at intersections."[214] Regarding the district court's conclusion that sidewalks are not a service, program, or activity, the Ninth Circuit observed instead that "we have construed the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does.'"[215] Buttressing this viewpoint, the court relied upon analysis from several other circuits construing "service, program, or activity" expansively,[216] a breadth that the court found was consistent with the regulation's "requirement of curb ramps in all pedestrian walkways, reveal[ing] a general concern for the accessibility of public sidewalks, as well as a recognition

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[213] *Id.* at 1074.

[214] *Id.* at 1076, citing 28 C.F.R. § 35.151(e) (statutory citations omitted).

[215] *Id.*, citing *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir.2001), quoting *Yeskey v. Pa. Dep't of Corr.,* 118 F.3d 168, 171 (3d Cir.1997), *aff'd,* 524 U.S. 206 (1998)) (internal quotation marks omitted).

[216] *Id.* at 1076. The Ninth Circuit noted the finding in *Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir. 1998) that "the phrase `services, programs, or activities' encompasses virtually everything that a public entity does"; and the reasoning in *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997) that the phrase "programs, services, or activities" is "a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"), *superseded on other grounds, Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 171 n. 7 (2d Cir. 2001). It added that "[a]ttempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless 'hair-splitting arguments,'" quoting *Innovative Health Sys.,* 117 F.3d at 45; and declared that "[t]he 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,'" citing *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch,* 179 F.3d 725, 731 (quoting *Innovative Health Sys.,* 117 F.3d at 44).

that sidewalks fall within the ADA's coverage...."[217] The court also found it persuasive that the Department of Justice had taken the position that sidewalks are subject to ADA accessibility requirements.[218] Deference to the Department's position, plus the language of the Title II regulation that "requires the provision of curb ramps in order for sidewalks to be accessible to individuals with disabilities," reinforced the rationale that led the Ninth Circuit to reverse the order of the district court granting summary judgment in favor of the City.[219]

Subsequent negotiations enabled the parties to enter into a detailed settlement agreement.[220] Among the terms of the agreement, the City of Sacramento committed itself to spend 20% of its transportation funding annually for up to thirty years on "installation of Compliant Curb Ramps at intersections" and "removal of access barriers along Pedestrian Rights of Way."[221] In a list of six categories of "Barriers to be Addressed," the first is "Compliant Curb Ramps at Intersections," which expressly included, in regard to detectible warnings for people with vision disabilities, "the installation of truncated domes at all locations where sidewalks intersect vehicular ways."[222]

(3) ***Ability Center of Greater Toledo, v. City of Sandusky,*** 385 F.3d 901 (6th Cir. 2004), was a class action lawsuit brought by Ability Center of Greater Toledo, Statewide Independent Living Council, and five named individuals with disabilities, against the City of Sandusky, Ohio,

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[217] *Id.* at 1077.

[218] *Id.*

[219] *Id.* at 1077-1078.

[220] *Barden v. City of Sacramento* Class Action Settlement Agreement, E.D. Cal., Case No. CIV-S-497 MCE/JFM, approved by the court January 22, 2004, https://www.scribd.com/document/23990786/barden-vs-city-of-sacramento-class-action-settlement-agreement.

[221] *Id.* at 11, subpart III.A; 14, section III(A)(3).

[222] *Id.* at 12, subsection III(A)(2)(a).

and its city manager.[223] The complaint alleged that the defendants had violated Title II of the ADA and regulations implementing it by failing to install proper accessibility features for individuals with disabilities in the course of renovating Sandusky sidewalks and street curbs, and by failing to develop a transition plan for implementing ADA requirements.[224] The district court granted summary judgment to the plaintiffs on the former claim and summary judgment to the defendants on the latter.[225] The defendants appealed the award of partial summary judgment to the plaintiffs, and the plaintiffs cross-appealed the district court's award of partial summary judgment to the defendants.[226] The Sixth Circuit began its opinion on appeal by noting the broad purpose of Title II in prohibiting public entities from excluding people with disabilities from participation, denying them benefits of services, programs, or activities, or otherwise discriminating against them, and the authority of the Attorney General to issue regulations to implement this prohibition.[227] It referred to Title II regulatory provisions that alterations to facilities commenced after January 26, 1992, affecting usability of the facility must be altered in such a manner that the altered portion is "readily accessible to and usable by individuals with disabilities,"[228] that facilities include roads and walks,[229] and that "altered streets and pedestrian walkways must contain curb ramps."[230] On appeal, the defendants did not challenge the district

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[223] 385 F.3d at 902.

[224] *Id.* at 903.

[225] *Id.*

[226] *Id.*

[227] *Id.* at 903-904.

[228] *Id.* at 904, citing 28 C.F.R. § 35.151(b).

[229] *Id.*, n.3, citing 28 C.F.R. § 35.104.

[230] *Id.*, citing 28 C.F.R. § 35.151(e).

court's finding that they had violated the Title II regulation, or the reasonableness or validity of Title II and the regulations issued under it; instead they contended that Title II's creation of a private right of action extends only to acts of intentional discrimination, and that the district court had ruled that they had not intentionally discriminated against the plaintiffs.[231]

The Sixth Circuit opened its analysis by acknowledging the Supreme Court's recognition that the broad prohibition of discrimination in Title II of the ADA – § 202 (42 U.S.C. § 12132) – is enforceable by a private right of action, and concluded that the enforceability by a private cause of action of regulatory provisions under Title II depends upon whether or not the provision "effectuates a mandate of Title II" as opposed to "impos[ing] unique obligations on public entities not contemplated by § 202 …."[232] The court ruled that the regulatory provision mandating that altered streets and pedestrian walkways must contain curb ramps[233] "effectuates a mandate of Title II and is therefore enforceable through the private right of action under the statute," and added "Title II does more than prohibit public entities from intentionally discriminating against disabled individuals."[234] The Sixth Circuit went on to discuss Supreme Court rulings, congressional report language, and decisions in lower federal courts making clear that Title II's objectives go well beyond merely eliminating intentional discrimination on the basis of disability.[235] The court concluded that "§ 202 of Title II does not merely prohibit intentional discrimination. It also imposes on public entities the requirement that they provide

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[231] *Id.*

[232] *Id.* at 906-907.

[233] 28 C.F.R. § 35.151(e).

[234] 385 F.3d at 907.

[235] *Id.* at 907-913.

qualified disabled individuals with meaningful access to public services, which in certain instances necessitates that public entities take affirmative steps to remove architectural barriers to such access in the process of altering existing facilities."[236] It found that the "New construction and alterations" provision of the regulation that includes the curb ramps installation requirement (28 C.F.R. § 35.151(e)) was adopted by the Attorney General at Title II's express direction, and, "[a]s such, … is enforceable through Title II's private cause of action …."[237] Accordingly, the Sixth Circuit held that plaintiffs had a private cause of action against defendants for failing to comply with 28 C.F.R. § 35.151, and affirmed the judgment of the district court on that issue.[238]

The court did, however, uphold the district court's ruling that the provision of Title II[239] imposing an obligation, in certain circumstances, for public entities to file a transition plan setting forth steps for making structural changes to achieve program accessibility was not itself enforceable by a private right of action.[240]

(4) ***Lonberg v. City of Riverside***, 571 F.3d 846 (9th Cir. 2009), was a Title II action filed by "a paraplegic who uses a wheelchair," who had "personally observed over 700 street corners within the City that as of October 1998 did not have curb cuts providing for wheelchair access."[241] The district court divided the lawsuit into three phases, the first of which dealt with the plaintiff's claim that the City's transition plan for attaining ADA compliance did not meet the

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[236] *Id.* at 913.

[237] *Id.*

[238] *Id.*

[239] 28. C.F.R.§ 35.150(d)(1).

[240] 385 F.3d at 913-914.

[241] *Lonberg v. City of Riverside*, No. EDCV97-237RTAJWX, 2000 WL 34602547, at *1, *2 (C.D. Cal. June 12, 2000).

standards established in the Title II standards.[242] After a bench trial, the district court issued findings in the plaintiff's favor; it found, as the Ninth Circuit characterized it, "numerous faults with the City's transition plan, including its purported failure to sufficiently identify particular physical obstacles limiting accessibility to the City's streets, intersections, sidewalks and crosswalks. It also faulted the plan for, among other things, failing to describe in sufficient detail the methods the City would use to achieve accessibility."[243] The district court concluded that based upon uncontroverted facts the City was violating the Title II's transition plan requirements, and granted the plaintiff's motion for summary judgment.[244]

On appeal, the Ninth Circuit disagreed with the district court as to the enforceability of Title II's transition plan requirement. It reasoned that "nothing in the language of § 202 indicates that a disabled person's remedy for the denial of meaningful access lies in the private enforcement of section 35.150(d)'s detailed transition plan requirements. The existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access."[245] The Court of Appeals indicated that a City could comply fully with Title II without ever having drafted a transition plan, in which case, a lawsuit forcing it to draft such a plan would not help individuals with disabilities at all; or, conversely, a public entity might have a transition plan that complies with the transition plan requirements, "but may still be in violation of § 202 by, for example, failing to alter its sidewalks in a way that provides meaningful access."[246] The court clarified that it was "not suggest[ing]

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[242] 571 F.3d at 847.

[243] *Id.* at 848.

[244] 2000 WL 34602547, at *10.

[245] 571 F.3d at 851.

[246] *Id.* at 851-852.

that section 35.150(d) is invalid or an otherwise improper exercise of agency discretion. We simply conclude that … it is not enforceable through § 202's private right of action …."[247] As it was reversing the district court's ruling and vacating the permanent injunction it had issued, the Ninth Circuit offered some perspective:

> This holding does not preclude another panel from finding that other regulations promulgated to effectuate § 202 are privately enforceable, nor does it prevent Lonberg from pursuing his pending claims for damages and injunctive relief raised in the other phases of this litigation. Indeed, to the extent the City is in violation of the ADA and its attendant regulations, *Lonberg's true remedy would lie in an injunction requiring the actual removal of barriers that prevent meaningful access.*[248]

In an unusual twist, over two years before the Ninth Circuit issued its opinion in *Lonberg v. City of Riverside* on unenforceability by private right of action of the transition plan requirement, the trial court had gone ahead with the other phase of the litigation and had issued just such an injunction as the Court of Appeals had prescribed as the "true remedy" in the case. The district court began its opinion by observing that "[t]his bifurcated phase of the trial is before the Court to address plaintiff John Lonberg's allegations that the defendant City of Riverside violated the Americans with Disabilities Act … by failing to construct its streets and sidewalks after January 26, 1992, so that they are accessible to and usable by persons with disabilities."[249]

As part of extensive findings of fact, including in regard to inaccessibility of various curbs in the City, the court found that "[t]he above-described obstacles prevent Plaintiff from being able to readily access and use the City streets and sidewalks, or require him to expend a

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[247] *Id.* at 852.

[248] *Id.* at 852.

[249] *Lonberg v. City of Riverside*, No. EDCV970237SGLAJWX, 2007 WL 2005177, at *1 (C.D. Cal. May 16, 2007)

significant amount of time or energy or risk his health and safety by going around or through the obstacles."[250] It added that "Plaintiff and other people who use wheelchairs are at great risk of tipping over, getting stuck, damaging their wheelchairs, or having to risk their safety by traveling in the street. The Court finds that the challenges that Plaintiff faces are pervasive and an immediate and irreparable harm."[251] Early in its Conclusions of Law, the court declared: "the ADA prohibits public entities from denying disabled persons the full and equal benefits of their services and programs. Among other things, this requires local governments like the City of Riverside to provide curb ramps on public streets when constructing or altering its streets or sidewalks."[252] In support of these conclusions, the district court cited the Ninth Circuit's decision in *Barden v. City of Sacramento,* discussed previously, and named it as authority for the proposition that "[s]treets and sidewalks are a program and service provided by the City."[253] The court recounted in some detail the minimum design standards regarding curb ramps and sidewalk construction, and observed that "[t]he City's duty to construct accessible curb ramps after January 26, 1992, is mandatory and the City has offered no cognizable defense for failing to do so …."[254] Relying on the *Kinney v. Yerusalim* and *Jones v. White* (discussed subsequently) precedents, the district court ruled that street resurfacing was an alteration under Title II that entailed the requirement of installing fully accessible curb ramps.[255] "Simply put," said the

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[250] *Id.* at *3.

[251] *Id.*

[252] *Id.* (statutory and regulatory citations omitted).

[253] *Id.*at *3, 4.

[254] *Id.*at *5-6.

[255] *Id.*at *6.

court, "because of the City's failure to construct accessible curb ramps and sidewalks, Plaintiff is being denied the ability to easily access a variety of government, commercial, and residential areas of the City, including the sidewalks themselves, and thereby is denied the ability to become a self-reliant member of the community" – a finding that prompted the court to exclaim: "This is precisely the type of discrimination that the ADA and California's accessibility access laws were designed to address."[256]

In imposing remedial measures to provide relief to the plaintiff, the court explained its actions in the following terms:

> By ordering the City to bring all of the curb ramps and sidewalk segments identified on Exhibit A to be in full compliance with the federal and state standards, the Court is promoting the Congressional objective of eliminating physical obstacles and preventing discrimination against disabled persons. Further, the repeated and significant difficulty Plaintiff encounters when attempting to use the non-compliant streets and sidewalks is a real and immediate threat of substantial and irreparable harm and it is exactly the type of discrimination that the ADA seeks to prevent. *Barden v. City of Sacramento,* 292 F.3d 1073, 1075–1077 (9th Cir. 2002). The Court finds that the public interest would be greatly served by the issuance of an injunction requiring the City to comply with the ADA and California's disability access laws.[257]

The Appendix A referred to by the court was a list by cross streets and compass direction of corners of some 189 curb ramps and sidewalk segments which the court was ordering to be put into compliance with ADA standards.[258] Thus, the court directed that "[a]n injunction shall issue from this Court ordering the City of Riverside to bring each of the curb ramp and sidewalk segments identified on Exhibit A into full compliance with the state and federal design

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[256] *Id.* at *7.

[257] *Id.* at *8.

[258] *Id.* at *9, app. A & n. 2.

guidelines within 120 days of this Order. Further, the Court orders that the City of Riverside immediately pay Plaintiff $221,000."[259]

(5) ***Frame v. City of Arlington***, 657 F.3d 215 (5th Cir. 2011), *cert. denied* 565 U.S. 1200 (2012), was an en banc decision in a case brought by five named wheelchair-using individuals who alleged that the City of Arlington, Texas, had violated Title II of the ADA and Section 504 of the Rehabilitation Act by failing to make sidewalks built or altered after January 26, 1992, accessible.[260] The plaintiffs sought only injunctive relief, not monetary damages.[261] The lawsuit had a lengthy, convoluted, vacillating history that involved a dismissal of the plaintiffs' complaint by the district court on statute-of-limitations and pleadings grounds;[262] a unanimous ruling on appeal by a panel of the Fifth Circuit that the plaintiffs had a private right of action to enforce Title II with respect to inaccessible sidewalks because public sidewalks are "services, programs, or activities" of a public entity within the plain meaning of Title II;[263] a withdrawal by the panel majority of its prior opinion and substitution of a revised opinion in which the panel, in a direct about-face from its prior ruling, determined that sidewalks were ***not*** "services, programs, or activities of a public entity" within the meaning of Title II.[264] This flip-flop ruling was the only decision of a U.S. Court of Appeals holding that program accessibility requirements under

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[259] *Id.* at *9.

[260] 657 F.3d at 221, 222.

[261] *Id.* at 221.

[262] *Id.*

[263] *Id.*; 575 F.3d 432, 434-437 (5th Cir. 2009).

[264] 657 F.3d at 222; 616 F.3d 476 (5th Cir. 2010).

Title II and federal regulations implementing it did not apply to sidewalks and were not enforceable under Title II's private right of action.

Upon petition by both parties for rehearing en banc, however, the Fifth Circuit granted the plaintiffs' petition, and rejected the panel's decision that plaintiffs had no right of action to enforce Title II with respect to sidewalks. At the beginning of its opinion, the court observed that "[f]or nearly two decades, Title II's implementing regulations have required cities to make newly built and altered sidewalks readily accessible to individuals with disabilities."[265] The en banc Court of Appeals then stated that its task was to resolve two issues: (1) whether Title II and § 504 (and their implied private rights of action) extend to newly built and altered public sidewalks and (2) whether that private right of action accrued (for statute-of-limitations purposes) at the time the City built or altered its inaccessible sidewalks, or alternatively at the time the plaintiffs first knew or should have known they were being denied the benefits of those sidewalks.[266] Its answers to the two questions were unequivocal: "We hold that the plaintiffs have a private right of action to enforce Title II and § 504 with respect to newly built and altered public sidewalks, and that the right accrued at the time the plaintiffs first knew or should have known they were being denied the benefits of those sidewalks."[267] In reaching that decision, the Fifth Circuit found that "[b]uilding and altering city sidewalks unambiguously are 'services' of a public entity under any reasonable interpretation of that term"[268] – a conclusion that it supported by reference to Supreme Court precedents, dictionary definitions, statutory language of the ADA,

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[265] 657 F.3d at 221.

[266] *Id.*

[267] *Id.*

[268] *Id.* at 226.

congressional commentary on the Act,[269] and a provision of Section 504 that defines a "program or activity" as "all of the operations of ... a local government."[270] The en banc court concluded that it not only "would have come as no surprise to the Congress that enacted the ADA that Title II and its implementing regulations were being used to regulate newly built and altered city sidewalks" but "[i]ndeed, Title II unambiguously requires this result. Having considered both the statutory language … as well as the language and design of Title II as a whole, we hold that Title II unambiguously extends to newly built and altered sidewalks."[271]

Subsequent to the Fifth Circuit's ultimate decision in *Frame v. City of Arlington*, the lawsuit was resolved by a settlement agreement that included: a multi-year city construction commitment; priorities for construction, with curb ramps for newly constructed and altered pedestrian crossings and ADA compliance upgrades for existing pedestrian crossings as the first two listed priorities; a requirement of a compliance plan with dates for achievement of the City's remediation and compliance work; access policy and process commitments; quarterly reports and monitoring; a complaint resolution process; and a dispute resolution process.[272]

(6) ***Cohen v. City of Culver City***, 754 F.3d 690 (9th Cir. 2014), was an action for damages under Title II of the ADA brought by an elderly man who required the use of a cane for

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[269] *Id.* at 226-230.

[270] *Id.* at 225, quoting 29 U.S.C. § 794(b)(1)(A).

[271] *Id.* at 231. In a somewhat surprising development, a panel of the Sixth Circuit, in a disability employment discrimination case concerning design defects of renovations in a building leased and operated by a state agency in Michigan, and not involving any claims about public sidewalk accessibility, made a disparaging attack on the en banc Fifth Circuit's decision in *Frame v. City of Arlington. Babcock v. Michigan,* 812 F.3d 531 (6th Cir. 2016), *aff'g* No. 12-CV-13010, 2014 WL 2440065 (E.D. Mich. May 30, 2014). The Sixth Circuit's opinion was largely an endorsement of the dissenting opinion in *Frame v. City of Arlington. Id.* at 812 F.3d 536-539. Its primary conclusion was that the plaintiff's ADA accessibility claim failed because she had not identified any service, program, or activity administered in the building in regard to which its inaccessibility disadvantaged her. *Id.* at 540.

[272] *Frame v. City of Arlington*, Civ. Action No. 4:05-CV-470-Y, Settlement Agreement (Oct. 16, 2012), https://www.clearinghouse.net/detailDocument.php?id=46318.

mobility, and was injured when he tripped and fell trying to get around a vendor's display that blocked the disability curb access ramp on a public street.[273] The Court of Appeals reviewed the district court's grant of summary judgment for the defendant to determine, *inter alia,* "whether the City may have violated its obligations under Title II of the ADA by allowing the vendor's display to completely block the curb ramp, impeding disabled access to the public sidewalk ...."[274] The Ninth Circuit cited its prior decisions to provide a context for considering the issues in the case:

- "We construe the language of the ADA broadly to advance its remedial purpose. *Hason v. Med. Bd. of Cal.,* 279 F.3d 1167, 1172 (9th Cir.2002)."
- "We have explained that the broad language of Title II brings within its scope 'anything a public entity does.' *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001) (internal quotation marks omitted)."
- "A city sidewalk is therefore a 'service, program, or activity' of a public entity within the meaning of Title II. *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002)."[275]

In interpreting the ADA regulations regarding program accessibility, the court underscored the distinction between the regulatory standard applicable to existing facilities and that which applies to new facilities and alterations. For existing facilities, the City would be mandated to operate each program, service, or activity in a manner that, viewed in its entirety, is readily accessible to and usable by persons with disabilities, meaning in particular that the City did not necessarily have to install curb ramps in every situation so long as it achieved program accessibility.[276] Regarding facilities that the City begins to build or alter, however, stricter requirements

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[273] *Id.* at 693.

[274] *Id.*

[275] *Id.* at 695.

[276] *Id.* at 696.

including "detailed accessibility standards" would apply, including the provision regarding curb ramps:

> (1) Newly constructed or altered streets, roads, and highways ***must*** contain curb ramps or other sloped areas at ***any*** intersection having curbs or other barriers to entry from a street level pedestrian walkway.
>
> (2) Newly constructed or altered street level pedestrian walkways ***must*** contain curb ramps or other sloped areas at intersections to streets, roads, or highways.[277]

When the City is altering or building a sidewalk, the regulation "requires it to construct a curb ramp at every affected intersection ...."[278]

On the facts before it, the Ninth Circuit ruled that the district court erred by holding that the City could rely on a "marginally longer route" that would have allowed it to be in compliance with ADA standards because the plaintiff could have accessed the sidewalk by using a different curb ramp, concluded that "a genuine dispute of material fact exists as to whether the City denied Cohen access to the sidewalk by reason of his disability," found that the district court had erred by holding that the City was entitled to summary judgment, and remanded the case for further proceedings.[279]

b. Related Circuit Court Decisions

In addition to Court of Appeals' rulings focused directly on the issue of municipal curb ramp installation and alteration requirements, several other decisions at the circuit court level have amplified and reinforced elements of the legal analysis of the core decisions. Two such cases were decided by the U.S. Court of Appeals for the Second Circuit. *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85 (2d Cir. 2010), was an action brought by a father on

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[277] *Id.*, quoting 28 C.F.R. § 35.151(i) (emphasis added by the court).

[278] *Id.* at 696-697.

[279] *Id.* at 697, 701.

behalf of his minor son with cerebral palsy, who used a wheelchair or crutches to get around.[280] The complaint charged that the public middle school the boy attended had violated Title II because architectural barriers, including the absence of curb ramps and a variety of minor obstacles, had made certain areas of the school and grounds, such as the gym, athletic fields (where the young man was a manager of the football team), the school's bus shelter, and a sidewalk adjacent to the school, inaccessible for him.[281] After trial, the jury entered a verdict for the plaintiff and awarded monetary damages.[282] On appeal, the Second Circuit found that there was sufficient evidence in the record for the jury to conclude that student "was denied 'meaningful access' to programs offered by the school."[283] Because, however, the Court of Appeals concluded that the jury's findings regarding particular architectural barriers at the school did not correspond to the distressful impact for which the jury awarded damages, it vacated the damage award and remanded the case for a new trial on the issue of damages.[284] In addition, the appellate court considered the plaintiff's motion for summary judgment on the ground that the sidewalk and the bus shelter, both of which were constructed after 1992, violated the ADA as a matter of law.[285] It determined that the bus shelter lacked a curb ramp on the side where students were picked up and dropped off, which meant that the plaintiff had "to travel in the bus lane and adjacent driveway, or use a curb cut more than 150 feet away which crosses another vehicular

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[280] 373 F.App'x at 88.

[281] *Id.*

[282] *Id.* at 87, 89.

[283] *Id.* at 88.

[284] *Id.* at 89-90.

[285] *Id.* at 89.

way"; ruled that "the bus shelter violates the ADA as a matter of law"; and remanded to the district court only for a determination of relief regarding that facility.[286]

Significantly for present purposes, as to the street adjacent to the school, the Second Circuit provided some guidance as to the law regarding accessibility of sidewalks and street crossings under Title II. As a starting point, the court stated that "[t]he ADA mandates that any new construction must be "readily accessible to and usable by individuals with disabilities," and that such construction projects "must conform to the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines (ADAAG)."[287] In particular, it noted that the regulations provide specific guidelines for new pedestrian walkways: "Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways."[288] To the defendant's contention that it did not own the sidewalk in question, the court responded that "if the District effectively controls this area and did so at the time of the new construction, then liability may still obtain."[289] The Second Circuit remanded the issues of liability and damages growing out of deficiencies in construction of the sidewalk to the district court for a new trial."[290]

Roberts v. Royal Atlantic Corp, 542 F.3d 363 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009), *on remand*, 2010 WL 749944 (E.D.N.Y., Mar. 03, 2010), was a lawsuit filed by a group of individuals with disabilities and a disability advocacy organization against companies that

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[286] *Id.* at 90.

[287] *Id.*, quoting 28 C.F.R. § 35.151(a), and citing 28 C.F.R. § 35.151(c).

[288] *Id.,* quoting 28 C.F.R. § 35.151(e)(2), recodified as amended at 28 C.F.R. § 35.151(i).

[289] *Id.* at 90.

[290] *Id.* at 91.

owned and managed a resort complex in Suffolk County, New York, in which the plaintiffs charged that the rooms and facilities were not wheelchair-accessible. Though the case was brought under Title III, rather than Title II, of the ADA and did not involve municipal sidewalk curb ramps,[291] the Second Circuit's opinion offers useful guidance regarding application of the "to the maximum extent feasible" standard that governs the extent of covered entities' duty to make alterations of facilities readily accessible and usable to individuals with disabilities – under Title II as well as Title III.[292] "If we determine that a particular modification is an alteration under the ADA," stated the Circuit Court, "we must then decide whether the alteration was made readily accessible to and usable by disabled individuals to the 'maximum extent feasible.'"[293] The court explained that the "requirement does not ask the court to make a judgment involving costs and benefits. Instead it requires accessibility except where providing it would be 'virtually impossible' in light of the 'nature of an existing facility.' The statute and regulations require that such facilities be made accessible even if the cost of doing so—financial or otherwise—is high."[294] Thus, "[o]nly if there is some characteristic of the facility itself that makes accessibility 'virtually impossible,' then, may the provision of access be excused."[295] The Second Circuit elaborated that the burdens of production and persuasion regarding "maximum extent feasible"

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[291] The Court of Appeals did mention "walks and sidewalks, curb ramps, and other interior or exterior pedestrian ramps" in the context of an "accessible path of travel" for exterior approach, entry, and exiting the resort's facilities. 542 F.3d at 376.

[292] 28 C.F.R. § 35.151(b) ("Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.").

[293] 542 F.3d at 371.

[294] *Id.*, quoting 28 C.F.R. § 36.402(c).

[295] *Id.* at 372.

are to be applied with a recognition of facilities-related information to which defendants are expected to have superior access:

> So, once a plaintiff has met an initial burden of production identifying some manner in which the alteration could be, or could have been, made "readily accessible and usable by individuals with disabilities, including individuals who use wheelchairs," the defendant then bears the burden of persuading the factfinder that the plaintiff's proposal would be "virtually impossible" ....[296]

In a First Circuit case, *Parker v. Universidad de Puerto Rico,* 225 F.3d 1 (1st Cir. 2000), a man who used a motorized wheelchair suffered injuries when his wheelchair overturned, allegedly because of two-inch drop-off on a pedestrian path on which he was traveling from a parking lot to the Monet Garden in University of Puerto Rico's Botanical Gardens.[297] In the process of vacating the district court's judgment in favor of the defendants as a matter of law, the Court of Appeals defined the parameters of the plaintiffs' claim under Title II of the ADA, and remanded the case for further proceedings.[298] The court recognized that Title II prohibits discrimination by public entities against persons with disabilities, and that the ADA affords a private cause of action under Title II.[299] Accepting that the wheelchair-using man was an individual with a disability, and that, to the extent that the defect in the path prevented him from using his wheelchair to get to the Monet Garden safely, "it did so by reason of his disability," the court turned to the remaining question of whether the plaintiffs had "established a prima facie

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[296] *Id.*

[297] 225 F.3d at 3.

[298] *Id.* at 4-8.

[299] *Id.* at 4.

case that Parker was denied access to the University's 'services, programs, or activities' within the meaning of Title II."[300]

In a section of its opinion headed "A Public Entity's Duties under the ADA," the First Circuit observed that "[a] public entity must make its service, program, or activity 'when viewed in its entirety,'"[301] readily accessible to and usable by individuals with disabilities, and that "the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases."[302] In regard to existing facilities, "the regulations give a high priority to mobility for persons in wheelchairs."[303] The court found that "the University was obligated to ensure that each service, program, or activity at the Botanical Gardens 'when viewed in its entirety,' was accessible to individuals with disabilities. Such access must be provided in the 'most integrated setting appropriate,' meaning that "the University has an obligation to ensure that individuals with disabilities – such as persons using wheelchairs – can travel to and from the Monet Garden using safe walkways, ramps, and curb cuts."[304] The court ruled that "a jury could conclude that the two-inch dropoff at the end of the paved path denied Parker safe access to the Monet Garden and caused his fall and injury,"[305] found that the plaintiffs' evidence was sufficient to make out a prima facie case under the ADA, and vacated the district court's judgment.[306]

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[300] *Id.* at 5.

[301] *Id.*, quoting 28 C.F.R. § 35.150(a).

[302] *Id.*, quoting 56 Fed. Reg. 35694, 35708.

[303] *Id.* at 5-6.

[304] *Id.* at 6-7.

[305] *Id.* at 7.

[306] *Id.* at 2.

c. District Court Decisions

A comprehensive survey of federal district court cases involving Title II challenges to cities' failures to install or upgrade pedestrian curb ramps is beyond the scope of this report. Suffice it to say that such cases are relatively common. Not surprisingly in light of the consensus in the Circuit Courts, consistent with the federal regulations, the decisions have generally reflected agreement about the existence of a private right of action to enforce Title II accessibility provisions; that sidewalks and pedestrian crossings fall within the scope of Title II coverage; and about the existence and standards regarding requirements that cities install ADA-compliant curb ramps on newly constructed and altered sidewalks and crossings, that extends to sidewalks and crossings that are being renovated, or altered by resurfacing. In the context of such general consensus, after initial skirmishes in the district courts, many, perhaps most, of these cases have been resolved by settlement agreements between the parties.

The following is a discussion of some notable examples of district court rulings on curb ramps issues.

In a series of rulings in the case of ***Californians for Disability Rights, Inc. v. California Dep't of Transp.***, a class action suit brought by two disability rights organizations and two individual plaintiffs with disabilities, the U.S. District Court for the Northern District of California: (1) certified a class of persons with mobility or vision disabilities allegedly denied access to sidewalks, cross-walks, and other outdoor pedestrian walkways;[307] (2) rejected the defendants' motion for summary judgment as to the plaintiffs' allegation that the defendants had "systematically violated the requirements to provide program access to existing pedestrian

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[307] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 336, 350 (N.D. Cal. 2008).

facilities by failing to remedy numerous and pervasive access barriers, including but not limited to missing curb ramps, unsafe curb ramps, dangerous cross-slopes, crumbled and uneven pavement and inadequate detectable warnings";[308] (3) ruled that "[a] non-accessible existing curb ramp can pose a barrier … to the same extent as a non-existent curb ramp," that "[i]f Defendants alter a roadway, they are obligated to ensure that the adjacent curb ramp complies with the ADA as well," and that "Defendants have a legal duty to upgrade noncompliant curb ramps when altering an adjacent roadway";[309] and (4) rejected the defendants' contention that "minor deviations" from ADAAG would not trigger an obligation to upgrade existing curb ramps.[310] A few days into trial on the merits, the parties proposed and the court agreed to temporarily suspend the trial to enable the parties to engage in settlement discussions.[311] This eventually led to an extensive Settlement Agreement that the court approved preliminarily and then, after a fairness hearing, issued an order granting final approval to the agreement.[312] The Final Approval Order identified, as salient features of the settlement, a funding commitment of $1.1 billion over thirty years to eliminate barriers and improve access; a monitoring procedure, including the hiring of an access consultant to oversee compliance for the first seven years, and mandatory reporting by the defendants for the full thirty years; and a grievance procedure for public

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[308] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, No. C 06-5125 SBA, 2009 WL 2392156, at *7 (N.D. Cal. Aug. 4, 2009).

[309] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, No. C 06-5125 SBA, 2009 WL 8595755, at *2-*3 (N.D. Cal. Sept. 14, 2009).

[310] *Id.* at *2.

[311] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, No. C 06-5125 SBA, Order Granting Plaintiffs' Application for Final Approval of Proposed Settlement Agreement and Overruling Objections to Settlement Agreement, Dock. Doc. # 515, at 2 (N.D. Cal. June 2, 2010).

[312] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, No. C 06-5125 SBA, 2009 WL 8595755, at *2-*3 (N.D. Cal. Sept. 14, 2009).

complaints relating to access issues.[313] The Settlement Agreement incorporated six exhibits setting out "Substantive Settlement Terms."[314] In the Final Approval Order, the court retained jurisdiction "to resolve any dispute regarding compliance with the Settlement Agreement" that cannot be otherwise resolved.[315]

In ***Deck v. City of Toledo***, a class action suit brought by individuals with disabilities who relied on manual or motorized wheelchairs or motorized scooters for mobility, the plaintiffs sued the City of Toledo and its Mayor for failing to install numerous curb ramps in compliance with the ADA and the ADAAG.[316] Due to safety hazards posed by improperly installed ramps, the plaintiffs sought a preliminary injunction against the City requiring curb ramp modifications to put the ramps in compliance as soon as practically possible; the District Court for the Northern District of Ohio granted the preliminary injunction ordering certain specified ramps to be brought into compliance within thirty days of the beginning of construction season.[317] The court held that curb ramps must meet the ADAAG standards, and observed that "[s]ince January, 1992, the ADA has required municipalities to install curb ramps meeting these specifications when repaving streets and roads."[318] And it clarified that "[u]ndue burden is not a justification

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[313] *Id.* at *3.

[314] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, No. C 06-5125 SBA, Settlement Agreement Re Class Action Settlement, Docket Document 454, at 13-14 & exhibits 5.1.1-5.1.6 (N.D. Cal. Dec. 22, 2009).

[315] *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, No. C 06-5125 SBA, Order Granting Plaintiffs' Application for Final Approval of Proposed Settlement Agreement and Overruling Objections to Settlement Agreement, Docket Document 515, at 15, ¶ 6 (N.D. Cal. June 2, 2010).

[316] *Deck v. City of Toledo*, 29 F. Supp. 2d 431, 432 (N.D. Ohio 1998).

[317] *Id.* at 432-434.

[318] *Id.* at 433.

for failing to comply with the obligation of accessibility."[319] In a subsequent opinion, the court recognized "that the curb ramps in question are in undisputed violation of the ADA and that disabled individuals still suffer the ramifications of having noncompliant ramps scattered throughout the community."[320] In holding that the statute of limitations would not bar the plaintiffs' claims because the City's actions constituted "a continuing violation," the court found that "[t]he City of Toledo has breached its duty under the statute; the City's benign neglect in the oversight of curb ramp construction creates an adverse impact on disabled individuals who live or frequently travel within Toledo."[321] When the plaintiffs moved for summary judgment, the court declared that "[c]urb ramps must be provided wherever an accessible route crosses a curb"; reiterated that municipal curb ramps on all newly constructed or altered streets, roads, highways, and pedestrian walkways are subject to ADAAG standards; and cited ADAAG specifications regarding maximum slopes; flush transition from a ramp to a walk, gutter, or street; containment of ramps at marked crossings within the markings, and level landings at the top and bottom of the ramp.[322] The court found that the plaintiffs had documented at least 302 separate locations in which the City had violated the ADA regulations for curb ramps, and granted the plaintiffs' motion for summary judgment on the issue of the City's failure to comply with the ADA.[323]

The proceedings in ***Jones v. White***,[324] a Title II suit filed by a quadriplegic wheelchair-user against the mayor and City of Houston, Texas, provide a nitty-gritty look at what litigating a

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[319] *Id.*

[320] *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 892 (N.D. Ohio 1999).

[321] *Id.* at 895.

[322] *Deck v. City of Toledo*, 76 F. Supp. 2d 816, 818 (N.D. Ohio 1999).

[323] *Id.* at 822-823.

[324] No. H-03-2286 (S.D. Tex. filed June 27, 2003).

municipal curb ramps case involves if the case is not resolved by settlement. The plaintiff sought to have the defendants install or upgrade pedestrian curb ramps in connection with two major City projects – one involving street resurfacing, changing a major street from two to three lanes, and other changes related to traffic flow; and the other involving replacement of traffic signal poles and related changes at over 1,350 intersections across Houston.[325] In a preliminary order, the court held that resurfacing a street from intersection to intersection is an "alteration" under the ADA that requires the City to install curb ramps to meet ADA requirements, and that when the City installs a new traffic signal pole at an intersection, it alters the sidewalk area in which the pole is placed, triggering the requirement that the altered area comply with the ADA accessibility regulations for altered facilities.[326] Subsequently, after a five-day evidentiary hearing featuring testimony from accessibility experts for both sides, and after reviewing various motions, briefs, responses, and exhibits, the court issued a detailed Memorandum and Order resolving many of the issues in the case and granting partial injunctive relief to the plaintiff.[327] After discussing standards for issuing a permanent injunction and summarizing a public entity's obligations under the ADA and Section 504, the court focused on Title II accessibility provisions, particularly the distinction between requirements for newly constructed or altered facilities and those for existing facilities, in regard to which it observed that "[i]n contrast to the flexible concept of accessibility permitted for existing facilities, the regulations for new construction and alterations are more specific and more demanding."[328] It quoted the regulatory

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[325] Memorandum and Order, *Jones v. White*, No. H-03-2286 (S.D. Tex. Aug. 29, 2006) at 3, citing Docket Entry No. 32, https://casetext.com/case/jones-v-white-7.

[326] *Id.*, citing Docket Entry No. 64, at 45-46.

[327] *Id.*, at 1-3.

[328] *Id.*, at 4-6.

provision stating that "[n]ewly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway,"[329] and added that "[t]he obligation of accessibility for new or altered facilities, unlike the obligation for existing facilities, does not allow for noncompliance based on burden."[330]

The court examined the specific provisions of the ADAAG regarding curb ramps, including slope, cross-slope, the gradient of transition between the ramp and street surface, and the dimensions and location of level landings at the bottom and top of ramps; and examined specific criteria developed by the City for assessing the "usability" of curb ramps.[331] In a section titled "The Evidence Presented," the court reviewed the extensive, detailed information the parties had provided, beginning with an illuminating catalogue provided by the plaintiff of the problems she had encountered with the City's curb ramps, which the court summarized as follows:

> Jones testified that she has trouble using many curb ramps. She testified that she often encounters "lip" problems if the street surface is not even with the ramp and gutter; if there is an uneven transition between street and ramp, the back wheels of Jones's wheelchair can get caught. Jones also complained that many of the ramps have sloping problems. Certain ramps are too steep, making it difficult or impossible for Jones to get up or down the ramps safely in her wheelchair. Other ramps have a "V" problem, which arises when the slope between the bottom part of the ramp and the slope of the gutter and street is excessive and causes the chair to "bottom out." Jones also complained that certain ramps are so uneven as to be unusable or have severe cracks. Other ramps have uneven areas at the bottom that permit rainwater, mud, leaves, and other debris to collect. Jones is afraid to go through such areas for fear of damaging or

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[329] *Id.*, at 6, quoting 28 C.F.R. § 35.151(e)(1), recodified as amended at 28 C.F.R. § 35.151(i).

[330] *Id.*, at 6.

[331] *Id.*, at 7-9.

> losing control of her wheelchair. Jones also testified that certain ramps lack flat landings at the top, which prevents her from stopping while crossing the street to observe traffic or to change directions. She also testified that certain ramps have uneven or excessive cross-slopes, which can make them difficult or even dangerous to use.[332]

The court next examined at length the detailed and often conflicting testimony of the experts on both sides;[333] included was a list prepared by the plaintiff's expert witness of twelve categories of deficiencies among the noncompliant curbs; in its Memorandum and Order, the court mentioned nine of the categories: "(1) curb with no ramp, (2) completely noncompliant curb, (3) slope greater than 12.3 percent, (4) no clear width, (5) transition not flush, (6) adjoining slope greater than 5 percent, (7) no level landing, (8) cross-slope greater than 10.3 percent, and (12) ramp under construction."[334] The court included a corner-by-corner table of specific corners complained about and the City's proffered defenses, and discussed the accessibility status of the curb situation by intersection designation.[335] A managing engineer of the City submitted a two-and-one-half-page chart of curb ramps in one area that needed attention, repair, or replacement.[336]

After digesting all of this information, the court ruled:

> This court has found that if a street is resurfaced from intersection to intersection, it is an altered facility and the City is required to make the altered parts of the facility compliant under the stringent § 35.151(b) and (e) standards. The curb that is part of the resurfaced street must have a curb cut and ramp that meet the requirements for new construction and altered facilities. That means that if a street is resurfaced, the existing curb ramps on the

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[332] *Id.*, at 11-12.

[333] *Id.*, at 12-18.

[334] *Id.*, at 16.

[335] *Id.*, at 22-24.

[336] *Id.*, at 18-22.

> resurfaced street, that are part of the altered facility, must be brought into compliance with the ADAAG requirements. The ADA requirements for altered facilities apply because the curb cuts and curb ramps at the portions of corners directly affected by street resurfacing are part of the resurfaced street.[337]

It then sorted the intersections one-by-one into categories and directed which ones were to be repaired or rebuilt to comply with the ADAAG, which ones were not being resurfaced or met the standard of "usability," which ones had already been replaced with compliant ramps, and which curbs were not in a pedestrian walkway route.[338] Ultimately, the court granted the plaintiff relief in regard to a list of intersections for which it ordered the City to "perform repair or construction work necessary to bring the [listed] curb cuts and ramps into compliance ...."[339]

In ***Procurador De Personas Con Impedimentos v. Municipality of San Juan***, a Title II and Section 504 action filed by two individuals with disabilities who used wheelchairs for mobility and a membership organization legislatively empowered to oversee compliance with laws enacted to protect people with disabilities, the district court faced what it termed an "important and complicated case dealing with the problem of limited sidewalk access for disabled persons."[340] The court noted that people with disabilities had "encountered a number of barriers making San Juan's sidewalks inaccessible to disabled persons, including sidewalks

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[337] *Id.*, at 26.

[338] *Id.*, at 29-34.

[339] *Id.*, at 36-37.

[340] *Procurador De Personas Con Impedimentos v. Municipality of San Juan*, 541 F.Supp.2d 468, 470-471 (D. Puerto Rico 2008). The court noted that "[t]his case, however, is not unique. Litigants in other jurisdictions have called upon the courts to address this significant issue in one way or another." *Id.* at 470, citing, e.g., *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 (6th Cir. 2004); *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir.2002); *Lonberg v. City of Riverside*, Civil No. EDCV 97-0237-SGL (AJWx), 2007 U.S. Dist. LEXIS38824 (C.D.Cal. May 15, 2007); *Jones v. White*, Civil Action No. H-03-2286, 2006 WL 358646, 2006 U.S. Dist. LEXIS 84052 (S.D.Tex. Nov. 17, 2006); *N.J. Prot. & Advocacy, Inc. v. Twp. of Riverside*, Civil No. 04-5914(RBK), 2006 WL 226332, 2006 U.S. Dist. LEXIS 56478 (Aug. 2, 2006); *Deck v. City of Toledo*, 56 F.Supp.2d 886 (N.D. Ohio 1999).

lacking curb ramps entirely, blocked curb ramps, curb ramps failing to comply with ADA size and safety requirements, sidewalks lacking necessary space to allow wheelchair access, and curb ramps in use for purposes other than pedestrian travel without providing any alternative for a person with disabilities" – barriers that "deny persons with disabilities access to public and private services along the affected avenues," interfere with attempts to get to medical appointments, to reach bus stops, and to engage in social and community interactions.[341] The court held that the plaintiffs had standing to bring the suit, and rejected the defendants' motion to dismiss the Title II claim, declaring that "the amended complaint sufficiently lays out a cause of action … under Title II of the ADA. The amended complaint's factual allegations set forth a plausible entitlement to relief under the statute."[342]

[341] *Id.*, at 471.

[342] *Id.*, at 473, 474.

V. NEW YORK CITY CURB RAMPS BEFORE 2002

Perhaps prompted by the enactment of Section 504 of the federal Rehabilitation Act of 1973, by New York City's admission, "[s]ince 1975, the City's own laws have required that pedestrian ramps be installed whenever sidewalks are reconstructed or replaced at intersections."[343] Since the late 1970s, DOT has reportedly made it a "standard practice" in its Capital Reconstruction projects "to construct pedestrian ramps on each intersection within the scope of these projects."[344] For resurfacing of City streets done by contractors, the City maintains that "[p]edestrian ramp installation has been a standard component of all Contract Resurfacing projects since 1984."[345] In addition, the City has reported that "[r]ecognizing that its Capital Reconstruction and Contract Resurfacing programs were designed for purposes other than pedestrian ramp construction, in 1984 DOT created its Pedestrian Ramp Installation Program ('PRIP'), a program specifically dedicated to pedestrian ramp construction."[346]

Information about the numbers of curb ramp installations completed under these DOT programs began to come to the fore around and after the filing of the case at bar in January of 1994. According to the Complaint in *EPVA v. City of New York,* on December 21, 1993, EPVA wrote to the Commissioner of DOT and requested that the City immediately advise it of steps it

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[343] New York City Department of Transportation, TRANSITION PLAN FOR THE INSTALLATION OF PEDESTRIAN RAMPS ON NEW YORK CITY STREETCORNERS, p. 2 (May 13, 1994), citing Administrative Code of the City of New York § 19-110. See also, *Baez v. City of N.Y.*, 278 A.D.2d 83, 88, 717 N.Y.S.2d 584 (2000) (Saxe, J., dissenting), in which the dissenting Justice, in discussing the origin of a curb ramp at issue in the case, observed that "the existence of the pedestrian ramp at the curb, in all likelihood, reflects that it was constructed after the enactment in 1975 of the New York City Rule requiring that pedestrian ramps be constructed for the assistance of people with physical disabilities whenever new sidewalks or curbs were constructed (see, Lancer, *Persons with Disabilities: Two City Efforts: Curb Ramps and Preferred Sources*, 3 CITY LAW 125; and see, New York City Rules and Regulations, Title 34, § 2-09[d] [13]; see also, Highway Law § 330 [enacted in 1975])."

[344] *Id.* at 4.

[345] *Id.* at 6.

[346] *Id.* at 8.

had taken to comply with ADA requirements, particularly the requirement that the City issue a curb ramp schedule in compliance with ADA regulations; EPVA did not receive any response to this request. (Compl., pp. 8-9, ¶¶ 26 & 27). In the Answer the City filed in the case, amid many general and specific denials, it admitted that "the City's ADA transition plan for DOT does not contain a schedule for installation of curb ramps." (Answer, pp. 4-5, ¶18).

On May 13, 1994, less than two months after the City's Answer was filed, the City issued its TRANSITION PLAN FOR THE INSTALLATION OF PEDESTRIAN RAMPS ON NEW YORK CITY STREETCORNERS[347] ("1994 Transition Plan"), which the City described as "the City's transition plan for pedestrian ramps installation at streetcorners, and the schedule for that installation, as required by § 35.150(d)(2) of the ADA Regulations."[348] The plan began with an acknowledgement of the ADA and its program accessibility standard, followed by quotation of key regulatory language: "[n]ewly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway" and "[n]ewly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways." (1994 Transition Plan at 1, quoting 28 C.F.R. § 35.15(e)).

Next, the plan provided some basic information about New York City intersections and streetcorners; it estimated that the City contained approximately 40,000 intersections and 160,000 corners, distributed across the five boroughs as follows:

Bronx	20,974 corners
Brooklyn	43,556 corners

[347] New York City Department of Transportation, TRANSITION PLAN FOR THE INSTALLATION OF PEDESTRIAN RAMPS ON NEW YORK CITY STREETCORNERS (May 13, 1994).

[348] *Id.* at 2.

Manhattan	14,900 corners
Queens	58,152 corners
Staten Island	20,766 corners
TOTAL	158,348 corners.

(1994 Transition Plan, at 2).

The plan provided some estimated data regarding pedestrian ramp construction in the City as of 1994 under the headings Capital Reconstruction, Contract Resurfacing, and Pedestrian Ramp Installation Program. In total, ***DOT estimated that through the three programs, it had "constructed ADA-conforming ramps on at least 52,172 corners, or approximately one-third of all corners citywide"*** – a figure that DOT said "represent[ed] ***a very conservative estimate of the total number of pedestrian ramps that have been installed on New York City corners.***" (*Id.* at 3 (emphasis added)). It added that, of the remaining two-thirds (approximately 106,176) of the corners "a substantial number may have had ramps installed by other agencies or by private developers." (*Id.*).

The plan included some details regarding each of the three categories of DOT programs providing for the construction of curb ramps. It explained that Capital Reconstruction projects typically provide for roadway, curb, and street infrastructure replacements, including sewer and water lines, and drains. (*Id.* at 4). From FY 1979 through FY 1993, DOT reconstruction work reportedly resulted in the installation of pedestrian ramps on approximately 14,080 corners (9% of all City corners). (*Id.*). The plan included the locations of nine "examples of recent capital roadway reconstruction projects" – two in Brooklyn, Queens, Bronx, and Manhattan, and one in Staten Island. (*Id.* at 5). Contract Resurfacing was described, as the name indicates, as "a DOT program which provides for the resurfacing of City streets by contractors retained by DOT." (*Id.* at 6). The plan reported that, from FY84 through FY93, this work "resulted in the

installation of pedestrian ramps on approximately 27,237 corners, or 17% of all corners citywide," listed ten recent Contract Resurfacing projects across the five Boroughs, and added that curb ramp installation accounted, on average, for 25% of the total costs of such contracts. (*Id.* at 6-7). The plan described the Pedestrian Ramp Installation Program ("PRIP") as enabling DOT to construct curb ramps at priority locations at which reconstruction or resurfacing projects had not been scheduled, and reported that, between 1984 and 1994, PRIP accounted for the installation of pedestrian ramps on 10,856 corners, approximately 7% of all corners in the City. (*Id.* at 8). It cited, as examples of PRIP being used at priority locations, the installation of pedestrian ramps along bus routes, and in central business districts and commercial corridors. (*Id.*). In a subsection headed "Other Pedestrian Ramp Construction," the transition plan suggested that "pedestrian ramps have been installed in connection with many other public and private construction projects," and provided several examples, but gave no estimates of numbers of ramps installed in this "other" category. (*Id.* at 9-10). In same subsection, DOT indicated that "field inspections conducted by DOT indicate that many City corners not included in DOT's estimate of 52,172 corners with pedestrian ramps constructed or funded to date may in fact have pedestrian ramps, albeit not conforming to ADA requirements." (*Id.* at 10). No indication was given as to why the actual number of such ramps identified in field inspections as having non-compliant ramps could not be provided.

A key section of the 1994 Transition Plan was titled "Future Pedestrian Ramp Construction." It began with a description of the information the ADA regulations seek in a transition plan; covered entities are to:

(1) identify the physical obstacles that limit accessibility to individuals with disabilities;

(2) describe in detail the methods that will be used to assure accessibility;

(3) specify the schedule for taking the steps necessary to achieve compliance with the ADA regulations, identifying the steps to be taken in each year of the transition period; and

(4) indicate the official responsible for implementation of the plan.

28 C.F.R. § 35.150(d)(3). (*Id.* at 11).

DOT's responses to these elements were perfunctory at times, e.g., "The physical obstacle that limits accessibility to city streets at intersections to individuals with disabilities is the elevation of the curbs above the roadway at the street corners," and "The method that will be used to assure accessibility to city streets at intersections will be to construct ADA-conforming pedestrian ramps at those streetcorners." (*Id.*). The response to the third item, which called for specifying steps necessary to achieve compliance with ADA regulations and steps to be taken each year, was that they would be set forth in the current and following sections. (*Id.*).

The plan contained a strong pledge that "[t]he City of New York, through DOT, is committed to constructing as expeditiously as possible pedestrian ramps on all corners which currently lack ADA-conforming ramps," tempered immediately by a proviso that this commitment extended only to "pedestrian ramps … not installed by other City agencies or private developers." (*Id.* at 12). The next paragraph, including a reference to economic and budgetary concerns resulting from the tough financial times of the early 1990s, seemed intended to tamp down expectations somewhat: "In a place as large as New York City, the task of constructing an ADA-conforming pedestrian ramp on every corner is an enormous undertaking. Given the City's current financial condition, and its obligation to provide other essential services, programs and activities, this task will require a long-term commitment of financial and administrative resources." (*Id.*).

The plan noted that expenditure of funds, including for installation of curb ramps, is governed by capital expenditure plans in the City's annual Capital Budget, Four-Year Capital

Program, and Ten-Year Capital Plan, and then added that "[t]o allow pedestrian ramp construction to proceed as expeditiously as possible, the City has substantially increased its funding for pedestrian ramp installation in its FY95 budget and in its updated Ten-Year Capital Plan." (*Id.*). "The increased funding and funding goals," maintained the City, "should allow DOT to fund construction of pedestrian ramps on an additional 55,273 corners, or 67.9% of all New York City corners by the end of the period covered by the present Ten-Year Capital Plan, *i.e.*, by the end of FY2003." (*Id.* at 12-13). The breakdown of projected installation progress to the end of FY2003 by category of DOT projects was as follows: Capital Reconstruction – 16,101 corners; Contract Resurfacing – 4,896; PRIP – 34,276. (*Id.* at 13-15). In regard to the PRIP, the plan explained that the FY95 Executive Budget and the updated Ten-Year Capital Plan had increased the PRIP allocation, from its usual level of $3 to $3.5 million, to $9 million for FY95, $10 million for FY96 through FY98, and $11.3 million for FY99 through FY2003 – a tripling of the City commitment to PRIP. (*Id.* at 15). Although the ADA regulations directed that ADA transition plans were to identify the steps to be taken in each year of the transition period, the City's 1994 Transition Plan did not include any yearly targets or projections of the numbers of pedestrian ramps to be installed.

The plan did recognize that "[t]he ADA Regulations set January 26, 1995 – three years from the effective date of the ADA – as the date for the completion of 'structural changes' necessary to bring 'existing facilities' into compliance with the ADA. 28 C.F.R. § 35.150(c)." (*Id.* at 16). It added, however, that this requirement was subject to the ADA regulatory provision declaring that compliance with an obligation that "would fundamentally alter the service, program or activity or would result in undue financial and administrative burdens" was not required. (*Id.* at 16, quoting 28 C.F.R. § 35.150(a)(3)). The City took the position that the

fundamental alteration/undue financial or administrative burdens defense applies to the January 26, 1995, deadline, and declared that the "City of New York, through DOT, has determined that it will not be able to complete the installation of all streetcorner pedestrian ramps by January 26, 1995." (*Id.* at 17). It indicated that upon completion of projects funded through FY94, 106,176 corners would remain to be ramped, while the City was "committed to constructing as expeditiously as possible pedestrian ramps on all corners which currently lack ADA-conforming ramps," it expected that pedestrian ramps would be installed on 67.9% of all City corners by the end of FY2003, and, if funding levels were continued at Ten-Year Capital Plan levels after 2003, "by FY2012 DOT could construct or let contracts to construct pedestrian ramps on all of the New York City corners then remaining to be ramped." (*Id.*).

Accompanying the 1994 Transition Plan, the City issued a document titled "Commissioner's Determination of Undue Financial and Administrative Burden" ("Commissioner's Determination"), to comply with the Title II regulation requirement that a public entity claiming undue financial or administrative burdens had to have its decision to that effect declared in writing, accompanied by "a written statement of the reasons for reaching that conclusion."[349] The Commissioner's Determination, signed by the Commissioner of Transportation on May 13, 1994, declared that the requirement that pedestrian ramps be installed on all corners in New York City by January 26, 1995, would impose undue financial and administrative burdens and necessarily result in fundamental alteration of the essential services, programs, and activities provided by the City and DOT. (Commissioner's Determination, at 2.). A section of the Determination headed "Estimated Cost of Pedestrian Ramp Installation" provided an overall gross estimate of what it would cost to install ADA-compliant ramps

[349] 28 C.F.R. § 35.150(a)(3).

throughout the City: "Based on past experience, DOT estimates the average cost of pedestrian ramp installation to be $2,300 per corner. Thus, it would require approximately $244 million (in constant FY94 dollars) to provide ADA-conforming camps on every remaining corner." (*Id.* at 2-3). The $2,300 average cost, however, was "based on locations that do not require special treatments to remove obstacles (e.g., below-ground subway and sidewalk vaults, catch basins, and fire alarm boxes), or to provide special materials necessary to comply with landmark district designations (e.g., stone flags and curbs). A detailed engineering evaluation of each location would be required to provide a precise estimate of the cost of addressing such special conditions." (*Id.* at 3). Based on its experience, however, DOT stated that "a rough estimate of the additional cost presented by these conditions is $50 million, excluding locations where there are extraordinary impediments." (*Id.*). Added to the $244 million figure, this would bring the total estimated cost (excluding "extraordinary impediments" corners) to $294 million.

According to the City, even if DOT had received sufficient funding as early as FY93, it would have been "logistically impossible to construct pedestrian ramps on 106,176 corners by January 1995, and undertaking to do so would have imposed undue administrative burdens on the City." (*Id.*). It indicated that the most cost effective means of constructing pedestrian ramps on a large scale would be through the letting of contracts under PRIP, but in the past DOT had let and managed PRIP contracts in the range of $3 million to $5 million per year, instead of the $80 million to $100 million that would be required to meet the January 1995 deadline – "an increase of 15 to 30 times over the size of the largest program previously managed." (*Id.*). According to DOT, such an increase in the number of ramp installation contracts would entail design and survey work, architect or engineer supervision, hiring a significant number of consultant engineers, finding sufficient construction firms available and able to do the ramp installation

work, and large-scale disruption of pedestrian and vehicular traffic in the City, all of which would make it impossible to meet the January 1995 deadline. (*Id.* at 4-5.).

In a section on "General Financial Impact on the City of New York," which focused on the City's financial processes and funding availability in general, rather than on curb installations in particular, the Commissioner's Determination included a several-page statement by the Mayor's Office of Management and Budget regarding availability of funds for capital projects at the time. (*Id.* at 6-9.). It discussed, *inter alia*, the City's credit rating, the budget-funding process, annual debt-service payments, and effects of the recession and delays and reductions it entailed. (*Id.*). A section on "Financial Impact on the Department of Transportation" provided information on DOT's overall responsibilities and its annual budget for FY94 ($1.361 billion), plus its anticipated FY95 budget ($664 million). (*Id.* at 9). A discussion of non-City funds included in DOT's capital budget, which accounted for "$43 million (20%) of the FY 94 Budget for street work and $27.7 million (15%) of the FY95 budget," contained an unusual statement that "[f]unding is usually restricted to improvements that serve to bring entire streets up to federal design standards, making the availability of funds for pedestrian ramp installation independent of roadway work questionable on streets which do not meet those standards." (*Id.*). ***Given that ADA accessibility standards are "federal design standards," the rationale for such an interpretation is not immediately fathomable.***

The Commissioner's Determination also included representations that meeting the January 1995 deadline would entail cancellation or fundamental alteration of existing DOT services, programs, and activities, including "cancelling or deferring other street and sidewalk projects ('This would have far-reaching consequences.')"; interfering with infrastructure rehabilitation programs, including street repairs and resurfacing, resulting in unsafe street

conditions and increasing the City's liability; interfering with Clean Air Act compliance and elimination of safety hazards; forcing the lay-off of all of nearly 600 DOT in-house resurfacing personnel; and preventing elimination of barriers to people with disabilities other than inaccessible corners. (*Id.* at 10-11). In that discussion, the Commissioner declared that "[t]o be maintained in a state of good repair, a street surface needs to be rehabilitated once every 10 to 15 years. Accordingly, the City should rehabilitate some 1,200 to 1,800 lane miles of its estimated 18,242 lane miles each year to maintain the City's streets in good repair. At current funding levels, the City is scheduled to rehabilitate only 1,000 land miles through resurfacing and reconstruction per year over the next few years." (*Id.* at 10).

The Conclusion section of the Commissioner's Determination stated the commitment of the City and DOT to "constructing as expeditiously as possible pedestrian ramps on all corners which currently lack ADA-conforming ramps ...." (*Id.* at 11). The City declared that it would not, however, be able to achieve construction of such ramps on all corners by January 26, 1995:

> Given the enormity of the task of pedestrian ramp installation in a place as large as New York City, the City's current financial condition, and the City's obligation to provide other essential services, programs, and activities, the construction of an ADA-conforming pedestrian ramp on every corner in New York City will require a long-term commitment of financial and administrative resources, as set forth in the accompanying Transition Plan for the Installation of Pedestrian Ramps on New York City Streetcorners. (*Id.* at 11-12).

VI. THE 2002 STIPULATION AND AMENDED TRANSITION PLAN

A. Issuance and Content

After eight years of litigation and negotiation, the parties entered into a Stipulation of Settlement on August 27, 2002; Judge Thomas P. Griesa so ordered that stipulation on September 9, 2002. (2002 Stip., Dock. #38; see City's MOL for FH, p. 3; Pf's FH MOL, p. 4; see City Objection Letter Resp., p. 3). After six "whereas clauses," the Stipulation began with a "Statement of Purpose," comprised of four provisions. The first declared that the federal government "in enacting the ADA found that the installation of curb ramps at all locations in the City where pedestrian walkways cross curbs is essential to the integration of individuals with disabilities, particularly those who use wheelchairs, into the commerce of daily life." (2002 Stip. ¶ 1). The parties then stated that they were "committed to the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs," (2002 Stip. ¶ 2), and that they agreed that the terms and conditions of settlement in the stipulation would result in such curb installation (2002 Stip. ¶ 3). In a "Definitions" section, the parties defined the terms "standard curb ramps" and "complex curb ramps"; explained what it means for capital funds to be "committed," "authorized for commitment," and "appropriated"; and distinguished between the City's "Curb Ramp Program" exclusively for the design and installation of curb ramps, and its "Other Capital Programs." (2002 Stip. ¶ 5).

Core parts of the stipulation are sections headed "Installations of Standard Curb Ramps" (2002 Stip. ¶¶ 6-12) and "Installation of Complex Curb Ramps" (2002 Stip. ¶¶ 13-18). Complex curb ramps are those that "require a unique design drawing to be prepared for that location, usually due to an obstruction or other unusual site condition," while standard curb ramps are ones that do not require a unique design drawing. (2002 Stip. ¶ 5). The section on standard curb

ramps presented three charts of capital commitments through the Curb Ramp Program for installation of standard ramps – one for funding commitments by the City that had been made in 2000 and 2001 before the stipulation was signed, one for the commitments in 2002 when the stipulation was finalized, and one for commitments being made under the stipulation for each of the years from 2003 to 2008. (2002 Stip. ¶¶ 6, 7, 8: Tables 1, 2 & 3). Each table had a column for commitments through the Curb Ramp Program and another for commitment in other capital Programs. For convenience the three tables are combined into a single Table A here.

TABLE A

1 **FISCAL YEAR**	2 **CAPITAL COMMITMENTS FOR STANDARD CURB RAMPS**	3 **CAPITAL COMMITMENTS FOR STANDARD CURB RAMPS IN OTHER CAPITAL PROGRAMS**
2000	**$10,719,000**	**$966,000**
2001	**$9,041,000**	**$1,144,000**
2002	**$23,495,000**	**$6,725,000**
2003	**$7,371,000**	
2004	**$15,646,000**	
2005	**$18,667,000**	
2006	**$33,139,000**	
2007	**$20,000,000**	
2008	**$19,825,000**	

No figures appeared in column 3 of the Table for the years 2003 to 2008, because for those years the City's commitments were to be made only through the City's Curb Ramp Program. (2002 Stip., ¶ 9).

The Stipulation provided that if the sums of money authorized for commitment in a given year were not committed in that year, the uncommitted balance would be carried over to the next year and added to the amount to be authorized for commitment in that year. (*Id.*, ¶ 8). Conversely, if the funds committed in a given year would exceed the amount specified, the excess amount would be carried over to the following year and subtracted from the amount to be authorized for commitment in that year. (*Id.*). If the funding commitments made in the stipulation were insufficient to pay for installation, by the end of 2008, of all standard curb ramps remaining to be installed in the City, the City agreed to make a capital commitment of $20,000,000 per fiscal year after 2008 to complete the design and installation of standard curb ramps. (*Id.* at ¶ 10).

The City pledged to "make its best efforts to ascertain and use the most efficient and the most cost-effective construction method possible for installation of standard curb ramps," and the parties agreed that the most efficient and most cost-effective construction method for installation of standard curb ramps at that time was "blitz" construction – which would target installation of standard curb ramps to designated geographic areas of the City – and would be the primary method used for standard curb ramp installations, except in exceptional circumstances.[350] (*Id.* at ¶ 11). The parties agreed to meet soon after the Stipulation was

[350] As examples of situations in which blitz construction would not be applied, the Stipulation listed situations (a) where installation of particular curb ramps constitutes a "priority" justifying a less efficient or less cost-effective method than "blitz" construction; (b) where a method more efficient and more cost-effective than "blitz" construction is found; (c) where installations of standard curb ramps are made in conjunction with other capital projects; (d) where installations of standard curb ramps are made in conjunction with another type of construction project, such as contract resurfacing; (e) where the curbs are composed of granite, or another similar materials; (f) where anomalous or unexpected site conditions warrant another construction methodology; or (g) where a particular

executed to identify agreed upon "priorities" that would justify use of construction methods other than blitz construction, and that the City would notify the Plaintiff of instances in which it was contemplating a policy change from blitz construction to some other methodology and the parties would meet concerning the contemplated change. (*Id.* at ¶ 12). Such notice and meetings would not, however, be required as to decisions regarding particular curb ramps, and "[t]he final decision concerning the appropriate construction method for installation of any particular curb ramp, whether standard or complex, will remain with the City." (*Id.*).

The Stipulation contained an abbreviated schedule of funding commitments for complex curb ramps, again in three tables (2002 Stip. ¶¶ 13, 14: Tables 4, 5 & 6), which are consolidated into a single Table B here.

TABLE B

1 **FISCAL YEAR**	2 **CAPITAL COMMITMENTS FOR COMPLEX CURB RAMPS**
2000	**$15,296,000**
2001	**$6,392,000**
2002	**$3,061,000**
2008	**$175,000**
2009	**$20,000,000**
2010	**$6,200,000**

geographic area requiring installation of standard curb ramps is too small to derive any benefit from "blitz" construction. (2002 Stip. ¶ 11).

The Stipulation did not allocate capital commitments for complex curb ramp installation in the years from 2003 through 2007.

The Stipulation included a provision for complex curb ramp installation, similar to that for standard curb ramps, that if the funding commitments made in the stipulation were insufficient to pay for installation by December 31, 2010, (it was by December 31, 2008, for standard ramps) of all complex curb ramps remaining to be installed in the City, the City agreed to make a capital commitment of $20,000,000 per fiscal year after 2008 to complete the design and installation of complex curb ramps. (*Id.* at ¶ 16). The impression that there would be two $20,000,000 pots of such funding – one for standard ramps and one for complex ramps – was dispelled by a provision clarifying that the sum of the post-2008 commitments could not exceed $20,000,000. (*Id.*). Another provision of the Stipulation described how the capital commitments under it would be affected by funding for design and installation of curb ramps under the City's Other Capital Program, including generating a 75% "credit" against the total amount of capital funds committed under the Stipulation. (*Id.* at ¶ 19).

A section of the 2002 Stipulation titled "The Capital Funding Process" began with the assurance that "[t[he City will authorize each of the capital commitments referenced in this Stipulation, and each of the carry-overs of capital funds in this Stipulation," but quickly added, "unless the City, as a whole, has an undue financial burden that prevents it from authorizing such capital commitments or carry-overs of capital funds." (*Id.* at ¶ 20). The section goes on to recite various vagaries of the City's funding apparatus, including adjustments to and updates of Commitment Plans for the Fiscal Year; legally mandated budgetary procedures, including the City Council budget appropriation process; and the possibility of "an undue financial burden" that may prevent the City from authorizing capital commitments. (*Id.*). Another paragraph in

the section provides that "the City will make its best efforts" to: "commit the authorized capital funds referenced … herein"; "draft the underlying contracts, process the contract bids, award the contracts, and take all other steps to have the contracts registered"; and "require the contractors to install the curb ramps required by the contracts as soon as practicable, and to otherwise fulfill their obligations under the contracts." (*Id.* at ¶ 21). But, "it is acknowledged that contractors are third parties over which the City has limited control." (*Id.*). The requisite "best efforts" the City is obligated to make are those efforts "that are limited only by an undue financial or administrative burden," and the parties recognize "that among the circumstances that might bring about an undue financial or administrative burden are: a civil emergency, involvement of the nation in a war or armed conflict, a natural or manmade disaster, a severe economic crisis, or a large budget gap reflected in the City's Financial Plan." (*Id.*).

The Stipulation required the City to issue, no later than December 6, 2002, an Amended Transition Plan for the installation of curb ramps, and to provide a copy to the Plaintiff. The plan was to set forth the yearly capital funding and funding carryover commitments of the Stipulation, and year-by-year "current estimates of standard and complex curb ramp installations, the methods of curb ramp installations planned by the City, and other aspects of the City's curb ramp installation plan set forth in this Stipulation." (*Id.* at ¶ 22). The parties agreed that "[u]pon the appropriation of capital funds for the installation of curb ramps, the City will use its best efforts to install curb ramps in accordance with the Amended Transition Plan ...."; "best interests" is defined as "those that are limited only by an undue financial or administrative burden," as above in the "The Capital Funding Process" section. (*Id.* at ¶ 23).

Two reservations appeared at the end of the discussion of the Amended Transition Plan. The first stated that "[t]he time frames set forth in the Amended Transition Plan are intended

only as guides, and may not be asserted against the City in litigation as an enforceable schedule for installation of curb ramps." (*Id.* at ¶ 24). The second, awkwardly placed in the Stipulation's discussion of the Amended Transition Plan (whose relevant provision merely acknowledged the possibility that some circumstances might amount to an undue hardship), declared: "The Parties agree that the City faced an undue financial burden and an undue administrative burden, within the meaning of Title II of the ADA, which prevented it from completing the installation of all curb ramps by 1995." (*Id.* at ¶ 25).

Another provision made clear that the Stipulation did not preclude the City from authorizing capital commitments over and above those agreed to in the Stipulation. (*Id.* at ¶ 26). Paragraph 27 of the Stipulation contained the following significant and controversial sentences:

> The City is excused from the installation of any curb ramps, which were otherwise required to be installed at the time of street resurfacing projects, commencing from January 1, 1999 and continuing to the date of this Stipulation. For all time periods that the City is in compliance with the terms of this Stipulation the City shall not be required to install, and shall be excused from installing, any curb ramps in proximity to street resurfacing projects within any particular time frame after corners have been by-passed by street resurfacing crews.

(*Id.* at ¶ 27).

These inelegantly worded statements are the "hold harmless" converse of the "blitz" construction embraced in paragraph 11, discussed *supra* at pp. 114-115, both of which will be examined on pp. 128 -129 *infra*.

The parties agreed to establish an "on-going working group" to meet "periodically (at least twice a year) to share data relevant to implementation of the Stipulation," and that the City would provide EPVA (at least twice a year or at other intervals as the parties might agree) with relevant "non-privileged information and documents, including information and documents

related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps." (*Id.* at ¶¶ 28, 29).

Paragraph 30 of the Stipulation is a critical feature in its enforcement; it provides that any dispute related to the Stipulation, including any assertion that the City has failed to comply with any of its provisions "will be submitted to this Court," and the Court "may adjudicate any such dispute and grant all appropriate relief." In the context of such a dispute, the parties have "the right to raise, and may raise, any legal or factual position." (*Id.* at ¶ 30).

Another paragraph of the Stipulation includes an acknowledgement by the parties that "all financial amounts referenced in this Stipulation are subject to appropriation by the New York City Council." (*Id.* at ¶ 31). If, however, the Council does not appropriate capital funds referred to in the Stipulation, in the absence of an "undue financial burden that prevents it from appropriating such capital funds," EPVA may declare the Stipulation to be null and void and apply to the Court for appropriate relief. (*Id.*).

In a series of provisions, the parties agreed that the settlement of the lawsuit should proceed as a class action, agreed that the standards for class action status were met, and stipulated to the entry of an order granting class certification. (*Id.* at ¶¶ 32-37). The class was defined as "qualified[351] individuals with a disability, as defined in Section 201(2) of the ADA, 42 U.S.C. § 12131(2), who use or seek to use curb ramps in the City." (*Id.* at 18, ¶ 34). In other provisions, the City agreed to pay reasonable costs and attorney's fees to EPVA, and EPVA agreed to release the City and its agencies and personnel from all claims and rights arising from acts and omissions complained of in the lawsuit "up to and including the date of the execution

[351] Since there are essentially no qualifications for using sidewalks and pedestrian crossings, the word "qualified" in the class definition is superfluous.

and 'so ordering' of this Stipulation." (*Id.* at ¶¶ 38 & 39). The parties made standard acknowledgements of having read the Stipulation and being fully informed of its content and facts, entering into the agreement voluntarily, etc.; and the parties agreed to other standard settlement terms regarding Construction, Headings, Counterparts, and Communications. (*Id.* at ¶¶ 41-45). Another provision declared that "[u]pon the execution and 'so ordering' of this Stipulation, the Action will be dismissed. The Court will retain jurisdiction to hear and resolve disputes arising under or related to this Stipulation and to otherwise enforce the terms of the Stipulation." (*Id.* at 20, ¶ 40).

On December 9, 2002, the City issued a new ADA transition plan for the installation of curb ramps, titled "Curb Ramps – Amended Transition Plan" ("2002 Transition Plan"), as called for in the 2002 Stipulation. For the most part, it reiterated or paraphrased the language, commitments, and tables in the Stipulation, including funding commitments, about which it commented that "[i]n the Stipulation, the City agreed to include in its budget specified amounts of funding until all curb ramps have been installed." (2002 Transition Plan at 1). Two particularly significant additions, relating to numbers of ramps installed and projected, were made, however. One of those declared that "DOT estimates that ***curb ramps have been installed on 99,867 corners as of December 3rd, 2000, Citywide***." (2002 Transition Plan at 2). The other was the City's estimate that, "based on current assumptions, the funding described above will result in curb ramp installations as illustrated on the attachment A hereto." (*Id.* at 9). Attachment A (reformatted here as Table C) presented the following information, under the heading "Projected Number of Ramps to Be Constructed":

TABLE C

FISCAL YEAR	STANDARD CURB RAMPS	COMPLEX CURB RAMPS	TOTAL
2002	9,865	240	10,105
2003	3,182	0	3,182
2004	4,647	0	4,647
2005	7,616	0	7,616
2006	13,896	0	13,896
2007	6,979	0	6,979
2008	7,750	14	7,764
2009	6,634	233	6,867
2010	0	1,639	1,639
TOTALS	60,569	2,126	62,695

B. Assessment of the 2002 Stipulation

Objectors have strongly denounced the 2002 Stipulation. They have called it "a glaringly-deficient settlement" (Objectors' Submission at 1), "toothless" and "ineffectual" (FH Tr. at 144, 147); and said that "[t]he 2002 settlement of EPVA's case explicitly approved the City's past noncompliance with the ADA and gave the City permission to continue flouting federal law" (Objectors' Submission at 1). They contend that "[t]he 2002 Stipulation perpetuated a system of ongoing discrimination against people with disabilities seeking to access

sidewalks" (*Id.* at 7), and described it as having "infected the entire process from the start" (FH Tr. at pp. 140, 141). They argued that "[t]he 2002 Stipulation suffers the same deficiencies as the 2016 agreement .... In fact, the 2002 agreement's deficiencies are even worse." (Objection Letter at 16). At one point, they declared:

> The actual obstacle to curb ramp construction and maintenance is the ineffectiveness and multiple deficiencies of the 2002 Stipulation, an agreement characterized by loopholes that allowed the City to avoid building curb cuts adjacent to resurfacing projects entirely, build non-compliant curb cuts, and avoid maintaining what few compliant ramps they did build.

(Objectors' Submission at 17),

They have catalogued a variety of things that they find wrong with the 2002 Stipulation, charging that the Stipulation has, among others, the following deficiencies:

(1) It "permitted the City to violate the ADA and conceded defenses which have no basis in the law." (Objectors' Submission at 8). In particular, they criticized provisions in which EPVA agreed to "excuse" the City from installing curb ramps "which were otherwise required to be installed at the time of street resurfacing projects," and had conceded that "the City faced an undue financial burden, within the meaning of Title II of the ADA, which prevented it from completing the installation of curb ramps by 1995." (*Id.*). Moreover, they took exception to the parties having drawn a distinction between "standard" and "complex" curb ramps, "invented ... from whole cloth and with no legal basis whatsoever"; and argued that the agreement was "devoid of legal standards for curb cut construction – leading to years of construction of inconsistent, non-compliant, and often dangerous curb cuts throughout the City." (*Id.* at 9).

(2) It "ignores major substantive matters that are essential to ensuring that people with disabilities have access to sidewalks." (Objectors' Submission at 9). Specifically, the Objectors objected that the agreement was silent as to maintenance of curb ramps; contained no protections (such as detectable warnings) for blind pedestrians; ignored the need for alternate accessible

routes when construction blocks access to sidewalks and curb ramps; and did not address other barriers to sidewalk access, such as "steep cross-slopes, raised and cracked sidewalks, narrow paths of travel, and protruding paths of travel." (*Id.*)

(3) It "omits essential procedural terms necessary to provide for effective enforcement." (Objectors' Submission at 9). The Objectors contended that "the agreement wholly lacked effective procedural mechanisms to assure that the City bureaucracy complies with its terms and that EPVA can monitor compliance." (*Id.* at 9-10). Among such deficiencies, they decried, as lacking transparency and checks and balances, information-sharing provisions limited to the "working group" process and an "open-ended pledge" that the City would provide EPVA with "relevant and non-privileged information and documents"; and that EPVA had "no means of obtaining any information that the City does not voluntarily turn over." (*Id.* at 10).

At the May 31, 2016, Fairness Hearing, the Objectors contended that there was also "a due process issue that goes all the way back to 2002 … that the only reason we are here today objecting and in this position of an objector is that we did not have adequate notice back in 2002," adding that the Objectors did not have an opportunity in 2002 to "make these same kind of objections, to fashion a better remedy, to be a part of the working group, to be involved in an issue that is fundamentally important to" the Objectors. (FH Tr. at 140). Counsel for the Objectors elaborated on the impact of the alleged notice deficiency as follows:

> [T]he due process violation of not being notified and given the opportunity to object has infected the entire process from the start, and allowed an unfair situation where EPVA was the only class representative for a very large, diverse class, where their ability to represent that entire class was not critically examined.
>
> A working group was created that never had the opportunity to include my clients. When the document exchanges that they alluded to happened, we never got any of those documents. The new settlement was negotiated completely without my client's input. The stipulation was signed by Judge Griesa, again, without any ex ante notice to my clients, and we were relegated to objector status.

> It all traces back to the original problem in 2002 that frankly was created by the process these lawyers set up where the notice did not say it was a class and did not give the class the opportunity to object.
>
> That fundamental problem has infected this entire process even today.

(*Id.* at 140-141).

In the Statement of Interest filed by the U.S. Department of Justice on November 17, 2016, (Dock., #121), the United States also took issue with some components of the 2002 Stipulation. It indicated that "to the extent the 2002 Stipulation … excuses the City from installing a curb ramp if it would result in an 'undue financial burden,' the undue burden analysis is inapplicable to new construction or alterations." (*Id.* at 6). It also declared that "because the ADA does not provide any exception to the requirement that public entities install curb ramps on newly constructed or altered sites, to the extent the 2002 Stipulation … purports to 'excuse' the City from installing 'curb ramps in proximity to street resurfacing projects,' … such a provision would also be inconsistent with the ADA." (*Id.* at 6 n. 8).

In addition, the Statement of Interest addresses the "standard curb ramps" versus "complex curb ramps" distinction, declaring that "neither the ADA nor the implementing regulations contain the terms 'standard curb ramp' or 'complex curb ramp.' Accordingly, there is no basis under the ADA to create different classes of curb ramps or apply different treatment to them." (*Id.* at 5).

Many of the criticisms of the 2002 Stipulation by the Objectors and the United States appear well-founded, and those issues are addressed later in this report in connection with the core analysis of the adequacy, fairness, and reasonableness of the 2016 Stipulation. Some of the negative commentary, however, seems to represent what is commonly referred to as "20-20 hindsight." It is easy to look back in 2016 or 2017 to denounce an agreement made a decade and a half earlier. In 1994, EPVA took the daunting and significant step of filing its lawsuit at a time

when there were few such lawsuits in the country. The challenges of a private, non-profit organization taking on the powerful municipal forces and impressive Law Department of the City of New York are evident. No other groups or organizations had come forward to jump into the vacuum and spearhead the battle for municipal curb ramps in the City. In its Complaint, EPVA alleged that "a substantial majority" of intersections in the City lacked curb ramps, and that "at the current rate of installation of curb ramps by the City, curb ramps would not be installed at all City intersections where pedestrian walks cross curbs for the next hundred years." (Compl., p. 6, ¶ 16; p. 7, ¶ 20).

In 2002, after years of litigation and dispute, the situation had improved very little. Counsel for the Plaintiff was quoted in the *New York Times* as stating that from 1994 to 1998 ramps were installed at the rate of about 7,800 per year, but had dipped to about 700 per year after that.[352] The fact that, after extended negotiations, facilitated by mediation efforts of Judge Duffy, the parties were able to enter into the 2002 Stipulation, and Judge Griesa "so ordered" it, was surely something of a breakthrough. The agreement was widely heralded as a victory.[353] Its shortcomings notwithstanding, the agreement led to commitments of sizeable sums of City funds and revved up City actions to make more sidewalk intersection crossings accessible to people with disabilities.

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[352] Randy Kennedy, *City Agrees to Spend $218 Million to Make Sidewalks Accessible to Wheelchair Users,* N.Y. TIMES, Sept. 13, 2002, at B3, Pf's FH MOL, ex. J.

[353] See, e.g., *id.*; John Woods, *Accord Reached on Plan to Put Curb Ramps on All City* Streets, NEW YORK LAW Journal, Sept.13, 2001, at 1, Pf's FH MOL, ex. I; Jennifer Steinhauer, *Drive to Tie Up Loose Ends: Battles Lasting under Guiliani Are Settled in Months*, N.Y. TIMES, Sept. 20, 2002, at B3, Pf's FH MOL, ex. J; Graham Rayman, *City Must Cut Corners for Disabled: Agrees to Spend $218M to Make Curbs Accessible*, NEWSDAY, Sept. 12, 2002, at A40, Pf's FH MOL, ex. K; Shelley Preston, *City Agrees to Ramp Up Sidewalks: Mayor's $217 Million Deal Settles a Civil Suit*, THE NEW YORK SUN, Sept. 13-15, 2002, Pf's FH MOL, ex. L; Robert Gearty, *Picking Up Pace on Curb Cuts,* DAILY NEWS, Sept. 13, 2002, Pf's FH MOL, ex. M.

Though the filing of the lawsuit and the 2002 settlement were widely publicized and were not hard to learn about by anyone who looked into curb ramp issues in the City, the record appears to show that, for nearly 20 years after the case began and over a decade after the 2002 Stipulation was put in place, no serious attempts were made by any outside persons or organizations to challenge the class representation or to intervene in the lawsuit. At the time the 2002 Stipulation was approved, no fairness hearing for class action settlements was required.

Thus, some of the attacks on the 2002 settlement are susceptible to the charge of Monday-morning quarterbacking. In 2002, some of the targeted legal deficiencies in the Stipulation were not so definitively settled as they are now. Although the Third Circuit had ruled in *Kinney v. Yerusalim* in 1993 that the undue financial burdens defense did not to apply to new ramps and altered ramps, in 2002 that proposition was not yet settled law in other jurisdictions nor completely clear in federal regulatory guidance. The Department of Justice's TITLE II TECHNICAL ASSISTANCE MANUAL, in effect when the Stipulation was agreed to, included a section on curb ramps that mentioned the undue burdens limitation without stating that it was applicable only to unaltered existing intersections.[354] And a Department of Justice publication titled *Title II Highlights*, updated on August 29, 2002, was, at the least, ambiguous in declaring in one place that "[s]tate and local governments – [a]re not required to take any action that would result in … undue financial and administrative burdens," while elsewhere stating that "[p]ublic entities must ensure that newly constructed buildings and facilities are free of architectural and communication barriers that restrict access or use by individuals with disabilities,"[355] without

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[354] U.S. Department of Justice, THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL, II-5.3000 Curb ramps, https://www.ada.gov/taman2.html#II-5.3000.

[355] U.S. Department of Justice, *Title II Highlights*, §§ IV & VII (last updated Aug. 29, 2002), https://www.ada.gov/t2hlt95.htm.

mentioning any special level of obligation relating to curb ramps. Very meticulous, precise, informed scrutiny might well have revealed to an astute analyst the inapplicability of the undue financial burdens defense to new and altered curb ramps, but this conclusion was not apparent to many who read the regulations before the courts and regulatory agencies spoke conclusively on the issue. Accordingly, it appears that counsel for the Plaintiff was speaking in good faith and with reason when he said at the 2016 Fairness Hearing, "In 2002, because the law was different and the law was interpreted differently, [the 2002 Stipulation] says the City could invoke an [undue] financial burden defense. They can't do that now. If they did that it would violate the ADA." (FH Tr. at 121).

The comments of both the Objectors and the United States regarding the distinction drawn in the 2002 Stipulation between standard and complex curb ramps are somewhat misdirected. The Objectors stated that the Stipulation's use of the terms was "invented … from whole cloth … with no legal basis whatsoever" (Objectors' Submission at 9); and the Statement of Interest declared that "neither the ADA nor the implementing regulations contain the terms 'standard curb ramp' or 'complex curb ramp.' Accordingly, there is no basis under the ADA to create different classes of curb ramps or apply different treatment to them." (Dock., #121, at 5). These statements treat the differentiation between the terms standard and complex curb ramps as if it were impermissible for parties to use any terms in a settlement agreement that are not contained in relevant legislation or regulations – a principle that would make much content and detail in such an agreement impossible. Plaintiff's counsel was correct in asserting that "[t]hose references are not, and are not meant to be, legal standards, and the Stipulations do not treat them as such. They simply are used in recognition of the fact that curb ramps that do not require unique design drawings can be installed and upgraded at lower cost and lesser time than can be

curb ramps that do require unique design drawings." (Stulberg Decl. at 20, ¶ 43). In fact, the term "standard curb ramp" is used in other jurisdictions in relation to installation of pedestrian curb ramps.[356] More involved curb ramps could be referred to as "complicated," "difficult," "intricate," "elaborate," "non-standard," or "big ticket," instead of "complex"; but the division of curb ramps into two categories by their complexity or simplicity makes logical, industrial, and administrative sense. Certainly doing so, even in a litigation settlement, is not improper or illegal, and is well within the province of municipal government. Problems relating to that distinction are discussed later in this report, but they stem, not from some inherent impropriety in identifying the two categories not mentioned in the ADA or regulations, but in how that classification was or was not used in implementing the Stipulation.

Even the provisions regarding giving the City an "excuse" for not complying with the requirement under ADA regulations that cities must install curb ramps in connection with road resurfacing work are not as clearly condemnable as the Objectors and the United States suggest. In his May 26, 2016, Declaration, counsel for the Plaintiff asserted that "[w]hen the 2002 Stipulation was negotiated, consummated and so ordered, installation of curb ramps during resurfacing was not required by the ADA, the regulations promulgated to [sic] it, or case law interpreting it (except in the Third Circuit). See *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993)." (Stulberg Decl. at 5, n. 1). Whether or not that analysis is accurate, in the 2002

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[356] See, e.g., City of San Diego, *Report No. PC-12-080*, Planning Commission, Attachment 5, p. 5 ("construction of a City standard curb ramp with truncated domes"), https://www.sandiego.gov/sites/default/files/legacy/.../pcreports12180_pg1.pdf; City of Minneapolis, *Minneapolis Pedestrian Master Plan*, Chapter 5, Objective 2.2.1, adopted Oct. 16, 2009, last updated May 30, 2014 ("the City uses the Mn/DOT standard curb ramp template"), http://www.minneapolismn.gov/pedestrian/pedestrian_pedestrian-masterplan-document#ch5; City of Oakland, *2012 Public Works Agency Infrastructure Report Card for the City of Oakland*, p. 8 (January 2013) ("The cost to construct a standard curb ramp is about $2,000, but installations involving utility or other conflicts can cost considerably more."), www2.oaklandnet.com/oakca1/groups/pwa/documents/report/oak050210.pdf.

Stipulation, the Plaintiff agreed to bargain away whatever right it had to insist on the resurfacing requirement based explicitly on a belief that "blitz construction" would get more curb ramps installed more quickly in the City. Does the goal of complying with the letter of the ADA regulation negate EPVA's right to choose the greater good to the class it represents by requiring more curb ramps to be installed more expeditiously through blitz construction? Does a party not have a legal prerogative to bargain insistence on one right in exchange for accelerated achievement of another more encompassing right, in this case getting more relief more expeditiously to the Plaintiff Class from the injustice of inaccessible corners? The answers to these questions are not as one-sided and indisputable as the Objectors and the United States suggest. As the report will discuss later, at some point the trade-off stopped working and became clearly detrimental to the Plaintiff Class. But that does not necessarily mean that it was not advantageous and lawful in 2002 in the context of a negotiated settlement "so ordered" by the federal court.

While aspects of the 2002 stipulation are certainly problematic, some of the flaws complained of are being judged from the vantage point of the present instead of from the perspective at the time the agreement was executed. To be fair, neither the Objectors nor the U.S. has sought to have the 2002 Stipulation declared null and void *ab initio*. And even if they had, it would hardly be possible legally and procedurally to invalidate retroactively a Stipulation agreed upon by the parties and "so ordered" by a federal court, that has been in place for nearly fifteen years, without challenge for most of those years. The issue of voiding the 2002 Stipulation retrospectively was not a focus of the Fairness Hearing, and the Special Master was not given the responsibility to investigate and provide the Court with input as to the fairness, adequacy, and reasonableness of the 2002 Stipulation at the time it was executed.

On the other hand, and quite significantly, the provisions of the 2002 Stipulation continue to matter and to affect the determination of the fairness, reasonableness, and adequacy of the 2016 Stipulation in providing relief to the Plaintiff Class, because the 2016 Stipulation did not terminate or replace the 2002 Stipulation, but expressly embraced its continuation. One of the 2016 Stipulation's whereas clauses states that "the Stipulation remains in full force and effect," and the very first matter stipulated and agreed to in the 2016 document is that it "supersedes corresponding provisions of the Stipulation," but "the Stipulation shall otherwise remain in full force and effect." (2016 Stip. at 1, 3). Moreover, the 2016 Stipulation declares that its purpose "is to augment the [2002] Stipulation ...." and that "the parties are expanding, not narrowing, the City's obligations under the Stipulation." (*Id.* at 3, ¶ 1). As Plaintiff's counsel said at the Fairness Hearing, "the 2002 Stipulation ... lives on ...." (FH Tr. at 120; *id.* at 93 ("the 2002 Stipulation, which continues to live on except as changed by the 2016 Stipulation ....")).

Inadequacies of the 2002 Stipulation, particularly in regard to gaps and omissions in requirements, enforcement mechanisms, performance schedules, and target end date, and their effect on relief to the Plaintiff Class (including whether the number of ramps installed under the agreement was commensurate with the sums of money expended on them and whether such ramps were adequate and ADA-compliant), are discussed in detail in Section XI.B of this report. And while the 2002 settlement, having both drafting and substantive shortcomings, is hardly a model for a settlement agreement in this type of litigation, significant parts of it made sense in the circumstances at the time and led to some important progress in the curb ramp situation in New York City.

In lieu of total condemnation of the 2002 Stipulation as worthless, and castigation of the parties and their counsel for their roles in developing and signing on to it, another narrative that

has some merit would say that EPVA took a brave, momentous step forward, when no one else in New York was, by filing its lawsuit, exactly two years after the ADA regulations became effective; and that, all things considered, EPVA had reason to enter into the 2002 Stipulation as the best deal it could obtain at the time. Similarly, the role of the City in the 2002 agreement could be characterized, not as resistant or disinterested regarding accessibility of New York sidewalks and intersections, but as having anted up big money to increase the number of curb ramps in the City. And instead of being considered a setback or an obstacle to progress in installing ADA-compliant ramps in New York, the 2002 Stipulation might be viewed as a seriously flawed advancement, but an advancement nonetheless, in the struggle to make the pedestrian network in the City accessible to people with disabilities.

VII. THE 2016 STIPULATION – ISSUANCE AND CONTENT

EPVA (United Spinal Association[357]) and the City of New York entered into their agreement titled "So Ordered Stipulation Resolving Disputes" on January 28, 2016, and Judge Griesa officially so ordered it on February 11, 2016. (2016 Stip.; Dock. ## 44 & 45). The Plaintiff summed up its perspective on the lead-up to the 2016 Stipulation as follows:

> EPVA and Plaintiff Class Counsel became concerned, in or around early 2013, that the central objective of the Stipulation – to ramp all remaining street corners in the City so that disabled persons would be able to cross any street – had not yet been achieved. To address that concern, Plaintiff Class Counsel asked the City's counsel for up-to-date data on where curb ramps had been installed, where curb ramps remained to be installed, whether the types of curb ramps remaining to be installed were "standard" or "complex" within the meaning of the 2002 Stipulation, how much money had been allocated for curb ramp installations in upcoming fiscal years, and how many curb ramps (whether "standard" or "complex") could be installed with those allocations.

(EPVA MOL for FH, p. 8).

According to EPVA, "[b]etween 2013 and 2015, the City's counsel provided Plaintiff Class Counsel with comprehensive data in response to their requests, and the On-going Working Group established by the 2002 Stipulation met periodically to discuss that data." (*Id.*). Data provided by the City's counsel indicated that the City had expended approximately $243 million for installation of curb ramps from 2001 through March 11, 2015, resulting in 97% of the street corners City-wide being ramped, and that the vast majority of the 3% of street corners (approximately 4,800) remaining to be ramped required "complex" ramps or were located in areas (including parts of Lower Manhattan) where major construction or other site conditions (e.g., subway vaults) made curb ramp installations unusually costly and time-consuming. (*Id.* at

[357] EPVA was renamed United Spinal Association in 2005. As the Docket continues to list the Plaintiff as "Eastern Paralyzed Veterans Association" and the Court and parties have continued to use that designation in communications and conversations, this Report continues to refer to the Plaintiff by the acronym EPVA.

8-9). EPVA also reported that "[d]uring the meetings of the On-going Working Group, Plaintiff Class Counsel also learned that certain curb ramps that were compliant with ADA standards when they were installed were no longer ADA compliant and, therefore, need to be upgraded." (*Id.* at 9).

The City has provided a succinct summary of the discussions and negotiation that led to the 2016 Stipulation:

> Starting in 2013, the parties, through counsel, began conferring about disagreements that had arisen regarding the implementation of the 2002 Stipulation & Order under the auspices of the On-going Working Group (see Docket No. 47 at 2). Eventually, the dispute resolution clause of the 2002 Stipulation & Order was invoked, in an effort to formally resolve disputes concerning, inter alia, completion of the installation of curb ramps at all remaining required locations in the City, and upgrading previously installed curb ramps that may no longer be in compliance with the ADA (see id.). The efforts of the parties to reach an agreement without wasting resources on needless litigation eventually resulted in the Stipulation Resolving Disputes.

(City's MOL for FH, pp. 3-4).

According to Plaintiff's counsel, after becoming aware that around 5,000 City corners where ramps were needed did not have them, EPVA concluded that "just continuing the $20 million a year was insufficient," so informed the On-going Working Group, and made the following demands:

> One, we need that $20 million to continue.
> Two, we need an infusion and a quick infusion and a concentrated infusion for upgrades.
> Three, we need reports on a regular basis, which you are required to give us all along anyway. We need to know what's happening and where it's happening and where this work is being done.
> Four, the parties agreed, again as part of the original arrangement, to essentially suspend installation of curb ramps on resurfacing, so long as city was complying with the blitz construction that brought the city to 97 percent coverage. But now we saw that resurfacing was needed in order to add funds and add opportunities for installation and upgrade of ramps. We said we don't want you to only install ramps on the resurfacing.

> We want you to upgrade the ramps you come across in resurfacing that are not up to code.

(FH Tr. at 89-90).

The call for a quick and concentrated infusion of funding for upgrades was a major departure from the 2002 Stipulation's focus on blitz construction installations of new pedestrian ramps, but it is notable that these calls by EPVA for upgrades were premised upon and limited to two situations: (1) "curb ramps that complied with ADA standards when installed [that] were no longer ADA compliant and needed to be upgraded" (EPVA MOL for FH, p. 9); and upgrading ramps that the City might "come across in resurfacing." (FH Tr. at 90). The City ultimately agreed to commit sizeable sums of $37,600,000 a year for 2016 and 2017 for upgrading existing non-ADA-compliant ramps in the City generally, and $11,500,000 in FY2016 for upgrading ramps in Lower Manhattan. (2016 Stipulation at 4, ¶ 3). But the initial focus on ramps that were not compliant with ADA standards because the standards had changed or on ramps adjacent to resurfacing reveals the extent to which achieving compliance with ADA curb ramp standards at all New York City corners as soon as possible was not a major Citywide priority.

The parties have not accentuated or even mentioned the critical fact that ***neither the 2002 Stipulation nor the 2002 Amended Transition Plan included a single commitment to installing ramps that are ADA-compliant. Moreover, the financial commitments and ramp number projections in the 2002 Stipulation and the Transition Plan were entirely for new curb ramp installations. not upgrades.***

Due to the lack of emphasis on and monitoring of ADA-compliance in existing and newly installed ramps and of upgrades to achieve compliance, ***at the time the 2016 Stipulation was being negotiated, over 70% of the ramps in the City were not in compliance with ADA Standards***. At the Fairness Hearing, the parties and the Objectors all agreed that approximately

116,500 corners with pedestrian ramps in the City (about 72%), or more, were not ADA-compliant.[358] (FH Tr. at 43 (Ms. Kurland); FH Tr. at 93 (Mr. Stulberg); FH Tr. at 134 (Mr. McAtee); FH Tr. at 144 (Ms. Caiola) ("79%"). In fact, if one subtracts the 4,860 corners that had not had ramps installed, the calculation can be made that some 74% of the existing ramps in the City were not compliant with ADA curb ramp standards.[359]

The extent of the City's non-compliance with ADA standards was largely brought to light by one of the objecting organizations, the Center for Independence of the Disabled, New York (CIDNY) as the organizational plaintiff in the lawsuit *Center for Independence of the Disabled, New York v. City of New York,* No. 14-cv-5884 (GBD), filed July 30, 2014 ("*CIDNY v. City of New York*"). In a Memorandum of Law filed on December 4, 2015, CIDNY claimed that "[b]efore this litigation was filed, the City had never evaluated whether or not its pedestrian ramps are compliant with the ADA"; and referred to "five separate studies, including three studies conducted by the City itself," within the prior eighteen months, that had assessed the condition of pedestrian ramps in Lower Manhattan, and demonstrated "the City's massive failure to comply with federal law requiring sidewalk accessibility for people with disabilities."[360]

The Objectors referenced, among others, a document titled "Pedestrian Ramp Survey: Lower Manhattan Statistics" (Aug. – Sept. 2014), NYC000064 (Objectors' May 2, 2016, Submission to the Court, ex. C, Docket, doc. #56-4). in which the City provided numbers and percentages regarding corners, ramps, and ADA compliance in Lower Manhattan. Among

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[358] 116,500 ÷ 162,000 = 71.9%.

[359] 162,000 – 4,860 = 157,140 (corners with ramps). 116,500 ÷ 157,140 = 74.1%.

[360] *CIDNY v. City of New York*, MOL in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 7-9, 14-cv-5884 (GBD), Doc. # 78 (filed Dec. 4, 2015) (emphasis in original), provided as exhibit 24 to Objectors' Submission to Special Master on Oct. 28, 2016, EX. 5; Kurland Declaration in *CIDNY v. City of New York*, Feb. 5, 2015, EX. 6, ex. M.

various items of information in the document, it reported that of 3,282 corners with ramps, 2,600 of them had non-ADA-compliant ramps, which constitutes 79.2% of ramps in place.[361] Counsel for the Objectors cited the 79% figure at the Fairness Hearing, faulting the counsel for the City, who, in response to Judge Daniels asking for an estimate of how many ramps in the City were not compliant with ADA requirements, responded that she did not have that information (FH Tr. at 31 (Ms. Kurland)); Ms. Caiola for the Objectors countered: "Ms. Kurland could not give you a number for how deficient or how noncompliant the ramps are right now. And yet we have a document from the *CIDNY* case that we received in discovery. There are 79 percent of the installed curb ramps that are deficient, not ADA compliant, not legal right now." (FH Tr. at 144 (Ms. Caiola)).

Regarding how many corners lacked ramps, the 3% statistic was contained in a City document titled "Pedestrian Ramps Count by Borough and Community Board," as updated March 11, 2015, that was available to the parties as they negotiated the 2016 Stipulation. (City Brief in Response to Objection Letter (May 26, 2016), ex. 9; EPVA FH MOL, ex. U). Figures were presented from a count of ramp status for each of the City's boroughs and Community Boards. Aggregated as Citywide totals, the document indicated that there were 162,355 corners, of which 157,497 (97%) were ramped or no ramp was required; the remaining, unramped corners numbered 4,827 (3%). The City also provided the Plaintiff's attorneys with Pedestrian Ramp Installation Summaries at various times, usually in connection with the On-going Working

[361] 2,600 (corners with non-compliant ramps) ÷ 3,282 (corners with ramps) = 79.2%. The document also showed that, of a total of 4,451 corners, 636 were missing ramps (i.e., needed but did not have them), which works out to 14.4% of corners not having a ramp though one was needed (636 (corners missing ramps) ÷ 4,421 (total corners) = 14.4%).

Group; a version from April of 2015, EX. 3, provided the same number – 4,827 (3%) – as in the Pedestrian Ramps Count by Borough and Community Board.

Accordingly, the data on the table as the parties worked toward the 2016 Stipulation indicated that 70 to 90 percent of the pedestrian ramps in place in the City were not ADA-compliant and 3% of the corners where ramps were needed did not have them.

As noted previously, the Whereas clauses and early provisions of the 2016 Stipulation made clear that the 2002 Stipulation was to remain in full force and effect, although specific provisions of the 2002 document would give way to corresponding provisions of the 2016 Stipulation. (2016 Stip., pp. 1, 3). The Whereas paragraphs also noted that the Plaintiff Class had "raised with the City certain disputes with the City over implementation of the [2002] Stipulation," and declared that those disputes concerned:

> the City's obligation under the Stipulation to complete installation of curb ramps at all remaining locations in the City where pedestrian walkways cross curbs, the need to upgrade curb ramps that were installed pursuant to the Stipulation, in compliance with the standards of the ADA and its implementing regulations and guidelines, … but which may no longer be in compliance with the ADA Standards, and certain enhancements to the City's 311 system relating to the City's responses to accessibility complaints concerning unramped corners and curb ramps that may not comply with the ADA Standards."

(*Id.* at 2).

Excised here from the preceding quotation, after the words "standards of the ADA and its implementing regulations and guidelines," were the following: "including but not limited to, 29 U.S.C. §§ 12132, 28 C.F.R. §§ 150(d)(2), 28 C.F.R. §§ 35.151 (b) and (i), and ADA Accessibility Guidelines for Buildings and Facilities § 4.1.6(1)(j) (collectively, 'the ADA Standards')." At the Fairness Hearing, counsel for the City told the Court that this language served to "define" "ADA Standards" (FH Tr. at 52-53, 60-62), and it is the only definition that the parties have ever proffered for that term. Even ignoring the incomplete citation form and

multiple section symbols for single sections, the definition has a number of problems. For one thing, there is no statute in the United States Code designated "29 U.S.C. § 12132," much less an ADA provision. Presumably what was intended was 42 U.S.C. § 12132, the general prohibition of discrimination in Title II of the ADA; this is a broad nondiscrimination mandate, not an accessibility standard.[362]

The regulatory provision at 28 C.F.R. § 35,150(d)(2) is from the July 26, 1991, Title II regulation that obligated public entities having responsibility or authority over streets, roads, or walkways, to include in their transition plans a schedule for providing curb ramps. It is emphatically not an accessibility standard. 28 C.F.R. § 35.151(b) deals with alterations of facilities by public entities and says that if an alteration affects the usability of the facility, it should be done in such a manner that, to the maximum extent feasible, the altered portion is readily accessible to and usable by individuals with disabilities, and calls for accessible paths of travel; the provision does not, however, establish specifications for accessible facilities or paths of travel, and is not an accessibility standard. 28 C.F.R. § 35.151(i) deals with curb ramps, as it is the provision of the Title II regulation, discussed in Subsection IV.D.2 *supra*, which requires curb ramps at newly constructed or altered streets, roads, or highways, but it provides no standards for such curb ramps.

The final part of the 2016 Stipulation's definition of "ADA Standards," "ADA Accessibility Guidelines for Buildings and Facilities § 4.1.6(1)(j)," is at least a reference to a guideline provision, but far from a helpful one. The "Accessibility Guidelines for Buildings and Facilities" were the former 2004 ADA and ABA Accessibility Guidelines that the Department of

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[362] 42 U.S.C. § 12132 states: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Justice incorporated into its 2010 ADA Standards. The cited provision is, however, not an accessibility standard; it is an exception from the application of such standards for "technical infeasibility" in alteration work.[363]

None of the components of the "ADA Standards" set out in the 2016 Stipulation provides specifications or benchmarks to guide the installation, upgrade, or repair of pedestrian curb ramps, and cannot serve as "ADA Standards" to govern the installation and upgrading of curb ramps in this lawsuit. This is a serious deficiency in the Stipulation, and one that the parties have not raised to the Court nor to the Special Master.

The parties agreed that the purpose of the Stipulation was to achieve three things: (1) completion of installation of curb ramps at remaining unramped locations in the City; (2) upgrading of curb ramps installed in compliance with ADA Standards, which are no longer in compliance with those standards; and (3) improved City methods and procedures for responding to complaints concerning unramped corners and non-compliant ramps. (*Id.* at 3, ¶ 1).

A section on "Funding" began with the City agreeing to continue to "make a baseline capital commitment of a minimum of $20,000,000 per Fiscal Year to complete the installation of curb ramps at remaining unramped locations in the City where pedestrian walkways cross curbs." (*Id.* at 3, ¶ 2). In addition, the City agreed to make capital commitments for upgrading existing non-ADA-compliant ramps to the tune of $37,600,000 per year in FY2016 and FY2017 for the City generally, and an additional $11,500,000 in FY2016 for upgrading non-ADA-compliant ramps in Lower Manhattan. (*Id.* at 4, ¶ 3). The City's DOT was charged with seeking

[363] The provision reads as follows: "(j) EXCEPTION: In alteration work, if compliance with 4.1.6 is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible. Any elements or features of the building or facility that are being altered and can be made accessible shall be made accessible within the scope of the alteration."

additional funds through the City's budgetary process in future fiscal years, "subject to appropriations." (*Id.* at 4, ¶ 4). The Stipulation expressly declared that all installations and upgrades under the agreement would be performed in accordance with the 2002 and 2016 Stipulations and the ADA Standards. (*Id.* at 4, ¶ 5). In regard to "Priorities" in putting in curb ramps, the 2016 Stipulation made some significant changes to the terms that had been applied under the 2002 agreement. One was that, while the City would continue to install new curb ramps Citywide, it would cease to do so through "blitz" construction – deemed "no longer necessary," because "approximately 97% of street corners City-wide are now ramped." (*Id.* at 4-5, ¶ 6). A second major change was that when streets are resurfaced, if a new standard ramp or an upgraded standard ramp is needed at a corner on a street adjacent to a street being resurfaced, the ramp shall be installed or upgraded before the resurfacing operation is completed. (*Id.* at 5, ¶¶ 5(A) & (C)). If a street corner contains "a site condition that requires a complex curb ramp, DOT or its contractors are to complete a Pedestrian Ramp Exception ("PRE") Form, in which case "the City will provide an accessible curb ramp, to the maximum extent feasible, within the meaning of the ADA standards." (*Id.* at 5, ¶ 5(A); 6-7, ¶ 7). Complex curb ramps are, however, not governed by the requirement that installations and upgrades are to be completed before resurfacing is completed. Disputes about installation or upgrades of complex ramps are subject to Court review under paragraph 30 of the 2002 Stipulation. (*Id.* at 6-7, ¶ 7).

A section of the 2016 Stipulation addressing "Public Outreach" contains three provisions – one noting that DOT has added search terms to assist 311 operators to better direct "City-wide accessibility complaints" to the appropriate agency and units; another indicating that DOT has modified its website to include links to the Accessibility Coordinator, including "nyc.gov/accessibility," and is making changes to "capture curb ramp specific complaints"; and a

third in which DOT commits itself to "mount an educational campaign that includes creation of a pamphlet to distribute to construction permit applicants," to train inspectors to better identify and address accessibility issues at construction sites, and to ascertain the type of guidance it can provide to its permit applicants and provide such guidance to applicants. (*Id.* at 7-8, ¶ 8).

In regard to modifying the 2016 Stipulation, it provides that "[t]he terms of this agreement may be modified by the Parties upon a written agreement signed by the attorneys for the parties." (*Id.* at 8, ¶ 10). No mention is made of presentation to and approval by the Court, or of notice to and comments from the members of the class or the general public, prior to such modification.

The agreement stated that notice of the Stipulation was to be posted on the websites of the Plaintiff and of the law firm representing the Plaintiff, and in the *New York Times*, the *New York Law Journal*, and the *New York Post* or *Daily News*; and be distributed to disability-rights non-profit organizations serving mobility-impaired persons in New York City. (*Id.* at 8, ¶ 11).

As to Attorney's Fees and Expenses, the Stipulation declared that a request for payment of Plaintiff's reasonable attorney's fees and expenses "for work commencing January 1, 2014," shall be presented to the Comptroller's Office, with payment to be subject to approval by the Office. (*Id.* at 8, ¶ 9). In the event that the Comptroller fails to approve the payment or the amount requested, the Plaintiff can apply to the Court for an Order for payment. (*Id.*).

VIII. THE PARTIES' AND OBJECTORS' POSITIONS ON THE 2016 STIPULATION

Predictably, EPVA and the City have both touted the virtues of the 2016 agreement they developed and signed. Plaintiff's counsel has declared that "[T]he 2016 Stipulation is an eminently fair, reasonable, and adequate resolution for the Plaintiff Class, which provides substantial and on-going relief that will hasten the day when every street corner in New York City is ramped in compliance with the ADA." (Stulberg Decl., p. 2, ¶ 3). In the Memorandum of Law of United Spinal Association (EPVA) in support of approval of the Stipulation, the Plaintiff extolled it as follows:

> The 2016 Stipulation significantly expands the relief provided under the 2002 Stipulation, requiring the City to complete installation of remaining curb ramps and to make previously-installed curb ramps ADA-compliant. To that end, the 2016 Stipulation requires the City to continue to commit at least $20 million per year to complete curb ramp installations, to commit an additional $87.6 million through FY2017 to upgrade curb ramps City-wide, to seek additional funding for installations and upgrades in future fiscal years (more than $100 million of which has already been committed), and to improve construction-related accessibility training and education. The total amount committed to date under the 2016 Stipulation for curb ramp installations and upgrades through FY2019 is $253.3 million (in addition to the amounts spent pursuant to the 2002 Stipulation), underscoring the fairness of the 2016 Stipulation for the Plaintiff Class.

(Pf's FH MOL at 2.)

In its letter responding to the Objection Letter of May 2, 2016, the City contended that "[t]he Stipulation resolving Disputes comprised a significant achievement on the behalf of the City and class counsel to resolve their disputes without resorting to litigation and the inevitable drain on resources that could instead be used to benefit the certified class through improvements in accessibility of the City's pedestrian infrastructure." (City Objection Response Letter at 10.) The City declared the Stipulation "fair, reasonable, and adequately protects the interests of the certified class," and deemed "preposterous" Objectors' contentions to the contrary and that "the

allocation of significant additional funding totaling over $250 million, for accessibility improvements to the City's pedestrian infrastructure, along with new programs created to promote the mandates of the ADA ..." was not sufficient. (*Id.* at 11).

The Objectors have been vigorous and steadfast in their condemnation of the 2016 Stipulation. In their May 2, 2016, letter to Judge Griesa, the Objectors wrote:

> We urge the Court to reject the Settlement in its entirety. In multiple fundamental respects, the Stipulation is procedurally and substantively deficient and fails to fairly or adequately protect the rights and interests of the class. As detailed below, the agreement also is in violation of the basic safeguards established to protect absent members of a class in class action lawsuits and denies the purported class justice under the Americans with Disabilities Act.

(Objection Letter at 1).

On October 28, 2016, the Objectors included, in an extensive submission of documents and exhibits to the Special Master (and provided to the parties' counsel), an outline of "Deficiencies in 2016 Stipulation," as follows:

A. Substantive Defects:
   1. No plan for implementation.
   2. No schedules or timetables or any promise or benchmarks for interim steps.
   3. No completion date for installation of new curb ramps.
   4. No completion date for upgrades. Only "projects" upgrades in Lower Manhattan *may* be complete in 5 years (¶ 6(B)).
   5. No remedy for 25 years of violating the ADA & Rights of Disabled Persons. Provides only that when resurfacing in future, will comply with law.
   6. No provision for maintenance.
   7. No provision for fixing mid-block barriers, routes near construction sites, or barriers affecting people with vision disabilities.

Also, substantial avenues to evade curb ramp requirements.

   8. Can change anything, any time (¶ 10) without court approval of notice.
   9. Ramps labeled "complex": (These are the majority of ramps at issue).
   10. Limits curb cuts only to the "maximum extent feasible," (¶¶ 6-7) (This standard not applicable to curb ramps).

B. Implementation Defects:

1. No surveys (such as in BOE/BCID/CALTRANS).
2. No regularly scheduled monitoring.
3. No use of experts.
4. No schedule reporting with provisions of specific information by City.
5. No inspection of plans and documents.
6. No revision to transition plan.
7. No revised written policies.
8. No provision for detailed accounting of funds spent.

C. Procedural Defects:

1. 2 week notice period.
2. Defective and misleading notice.
3. No bar to future litigation.
4. No notice or chance to object before agreement.
5. No court approval process prior to agreement.
6. No fairness hearing before agreement.

D. Negotiation Defects:

1. No depositions, discovery, requests for admission, requests for production of documents, or inspections of curb cuts.
2. No independent prep work through surveys, experts, FOIA requests.

(Objectors' Submission, EX. 5, ex. 1)

The Fairness Hearing on May 31, 2016, afforded the parties and the Objectors an opportunity to have direct input to the Court on the issues in the case. At the beginning of the hearing, Judge Daniels sought to give the participants a clear idea of what he was hoping for during the proceeding. He indicated that, in general, he wanted to hear from the lawyers very specifically on the legal issues that needed to be addressed and substantive issues with regard to the nature of the settlement. (FH Tr. at 3). He said that he wanted the City attorneys to tell him: (1) whether there is a plan pursuant to the agreement for full compliance with the ADA, and what that would entail; (2) what the City's timetable is for full compliance, what the schedule is, and what the completion date is; and what moneys are committed to it. (*Id.* at 3-4). He wanted the Plaintiff's attorneys to describe: (1) what objections or concerns with noncompliance drove them to seek a new agreement: (2) what provisions of the second agreement are new; and (3)

how the new agreement addresses specifically the concerns with the City's compliance with the original agreement. (*Id.* at 4).

In addition, Judge Daniels said he was hoping to hear from both sides about: (1) whether EPVA is the appropriate representative for people with visual impairments; and (2) what specific provisions of the second agreement deal with issues affecting people with visual impairments. (*Id.*). Then, he wanted to hear from the Objectors specifically (not a gripe session) about: (1) what the agreement provides or does not provide that they object to substantively; (2) how the agreement should proceed procedurally; and (3) what provisions are needed to ensure compliance. (p. 5). Judge Daniels added that he thought a major issue was what in the 2016 agreement gives any assurance that it will resolve the issues once and for all, so that, as he put it, "considering the 2002 agreement, that 14 years from now we won't be sitting around this courtroom talking about the same issues." (*Id.* at 5-6).

Judge Daniels apparently obtained a modicum of the information he was seeking at the hearing, but certainly not all of it. The two major informational pieces that the parties provided and stressed were that ramps had been installed at 97% of the corners in the City, and the sums of money that the City was committing under the Stipulation. The 97% datum had been featured in the 2016 Stipulation. (2016 Stip., p. 2 & p. 5, ¶ 6). That figure and its converse – the 3% figure (approximately 4,800 corners) that were not ramped – were cited repeatedly during the Fairness Hearing, and touted by the parties as indicia of impressive progress.

The parties also emphasized and had considerable dialogue with Judge Daniels concerning funding commitments made by the City. Such commitments included money for continuing installation of curb ramps in the amount of $20 million per year for fiscal years 2016-

2019, totaling $80 million; funds for upgrades for FY2016 & FY2017 amounting to $87.6 million (including $10 million for lower Manhattan), and $74.2 million for FY2018 & FY2019. These figures add up to $241.8 million for installations and upgrades for 2016-2019. Adding to that number funding of $53 million for repair of defective sidewalks for 2016 & 2017 yielded a grand total of $294.8 million for installations, upgrades & repairs from 2016 through 2019. Each of these expenditure commitments, individual and in the aggregate, was mentioned at some point in the Fairness Hearing, and many of them were the subject of considerable exploration and back-and-forth interchanges with the Court.

Given the information that some 4,800 City corners currently needed curb ramp installations, that many of the curbs with existing ramps had to be upgraded to comply with ADA standards, and that the City was committing sizeable sums of money for the remaining installations and the upgrades, the Court endeavored to find out how many corners and curbs were involved, what the schedule for installations and upgrades was per year, and when these tasks would be completed. In regard to completing the installations, Judge Daniels asked counsel for the City whether it had estimated how many curbs would be done a year and when they would be completed, and received the answer that "[i]t varies, depending on the year and depending on which project we are talking about." (FH Tr. at 39). Trying again, the Court inquired "When do you intend to do and complete the new installations? Is there a timetable for that?" and received the following response: "The new installations we will continue doing … within the $20 million of annual allocations per year, … and it is hoped that within five years it will be accomplished within lower Manhattan. And hopefully within the decade they will be finished citywide." (FH Tr. at 11). The Court pursued the matter further by asking, "So you believe that $20 million will be sufficient to make all citywide curbs compliant at some point

within 20 years?" and was told "It's hoped that that is the case, yes." (*Id.*). Counsel for the Plaintiff expressed his belief that in the 2016 Stipulation the City had made a commitment "[t]o complete the installation of curb ramps at the remaining corners where they do not exist. That is a contractually binding, a so-ordered statutorily binding obligation" (*Id.* at 110), but was less certain of the timetable. When the Court asked, "In what period of time?" counsel responded that "the phrase that continues to govern both agreements is expeditiously." (*Id.* at 110-111). When Judge Daniels countered that "that is not a commitment .... A commitment is telling me when you are going do it. That is why I asked them what schedule they are going to do it on and when it's going to be complete," Plaintiff's counsel responded only, "We have been addressing that, and we've been talking about it. And have been talking to [City's counsel] about it." (*Id.* at 111).

When Judge Daniels focused on the issue of upgrading existing curb ramps to bring them up to ADA compliance, he queried counsel for the City as follows: "You said your goal was to bring all of the curbs up to current ADA standards. What percentage of curbs are currently, are compliant with current ADA standards – or up to, not compliant with – are up to current ADA standards? Do you have that?" (*Id.* at p. 20). The response on the part of the City was "No, your Honor. We do not have that." (*Id.*) Judges Daniels later tried again: "In the city that everybody says they want to make ADA compliant, fully up to current ADA standards, how many curbs are we talking about? You don't have to give me an exact number. How many thousands?" (*Id.* at 31). The response the Court received was "I don't have that information your honor." (*Id.*). Subsequently, counsel for the Plaintiff offered a statement of commitment coupled with an excuse for not having a schedule for upgrades: "I am going to work on curb ramp upgrades until they are all in compliance. It is true, some may fall out of compliance and

the law may change, etc. … In a sense upgrades isn't something that lends itself easily to a set date, because that can move and that can change." (*Id.* at 111).

After various questions by the Court about the numbers of curb ramps to be installed or upgraded, or a date or schedule for installations or upgrades were met by recitations of dollars committed by the City, the Court commented to the Plaintiff's counsel:

> You said you had a problem with the numbers because the numbers didn't work out. Well, I have a little concern that the numbers didn't work out because you guys are not talking numbers. You have to tell me what it is that you expect they are going to accomplish, when they are going to accomplish it, and how much it is going to cost so I can anticipate and everyone else can anticipate that they had the commitment to do that and that's what they intend to reasonably do.

(*Id.* at 112-113)

During the course of the hearing, the position of the parties as to when the upgrades to existing ADA ramps would be accomplished ranged from we-don't-know, to it-depends, to 20 years, to 10 years. Early in the proceeding, counsel for the City declared that "the City will upgrade curb ramps to current ADA specifications. … That will for the most part be done in connection with roadway resurfacing or other alterations that were done. In other words, when a roadway is resurfaced, the curb ramps that are adjacent will be upgraded at that time." (*Id.* at 10). The Court responded, "[T]hat is indefinite. That is ad infinitum. There's no end to that. When do you expect to accomplish full compliance with the ADA? … In 20 years? A hundred years? Depending on whether or not you ever have to?" (*Id.*). The City's counsel answered, "It's likely to be done within 20 years." (*Id.*). Judge Daniels probed the 20-year target further by asking, "What makes 20 years a reasonable time period as opposed to 30 years as opposed to five years?" and received the response that "basically, the resurfacing occurs with the city, on average a street will be resurfaced within 20 years. Any street will be resurfaced within 20 years." (*Id.* at 26).

Then, after having assured the Court three more times that the upgrades, linked to resurfacing being done for every street within 20 years, would be completed in 20 years (*Id.* at 42), counsel for the City suddenly interrupted her dialogue with the Court to say "Your Honor, I found the estimate for the upgrade. … And the total number of ramps [corners] upgraded in one year, the estimate is 11,653." (*Id.*) She went on to say that "this estimate would have everything upgraded in ten years … the total would be 116,530 ramps [corners] in ten years and that's 100 percent of the ramps [corners]." (*Id.* at 43). A few minutes later, counsel reiterated the gist of the commitment – "the City within ten years will upgrade 116,000 and change," and identified the document from which she had derived the new figures – the City's *10 Year Plan to Upgrade All Ramps: Sidewalk Program and CWC In-House Plan, ("10 Year Plan")*, EX. 13.[364] The City's counsel would later add that "the document that was referred to earlier, I think it's exhibit B to the objectors' submission, actually is a calculation, a budget projection by the Department of Transportation, presumably by a combination of budget and engineers." (FH Tr. at 98-99; see also *id.* at 44-45). In reality, the City's counsel had submitted the plan as an exhibit to the Declaration she filed with the Court in the *CIDNY v. City of New York* lawsuit on February 6, 2016.[365] She would subsequently explain that the Plan was "created in the summer of 2015 and distributed at a City meeting that was held August 14, 2015," and "was produced in discovery to the Plaintiffs in the *CIDNY* case on September 25, 2015." (Sherrill Kurland email message to Special Master, July 25, 2017). The *10 Year Plan* is significant both because it shows (with expenditures amounts and corners numbers) what DOT views as accomplishable in upgrading

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[364] Kurland Declaration in *CIDNY v. City of New York*, Feb. 6, 2016, EX. 6, ex. M, Doc. 96-13, at 3. The *10 Year Plan* was also included in the Objectors' May 2, 2016, Submission to the Court in the *EPVA v. City of New York* case, ex. B, doc. #56-3; and provided as exhibit 2 to Objectors' Submission to Special Master on Oct. 28, 2016, EX. 5, and as exhibit 3 by CIDNY in its October 28, 2016, Submission to the Special Master, EX. 7.

[365] See EX. 6, ex. M.

existing non-compliant ramps, and because the 116,530 figure (about 73% of the total corners) represents DOT's best estimate, though not based on a count or survey, of the number of corners in the City having non-ADA-compliant ramps.

Thus, after some meandering, evasion, equivocation, and inconsistency during the proceeding, the Fairness Hearing highlighted the participants' relative consensus on several major matters: (1) the parties' agreement that about 4,800 corners still need ramp installations; (2) the several funding commitments in the 2016 Stipulation, totaling $294.8 million for installations, upgrades & repairs from 2016 through 2019; (3) the parties' and Objectors' recognition of the City's estimate of 116,530 (about 73% of the total corners) as the number of corners in the City not having ADA-compliant ramps; and the City's, EPVA's, and the Objectors' acknowledgment of. and reliance on, the City's *10 Year Plan to Upgrade All Ramps*.

IX. PURSUIT OF CERTAIN KEY INFORMATION

In addition to the documents and arguments they provided to the Court before and during the Fairness Hearing, after the Special Master was appointed, the parties and Objectors submitted a large quantity of information and documents directly to him. Legal counsel for the parties and Objectors also made themselves available for in-person and telephone meetings with the Master, and responded to email queries and requests. At the City's request, the Master, along with parties' counsel, met on December 12, 2016, with 15 employees of New York City DOT representing DOT's Sidewalk Inspection Management and the DOT Commissioner's Office, plus the Mayor's Office for People with Disabilities: the meeting featured a Powerpoint-style slide presentation on the "Sidewalk Program: Pedestrian Ramp Program," providing background information, some data, and pictures of various configurations of curb ramps. (EX. 8). In conjunction with the meeting, several DOT staff members, including two engineers and counsel for the parties, accompanied the Master on site visits to seven different sites in Manhattan to view various types and configurations of curb ramps that were being installed or upgraded, in different stages of construction.

On December 19, 2016, the Special Master met face-to-face with seven attorneys representing the Objectors. And on January 23, 2017, the Master attended a meeting with DOT Commissioner Polly Trottenberg, nine members of her staff, and four attorneys from the New York City Law Department, plus counsel for the Plaintiff. In the in-person meetings, phone conferences, and email exchanges, the Master had frank, informative, and productive exchanges with the various counsel and other participants on behalf of the parties and the Objectors.

From the start, the Master considered it critical to document and verify two key facts: the number of corners (about 4,800) still needing installations, and the number of corners needing

upgrading (116,530). Where had those figures come from, who said so, and how did they know? The answers were not quickly forthcoming. As to the number of corners that need but do not yet have ramps, information requests to the City led to a chain of exchanges between the Master and the City; it is set out at length here to illustrate the difficulties of obtaining specific and authoritative curb ramp information from the City. In a January 10, 2017, email to counsel for the parties, the Master observed that "the statistic that 97% of pedestrian crossings in New York City have curb ramps has been referred to and quoted numerous times," but identified a need to "pin down and be able to cite what person or agency made such a determination, on what date, how exactly it was computed or estimated, and in what document it originated." On January 13, counsel for the City replied as follows:

> Documentation of the 97% statistic is available in *EPVA* filings at docket numbers 70-1 (paragraph 3), and 70-9 (page 6). The former is a declaration by Leon Heyward, the Deputy Commissioner of the Division of Sidewalk and Inspection Management at DOT. The latter is a spreadsheet report provided to class counsel during a working group meeting in April of 2015.

The Heyward March 25, 2016, Declaration contained only a bald assertion of the 97% figure and the spreadsheet report was the document titled "Pedestrian Ramps Count by Borough and Community Board," as updated March 11, 2015 (discussed previously), neither of which identified a source. The email went on, however, to provide the following information:

> In or around 1999, the City engaged students from the Cooper Union to compile an inventory of the City's pedestrian ramps that DDC has updated over the years as pedestrian ramps are installed and as new site conditions are observed. The data reflecting these updates is provided periodically by DDC to DOT, which conducts a review for accuracy and consistency. DOT then generates an updated spreadsheet report that is subsequently provided to class counsel during *EPVA* working group meetings.

This prompted more probing by the Master on January 18:

> Was the survey of pedestrian ramps done by the students from the Cooper Union starting in 1999 a comprehensive survey of all corners in New York City, in all the boroughs? Did it identify both those corners with ramps and those without? Similarly,

> does the review for accuracy and consistency conducted by DOT involve a comprehensive verification of whether each pedestrian crossing in the City where there should be a ramp has one? In short, has anyone or any agency actually counted all the crossings that have ramps and all that should but don't, and, if so, who and when? I want to be secure that the information I put in the report is fully accurate, and I would be more comfortable if you can provide me this kind of information, especially in regard to this fundamental, baseline statistic.

That message elicited the following response from the City's counsel, on January 23:

> [E]very corner in the City was surveyed in 1999 by the students from the Cooper Union. It identified both those corners with pedestrian ramps and those without. The review for accuracy and consistency by DOT involves a comparison of the installation data received previously from DDC with any new data to ensure, essentially, that the computations are correct.

The January 28 reply of the Master was as follows:

> The information [you provided] gives me some more information about the origins of the figures and percentages on corners with and without curb ramps, but, in order to cite, explain, and defend the data in the report, I need more in the way of primary source documentation. I was hoping that you would provide me a report on the survey contemporary to the time it was conducted; a table of its findings; an authoritative description of its methodology; details of the personnel involved; the dates the survey took place; and how its results were announced, recorded, and preserved – at the very least, some official documents from the time the survey was conducted stating what it was and what it found. I have yet to find anything on the Internet about the survey. I am hard pressed to figure out how I can cite and deem the figures as authoritative without considerably more documentation.

On February 24, the Master asked the parties to provide him with "a list of intersection/corners in New York City having pedestrian crossings that are currently without ramps." Then, during a phone conference on February 28, involving the parties' counsel, four other City attorneys, and the Master, counsel for the City informed the participants, seemingly out of the blue, of the existence of a survey of all corners in the City conducted in 2006 to 2010. When the Master asked, "Why am I just hearing about this now?" City's counsel responded, "We did not have that information." The Master followed up the phone meeting with a message on March 2 that included the following:

> You informed me on Tuesday about a 2006-2010 survey of every corner in the City using GPS, recording whether each pedestrian crossing did or did not have an accessibility ramp, producing information that was uploaded into a graphic data base and updated on an ongoing basis (by DDC I believe). This survey was apparently the source of the 97%-ramped/ 3%-unramped statistic that was cited in the 2016 Stipulation, at the Fairness Hearing, and in various documents. You indicated that you would provide me with information about the origins, nature, results, and current status of this survey; and that I might want to speak directly to the City employees who were involved in doing the work on it. In discussing the documentation of the process and results that I need, I should have been more clear that I would like it in the form of an affidavit (as one of you suggested) with appropriate document attachments. This will be particularly useful in documenting and citing the information in my report. You also indicated that you would be able to provide me with a list of corners that do not have ramps, and that a re-survey of all corners on the list would be completed this summer.

The message also requested "source documentation of ramped and not ramped corners by boroughs and totaled for the whole City as present in several exhibits and Powerpoint slides, and whether the numbers were based on a count or on a projection or extrapolation …."

After these requests and the February surprise of the newly discovered (??) 2006-2010 survey of all NYC corners, nothing was forthcoming from the City (despite periodic reminders) for the next two months. Then, on May 3, the City's counsel delivered a trove of materials, including four Declarations, two data reports, and 22 exhibits, one of which was a list of 4,431 City corners needing pedestrian ramps. One Declaration was that of Mr. Eric Macfarlane, the Deputy Commissioner of the Infrastructure Division of the New York Department of Design and Construction (DDC), who provided information about both the "1999 Inventory" and the "2006-2010 Survey." (Declaration of Eric Macfarlane, *EPVA v. City of New York* (May 3, 2017), EX. 9, ("Macfarlane Decl."), at 1, ¶ 1).

According to Deputy Commissioner Macfarlane, the "1999 Inventory" began in the summer of 1999, when DDC assigned student interns (mostly college engineering students from the Cooper Union in New York City) to conduct a citywide pedestrian ramp inventory. (*Id.* at 2,

¶ 6). The interns completed the survey of all corners in the City, recording a Yes or No to indicate whether each corner had or lacked a pedestrian ramp. (*Id.*). The results of the Inventory were stored by DDC "on Microsoft Excel spreadsheets and within a Microsoft Access database." (*Id.* at 2, ¶ 7). Over the next several years, DDC staff updated the spreadsheets and database by adding new locations where curb ramps had been installed. (*Id.* at 2-3, ¶ 8).

Mr. Macfarlane also indicated that in 2006 DDC began a new comprehensive survey conducted by DDC staff and a consulting firm, which was completed in 2010. (*Id.* at 3, ¶ 9). The survey personnel used a hand-held device that recorded GPS coordinates of each location; they also took photographs of each corner and recorded data regarding site-specific issues "that would require an individualized engineering design and longer construction period to install pedestrian ramps at that corner." (*Id.* at 3, ¶ 10). The collected data were automatically uploaded into DDC's Pedestrian Ramp GIS (Geographic Information System) Database, linked to the hand-held devices used to conduct the survey. (*Id.* at 3, ¶ 11). He went on to describe DDC's Pedestrian Ramp GIS Database as "a geographic information system built on the ArcGIS platform, which is utilized by DDC to store survey data on its servers," permitting data extraction and analysis, and creation of geographical maps, reports, and Microsoft Excel spreadsheets on an ad hoc basis. (*Id.* at 3-4, ¶¶ 11 & 12).

He reported further that "DDC's Pedestrian Ramp GIS Database is continuously updated by DDC, and that, ***as of May 3, 2017, it reflected that "4,431 corners are missing pedestrian ramps throughout the City,"*** reflected in a list, current as of February 2017, appended as exhibit A to the Declaration. (*Id.* at 4, ¶¶ 13 & 14, & ex. A).

Another extended quest, which started earlier and took a different trajectory, involved obtaining solid data regarding how many corners with curb ramps need upgrading to comply

with ADA standards. At a meeting of the Special Master with the parties' counsel on November 16, 2016, the Master sought information about the number of corners in the City having ramps that were not in compliance with ADA standards, and received assurances that such information would be provided.

On November 28, the Master sent a follow-up message to the counsel for the parties that included the following:

> I also asked you to provide me with the number of noncompliant ramps currently in the City. I understood this to mean the numbers of crossings in each of three categories: (1) those that have ramps but do not have detectable warnings (truncated cones); (2) those that have ramps with detectable warnings that do not comply with current ADA accessibility standards; and (3) those that have ramps with compliant detectable warnings, but are otherwise not in compliance with current ADA accessibility standards.

He added that he expected that "this information would be forthcoming relatively quickly." On November 30, counsel for the City responded that "we are still in the process of tabulating the qualitative metadata we have regarding curb ramp upgrades and the discrete categories you requested. We anticipate we should be able to have that information ready for you soon."

On December 9, the City's attorneys sent a message that included the following: "[A]ttached please find the data regarding curb ramp upgrades you requested. The City has surveyed approximately 30,000 corners so far (mostly in Lower Manhattan), and has extrapolated these results to project its citywide programmatic needs." The attachment was a table headed "Category Breakdown of 29,165 Corners Surveyed." (EX. 10). It consisted of columns of figures reflecting the curb ramp status of the corners surveyed, primarily in terms of whether they had ramps that were ADA compliant (or no ramp was necessary) or were non-ADA compliant. It separated curb ramps, whether in place or needing to be installed, into two categories depending on whether they were or would be standard ramps or complex ramps, and

then went into some detail as to what problems or issues caused particular corners to require upgrading. Key statistics were that ***over 80% of the corners surveyed were not ADA compliant, and either needed to be upgraded or to have ramps installed,*** and that ***12.1% of the corners surveyed needed ramps installed.*** (On its face, the 12.1% calculation differs dramatically from the approximately 3% figure of unramped corners in the City overall; this difference might be explained by peculiarities of the Lower Manhattan focus of the 29,165 corners surveyed, although this disparity and its effects have not been documented.).

The survey also identified and tabulated categories of deficits that made ramps ADA non-compliant, such as slope issues, width issues, defective tiles, curb reveal issues, and defective sidewalks or curbs. Nearly 27% of the standard ramps and 22% of the complex ramps surveyed did not have tiles with detectible warning devices (truncated cones) – percentages that likely represented serious undercounts because the survey had a separate category for "multiple issues" that included about two-thirds (63%) of the ramps and surely contained many for which no detectible warning tiles was one of their shortcomings. Though the email message indicated that the City had "extrapolated these results to project its citywide programmatic needs," no statistics based on such extrapolation were included in the Category Breakdown document itself. Moreover, extrapolating or projecting citywide figures from a sample of only 18% of corners, mostly in Lower Manhattan, is surely a dubious proposition.

In the slide show presentation at the Master's meeting with DOT employees on December 12, 2016, (three days after the Category Breakdown table was submitted to the Master), the document was included as one of the slides. (EX. 8, Slide 10). Another slide (Slide 11), headed "Pedestrian Ramps: Upgrading Existing Ramps," contained a precise current number of the corners in the City – 162,355 – and an ***estimate of the number of corners needing to be***

upgraded citywide – 119,184, larger by 2,654 than the 116,530 figure quoted previously. The slide also contained two statements of DOT intentions going forward: (1) "DOT plans to upgrade all corners in Lower Manhattan within an anticipated 5 year period"; and (2) "DOT projects to upgrade the remaining corners in conjunction with resurfacing projects" (EX. 8, Slide 11).

At the January 23, 2017, meeting with Commissioner Trottenberg, DOT employees, and City attorneys, much of the discussion concerned upgrading of curb ramps and the approach adopted by DOT and in the 2016 Stipulation that upgrading would occur in conjunction with paving and resurfacing of streets. Commissioner Trottenberg underscored that upgrades would be made to corners adjacent to streets being repaved or resurfaced, and she and other DOT personnel described the survey of 29,165 corners as a "living survey" that would be ongoing and would take seven to ten years to complete. The DOT General Counsel stated unequivocally that the survey would involve a review process after five years and would take seven to ten years in all to complete. DOT's position was that corners would be surveyed as they were being scheduled for upgrading in connection with street resurfacing.

The Commissioner said that funding of $80 million per year ($20 million for installations plus $60 million for upgrades each year) would continue for 20 years, amounting to $1.6 billion over 20 years, that would permit installations and upgrades of about 6,000 corners per year. She added, however, that there was "no finishing date." Regarding installations of ramps at corners lacking them, she said that she did not see all the ramps being installed in the next 5 years. There was some discussion of the "infeasibility" defense to full ADA compliance, the rendering of "equivalent facilitation," complexities in upgrading, and the idea that some corner might require a "million-dollar ramp."

Following up on the meeting with Commissioner, on January 28 the Master sent a message to the parties conveying the following:

> I need … primary source documentation regarding … compliant and non-compliant ramps. At the meeting, some of the City employees indicated that they could provide me with considerably more information about the survey producing the "Category Breakdown of 29,165 Corners Surveyed" table, the schedules for upgrading non-compliant ramps, and also about the costs of and schedule for continuing and completing the survey. I look forward to receiving that information.

During a telephone conference with the parties' counsel on February 28 and by emails in March and April, the Master reiterated and reemphasized his request.

Finally, as part of the packet of materials the City submitted to the Master on May 3, the City's counsel included a Declaration of the Deputy Commissioner of DOT's Division of Sidewalk and Inspection Management, Mr. Leon Heyward, signed on May 1, 2017 ("Heyward May Day Declaration," EX. 4). In his Declaration, Deputy Commissioner Heyward indicated that "[s]tarting in the summer of 2014, DOT staff began to survey the condition of corners in the City containing pedestrian ramps. This survey is an ongoing project, which continues as of the date herein." (*Id.* at 2, ¶ 6). He described some of the factors that go into determining which corners are surveyed, including "high pedestrian volume or other high priority locations," "corners adjacent to roadway resurfacing operations," corners regarding which the City has received complaints, and corners where sidewalk repairs or other construction work was completed. (*Id.* at 2, ¶ 7). Mr. Heyward provided a technical description of what resurfacing of roadways entails:

> Milling (or grinding) the roadway surface to remove a shallow portion of the roadway surface material; adjustment of metal hardware in the asphalt, as necessary (e.g., utility access covers, grates, and valve boxes); paving of the roadway surface; installing thermoplastic pavement markings (e.g., lane dividers); and installation of curb ramps.

(*Id.* at 3, ¶ 9).

He indicated that the results of the survey are entered into DOT's Pedestrian Ramp ("GIS") Database by using the "Collector" application on an iPad, which serves as an online extension of the GIS database, allowing field staff to enter real-time data regarding the presence or condition of curb ramps at a particular corner. (*Id.* at 3, ¶¶ 11 & 12). Photographs are taken via the iPad and uploaded on the database, and field staff record information about the corner from a list of about 60 potential characteristics/fields and can edit data previously entered on prior site visits. (*Id.* at 3-4, ¶ 13). Deputy Commissioner Heyward noted that survey data derived from the GIS database were summarized in the "Category Breakdown of 29,165 Corners Surveyed" table, which had been provided to the Special Master in December and was attached as exhibit B to the Heyward May Day Declaration. (*Id.* at 4, ¶ 14). Finally, he stated that the database "is continuously being updated by DOT staff as surveys are ongoing," and that, as of May 1, 2017, the database "contains information for approximately 43,843 corners in the City of New York." (*Id.* at 4, ¶ 15).

X. APPRAISING CURB RAMP PROGRESS IN NEW YORK CITY

A. City's Promises and Commitments

For many years and in a variety of modes, the City of New York has avowed a steadfast dedication to making the City's pedestrian crossings accessible to and usable by people with disabilities by installing curb ramps at all if its corners. Legal and administrative commitments to that end in the 1970s and 80s are described in a previous section of this report.[366] Subsequently, the 1994 Transition Plan included the forceful statement that "[t]he City of New York, through DOT, is committed to constructing as expeditiously as possible pedestrian ramps on all corners which currently lack ADA-conforming ramps ...." (1994 Transition Plan EX. 1, at 12). The Conclusion section of the Commissioner's Determination, signed by the Commissioner of Transportation that same year stated the commitment of the City and DOT to "constructing as expeditiously as possible pedestrian ramps on all corners which currently lack ADA-conforming ramps ...." (Commissioner's Determination, at 11). The 2002 Stipulation included the declaration that the parties were "committed to the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs," and that the terms and conditions of settlement in the stipulation would result in such curb installation (2002 Stip. ¶¶ 2 & 3). In each of these documents, the City committed itself to accomplishing compliant ramp installation at curbs throughout the City in an "expeditious" manner. These commitments were echoed at the Fairness Hearing in statements by counsel for the Plaintiff that "[t]he phrase that continues to govern both agreements ... is expeditiously," and "[t]he obligation ... comes from the thrust of

[366] See p. 102, nn. 343-346 and accompanying text.

both stipulations which says … the job must be finished expeditiously." (FH Tr. at 111, 124 (Mr. Stulberg)).

The City has also proclaimed its commitment to full curb ramp accessibility in a variety of other ways. DOT's City's *Street Design Manual* declares unequivocally: "ADA-compliant pedestrian ramps must be provided at all pedestrian crossings; separate ramps should be used aligned with each crosswalk and be centered on a continuation of the sidewalk." (N.Y. City Dep't of Transp., STREET DESIGN MANUAL 71 (2d Ed., 2015)). DOT's HIGHWAY RULES contains a rule providing that "[a]ny person constructing, reconstructing or repairing a corner shall install pedestrian ramps in accordance with the latest revision of Standard Detail Drawing #H-1011," which is a detailed rendering of a curb ramp with specs for the dimensions, slopes, layout arrangement, location, and other features of a corner pedestrian ramp, complete with detectable warnings.[367]

The DOT website features a number of relevant pronouncements, including the following:

> It is the policy of New York City Department of Transportation to comply with all applicable laws, including, but not limited to, the Americans with Disabilities Act (ADA) and the Rehabilitation Act. …
> Pedestrian ramps are an essential element of the City's ongoing efforts to remove barriers preventing individuals with disabilities, particularly those who use wheelchairs, from traveling throughout the City.[368]
>
> The City has agreed to install pedestrian ramps at all remaining un-ramped locations in the City where pedestrian walkways cross curbs.[369]

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[367] NYC DOT, *Highway Rules*, RULES OF THE CITY OF NEW YORK, Title 34, Ch. 2, p. 59, § 2-09(f)(4)(xiv) (Aug. 7, 2016), referencing NYC DOT, *Standard Details of Construction*, Standard Detail Drawing #H-1011 (July 1, 2010).

[368] *DOT Initiatives for People with Disabilities,* http://www.nyc.gov/html/dot/html/about/accessibility-information.shtml.

[369] *Pedestrian Ramps*, http://www.nyc.gov/html/dot/html/pedestrians/pedestrians.shtml.

Pedestrian Ramp (New Installations)
NYC DOT is committed to the installation of pedestrian ramps at all corners where they are missing in the City. The Federal government, in enacting the Americans with Disabilities Act (ADA), found that the installation of pedestrian ramps is essential to the integration of individuals with disabilities, particularly those who use wheelchairs, into the commerce of daily life. …
Pedestrian Ramp (Upgrades)
Accessibility and pedestrian safety continue to be a major priority for NYC DOT. With the installation of pedestrian ramps at 96.8% of the City's corners, NYC DOT is focused on upgrading pedestrian ramps to meet current ADA standards.[370]

These various forms of commitment and requirements are in addition to those in the 2016 Stipulation.

B. Unavailability of Adequate Data

Attempting to determine the status of pedestrian curb ramp accessibility in the City, or of a particular corner or area in it, is a daunting and often fruitless quest, whether for a court, a special master, people with disabilities and their organizations, or other. This subsection describes some of the dimensions and causes of this problem.

Some examples of difficulties in obtaining accurate numbers and time frames surfaced in connection with the Fairness Hearing on May 31, 2016. As discussed earlier in this report, when Judge Daniels asked counsel for the City what percentage of curbs are compliant with current ADA standards, Counsel replied, "We do not have that." The Court also sought but was unable to learn the City's planned completion date for full ADA compliance, the schedule for achieving it, and the sums of money committed to it. Nor was the Court able to find out when the parties expected to install curb ramps at the approximately 4,800 corners still needing them. When Judge Daniels asked counsel for the City what percent of curbs were anticipated to fall into the

[370] *Pedestrian* Ramps, http://www.nyc.gov/html/dot/html/pedestrians/pedramps.shtml.

"infeasibility" category, she replied "a small percentage," and when queried further, she admitted, "We don't have that." (FH Tr. at 25-26). Also discussed previously were the erratic variations given to the Court at the Fairness Hearing regarding when upgrades of all non-compliant ramps would be completed – starting out with the City not having any estimate, to a projection of approximately 20 years, and finally arriving at a consensus by the parties (supported by the City's *10 Year Plan to Upgrade All Ramps*, EX. 13) that all the needed upgrades would be completed in 10 years.

Subsequent to the appointment of the Special Master, the parties provided considerable information to him on their own initiative or at his request. The parties' counsel participated in various meetings and phone conferences, and responded to requests and questions from the Special Master. A number of DOT employees were made available for two large meetings, one of which was attended by DOT Commissioner Trottenberg; some of the DOT staff accompanied the parties' counsel and the Special Master to various City corners, where they explained and answered questions about the ramp construction that was going on or was needed at these corners. Overall, the City's employees and legal representatives provided a great deal of information, much of it focused on the complexities involved in installing and upgrading curb ramps; the sums of money committed annually to curb ramp construction; the realities of budget constraints; and the intricacies of budget-allocation and funding processes, the construction planning process, and general bureaucratic hurdles and limitations. The parties repeatedly recited and touted the figure of around 4,800 corners still needing ramps installed, usually characterized as 3% needing ramps and 97% currently having them, and accentuated the annual financial commitments being made by the City under the 2002 and 2016 Stipulations.

At times, however, the parties have fallen short of providing reliable and timely pieces of consequential information. The extended process by which the Master sought, with mixed success, to obtain accurate numbers of non-compliant ramps in the City and information to support the representation that the number of corners needing ramps installed was about 4,800 was described supra in Section IX at pp. 149-155. Also discussed previously was the unexpected revelation on February 28, 2017, of the existence of a survey that had been conducted in 2006-2010 of all corners in the City – information to which even the City's counsel had not been privy until then.

Certain types or items of relevant information were either not known by DOT, not shared with counsel, or not readily provided to the Master and the Plaintiff. Standard legal and business practice would have called for City to provide, for various time periods (each month, quarter, half-year, year, etc.) a report or chart of expenditures on installations and upgrades, paired with the numbers of ramps actually installed or upgraded. At various times, the City did the former, sharing data on amounts committed and sometimes actual expenditures for ramp construction through spreadsheets shared initially with the Plaintiff and later provided to the Master, but the City did not provide ongoing information about the numbers of ramps installed or upgraded with the money expended.

C. Making the Most of the Numbers

The data regarding the progress that the City has made toward a pedestrian crossing network that is readily accessible to and usable by people with disabilities are messy and incomplete at times, and not always reliable. Some enlightening, core facts can be gleaned, however, by aggregating and synthesizing figures from various available sources.

1. Curb Ramp Installations

Long-range progress can be traced in the broad facts that an estimated one-third of City corners had curb ramps in 1994; two-thirds had curb ramps in 2002; and all but 4,431 (2.77%) had ramps in February, 2017. While annual installation data are not available for all of the intervening years, figures are available for 2013 (from the Fairness Hearing, FH Tr. at 73); for 2015 (from the "Pedestrian Ramps Count by Borough and Community Board," (City Brief in Response to Objection Letter (May 26, 2016), ex. 9; EPVA FH MOL, ex. U); for December, 2016 (from the DOT slide presentation on the "Sidewalk Program: Pedestrian Ramp Program," Dec. 12, 2016, EX.8, Slide 3); and as of February, 2017 (from the Macfarlane Declaration, EX. 9).

A more detailed recapitulation of the data (based on the estimate of 160,000 corners in the City and using the current 2017 figures in lieu of those from 2016) is summarized as follows:

Year	Corners with Ramps	Corners Without Ramps
1994	53,333 (33%)	106,666 (67%)
2002	106,666 (67%)	53,333 (33%)
2013	150,040 (93.9%,)	9,760 (6.1%)
2015	155,173 (97%)	4,827 (3%)
2017	155,569 (97.23%)	4,431 (2.77%)

From these figures, it is a simple matter to determine how many curb ramps were installed in each of the intervals: 1994 to 2002, 2002 to 2013, 2013 to 2015, and 2015 to 2017. The results, surprising and enlightening, show the following:

1994-2002: 53,333 ramps were installed over 8 years – an average rate of 6,667 per year.

2002-2013: 43,573 ramps were installed over 11 years – an average rate of 3,961 per year.

2013-2015: 4,933 ramps were installed over 2 years – an average rate of 2,467 per year.

2015-2017: 396 ramps were installed over 2 years – an average rate of 198 per year.

As to percentage declines in curb ramp installation rates:

- The average yearly rate of installations in the 2015-2017 period is 97% lower than it was during the 1994-2002 period.
- The average yearly rate of installations decreased by 41% from the 1994-2002 period to the 2002-2013 period.
- The average yearly rate of installations fell another 49% from the 2002-2013 period to the 2013-2015 period.
- The average yearly rate of installations went down by 92% from the 2013-2015 period to the 2015-2017 period.

At the 2015-2017 rate, it would take 22.4 more years to install the remaining 4,431 ramps. On the other hand, if the 1994-2002 rate of installations had continued in ensuing years, all the corners would have had curb ramps installed by about 2010.

Information generated by the City as of October 20, 2016, provides details regarding the characteristics of sites still needing pedestrian ramps installed. (Pedestrian Ramps Count by Borough and Community Board, EX. 14, item 3, at 3, October 20, 2016. Of the 15,127 corners in the City that did not have curb ramps, 10,021 reportedly were sites where no ramp was required (usually because the pedestrian crossing was level, without a curb to traverse), leaving 5,106 corners where ramps were needed but not yet installed. DOT grouped the 5,106 corners needing ramps into the following categories as to the type of ramp they needed:

Ramp Category	Number
Simple	1,137
Project Interference	534
Complex (ordinary complex)	1,842
Landmark/Historic	539
TA (Transit Authority) Structure	834
Survey Monument	28
Vault	37

Other (Non-DDC construction, wetland, trees, steps, encroachment, private property, etc.)	155

The City's October 20, 2016, report also presented information on a Borough-by-Borough basis, including the following totals of corners in need of curb ramp installations:

Borough	Corners Needing Ramps
Bronx	495
Brooklyn	1,657
Manhattan	1,047
Queens	1,007
Staten Island	900
TOTAL	5,106

The parties have provided some information regarding the expense involved in installing ramps. In his May 30, 2017, letter, the Plaintiff's counsel declared:

> In May 2016, the City estimated the approximate cost of [installing] "standard ramps" at $6,000 each, the cost of most "complex ramps" at $32,000 each, the cost of complex ramps built above subway entrances at $50,000 to $100,000 each, and the cost of "complex ramps" built in landmark districts at $50,000 each.

(Stulberg letter to Special Master, May 30, 2017, EX. 12, at 2 (parentheticals omitted).

At the Fairness Hearing, City's counsel reported to the Court that the estimated average installation cost for a standard ramp is about $5,880, and that the average cost for installing a complex ramp is about $32,000. (FH Tr. at 39-40). To date, the City has not been able to provide much documentation of $50,000 figure and $50,000 to $100,000 range quoted by Plaintiff's counsel (email message of Sherrill Kurland to the Special Master of July 5, 2017), nor the (perhaps apocryphal) references to "a million-dollar ramp." (See pp. 158 *supra*, and 217-218 *infra*). Given the variety of complexities that may be present at any particular site, including being over or adjacent to a subway station or other transportation facility; being located in a

historic or landmark district; or presence of a wetland, a vault, a survey monument, steps, trees, or non-Department-of-Design-and-Construction construction interference, and individual differences in sites within any of these complication categories, the "average" and range of cost estimates for "complex" ramps provided by the City are not reliable in the absence of site-by-site evaluations linked to precise expense data.

2. ADA Non-Compliant Ramps Needing Upgrading

The City does not actually know how many corners in its jurisdiction have ramps that do not comply with ADA standards, because it has not done a citywide survey of them. Counsel for the Plaintiff stated in his May 30, 2017, letter to the Special Master that "the City has completed surveying only about 18% of the City's street corners and, therefore, lacks information as to the number of ramps to be upgraded, the types of upgrades needed on those ramps, and the cost of upgrading those ramps." (Stulberg letter to Special Master, May 30, 2017, EX. 12, at 4). Since 2014, the City has conducted a survey of 29,165 corners (approximately 18% of total corners in the City), mostly in Lower Manhattan; DOT has summarized the results in the document titled "Category Breakdown of 29,165 Corners Surveyed," EX.10, discussed at pp. 154-155 *supra*. Based upon the survey results, DOT has estimated that 119,184 corners need to be upgraded citywide (2,654 more than the 116.530 figure quoted at the Fairness Hearing and in other DOT documents), and amounting to approximately 73.4% of all corners (or 74.4% if one uses the 160,000 estimate of total corners). The projected percentages must be taken with a grain of salt, however, as they are extrapolated from a sample that is small (18% of corners) and derived principally from an area – Lower Manhattan – that does not adequately represent the City as a whole.

Taking the DOT projections at face value, they provide some insight into the deficiencies of a sizeable proportion of City ramps. Twenty-five percent of non-compliant ramps surveyed had no detectible warning tiles, and the other 75% had problems with slopes, ramp widths, and a variety of other defects of tiles, ramps, curbs, and sidewalks. Some of these presumably involved curb ramps that were not ADA-compliant when installed; others that initially were compliant with ADA standards but became non-compliant due to changes in the standards; and some that became substandard due to deterioration, damages, accidents, construction, and other causes.

Apart from the 2014-2017 survey, ***no data have been presented to indicate how many or what percentage of ramps in New York City have been compliant or non-compliant with ADA standards over the years since the lawsuit was filed and during the application of the 2002 and 2016 Stipulations. The projections made by the City that about three-quarters of existing ramps are not in compliance with ADA curb ramp standards are the best information presently available.***

Regarding the costs of upgrading ramps, Plaintiff's counsel wrote in his May 30, 2017, letter, that "the City advised us last week that the cost of upgrades can vary widely depending upon what work is needed and who does the work (e.g., a ramp in need of a detectable surface can cost from $1,860 for an in-house crew to $3,576 for an outside contractor, and a ramp requiring reconstruction can cost from $8,601 for an in-house crew to $13,284 for an outside contractor." (Stulberg Letter to Special Master, May 30, 2017, EX. 12, at 4). The City was able to provide some documentation for the $1,860, $3,576, $8,601, and $13,284 figures quoted. (Kurland July 5, 2017, email message). However, these figures are too imprecise, with too many variables, to provide the basis for useful calculations.

D. What Has Been Done and What Still Needs to Be Done

The statistics and commentary in the preceding subsections provide considerable information about the things that have been accomplished in achieving curb ramp accessibility in New York City and the work that remains. This subsection provides a brief overview of advances that have been made and objectives that have yet to be achieved.

1. Accomplishments

Progress has been made in the curb ramp situation since 2002 under the two stipulations. The accomplishment of which the parties probably have most sung the praises is that 97% of City corners – 155,169 – now have curb ramps. They have also highlighted that the City has spent large sums of money under the Stipulations – approximately $243 million under the original stipulation, and commitments in the 2016 Stipulation totaling $294.8 million for installations, upgrades, and repairs from 2016 through 2019. Together that would total $537.8 million over 18 years, or about $29.9 million per year. Pursuant to the 2016 Stipulation, curb ramps are already being upgraded on a priority basis in Lower Manhattan. By letter of May 18, 2017, Senior Counsel for the City notified the Special Master that the City had "increased its pedestrian ramp upgrade funding … to $60 million per year for fiscal years 2017-2027 in the City's latest 10 Year Capital Commitment Plan published on April 26, 2017." (Kurland May 18, 2017 Letter, EX. 11, at 2, and ex. A).

A citywide survey of corners, on a has/does-not-have-curb-ramps basis, has been acknowledged and its results reported. DOT has identified the 4,431 corners that need ramps but do not have them, and the list of all corners so identified has been provided by the City to the Special Master and the Plaintiff, and sent to Counsel for the Objectors. (EX. 9, ex.A). Since

2014, DOT has surveyed 29,165 corners to assess their compliance with ADA standards, the results have been reported, and projections made from it for the entire City.

Under the 2016 Stipulation, the City has modified DOT's website to add links to its Accessibility Coordinator, and made some enhancements to the City's 311 system, including adding search terms to assist operators to properly direct accessibility complaints.

2. Still to Do

The task of achieving full accessibility of pedestrian crossing accessibility in the City is far from finished. Some of the accomplishments described in the previous subsubsection have less-than-rosy aspects. The statistic on ramps installed overall (97%), for example, is greatly tarnished by three facts: first, that 14 years after the 2002 Stipulation, 4,431 corners that need ramps still do not have them; second, that the average yearly rate of ramps installed has plummeted dramatically; and third, that the City's numbers indicate that 80% of the corners in the City either do not comply with ADA standards, or do not have a ramp at all though one is needed.

The impressiveness of hefty amounts of money committed to ramp construction and upgrades is lessened somewhat by the City's failure to provide any direct, systematic documentation of the linkage between the funds expended and the number of ramps they underwrote, leaving some doubt as to whether the funds have been spent efficiently and productively. And the survey of ADA compliance of 29,265 corners is a start, but only a start, and a belated one at that. When used to project assessments of the entire pedestrian network in the City, standards for valid and reliable data collection dictate that the limited survey does not provide a sufficiently large and representative sample.

Two of the most substantial unfinished tasks are upgrading the three-quarters of City corners with ramps that do not come up to ADA standards, and installing ramps on the 4,431 corners without them. To make that possible, the detailed survey of ADA compliance and non-compliance of corners needs to be completed over the whole City as soon as possible, and its results verified and made available. Feedback from disability organizations and the public needs to be solicited to augment and verify the results obtained. These and other measures to facilitate the achievement of the basic objectives of the 2002 and 2016 Stipulations are discussed in Section XII *infra*.

XI. ASSESSMENT OF THE 2016 STIPULATION

Since 2003, the requirement that, before approving a settlement agreement in a class action lawsuit, a Court must hold a hearing and make a determination that the settlement is fair, reasonable, and adequate,[371] has provided an extra layer of protection for members of the class, so that their rights will not be abrogated or bargained away inappropriately by the terms of a settlement. Since one of the principal purposes of settlement in a class action is to ensure that class members receive appropriate relief, commensurate with what they were likely to have obtained had the case been litigated to completion without the settlement, taking into account the time and resources that extended litigation entails, the Court must determine whether the relief afforded members of the class is fair, reasonable, and adequate.

A. Elements of a Fair, Reasonable, and Adequate Settlement Agreement in Such a Case

At the very beginning of the Fairness Hearing, Judge Daniels cut to the chase by describing the major things he wanted to get from the proceedings; he said that he wanted to know (1) "whether there is a plan pursuant to this agreement for full compliance with the ADA and what that full compliance would entail"; (2) "what … is the timetable for such full compliance, what the schedule is, and what would be a completion date"; and (3) what moneys are committed to this." (FH Tr. at 3-4). And these questions, said Judge Daniels, were in the overall context of "what is it about the 2016 agreement that gives any assurance that, considering the 2002 agreement, that 14 years from now we won't be sitting around this courtroom talking about the same issues and saying that we need another 16 years to try to figure out what needs to

[371] F.R.C.P. 23(e)(1)(C), as amended on Mar. 27, 2003, effective Dec. 1, 2003.

be done and how it's supposed to be accomplished." (*Id.* at 5-6). Later, Judge Daniels directed the Plaintiff's counsel:

> You have to tell me what it is that you expect they are going to accomplish, when they are going to accomplish it, and how much it is going to cost so I can anticipate and everyone else can anticipate that they had the commitment to do that and that's what they intend to reasonably do.

(*Id.* at 112-113)

The Court's queries probe matters that are at the heart of a fair, reasonable, and adequate settlement agreement – what have the parties agreed to do, when have they agreed to do it, how can we know whether or not they are doing it, what is to happen if they are not doing it, and when will they have fulfilled their obligations under the settlement. If the settlement agreement is in a class action suit, a major additional concern under Federal Rule of Civil Procedure 23(e) is the fairness, reasonableness, and adequacy of the terms and relief under the settlement to the members of the class. A comprehensive review of the components and terms of the numerous settlement agreements resolving curb ramp disputes under the ADA is well beyond the scope of this report, but settlement agreements in some of the cases discussed in subsubsection IV.D.3 of this report attest that almost all such settlements contain: a schedule for the defendant municipality to install ADA-compliant ramps and upgrade ramps that do not comply with current ADA standards to make them compliant, with deadlines and target numbers of ramps; standards and procedures for ensuring that legal requirements and agreed-upon terms are met; funding and administrative commitments for enabling the scheduled ramp construction and upgrades; a requirement for regular reporting and verification of progress in installing (or upgrading) ramps; a description of consequences if the defendant municipality is not meeting the schedule; and a target deadline for completing full compliance.

An analogous, condensed version of such elements is found in the ADA regulations' requirements for an ADA transition plan, which state that, if a public entity has responsibility or authority over streets, roads, or walkways, "its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs," and "shall, at a minimum -- (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities; (ii) Describe in detail the methods that will be used to make the facilities accessible; (iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and (iv) Indicate the official responsible for implementation of the plan." (28 C.F.R. §§ 35.150(d)(2) & (3)).

B. Interplay with 2002 Stipulation

As noted in at p. 127 *supra*, the original validity of the 2002 Stipulation is not at issue at this time and the Special Master was not authorized to investigate and provide the Court with input as to whether the 2002 Stipulation was fair, adequate, and reasonable at the time it was executed. But, as also mentioned previously, the 2002 Stipulation continues to matter significantly on the issue of the fairness, reasonableness, and adequacy of the 2016 Stipulation in providing relief to the Plaintiff Class. Critically, the 2016 Stipulation did not terminate or replace the 2002 Stipulation, but expressly embraced its continuation; the 2016 Stipulation provides that it "supersedes corresponding provisions of the [2002] Stipulation," but "the Stipulation shall otherwise remain in full force and effect" (2016 Stip. at 1, 3), paraphrased by Plaintiff's counsel at the Fairness Hearing as "the 2002 Stipulation … continues to live on except as changed by the 2016 Stipulation …." (FH Tr. at 93).

Thus, many of the provisions of the 2002 Stipulation continue to be applicable to govern relief that the class will receive under the combination of the two Stipulations going forward. And continuation of some of the 2002 provisions has a strong impact on the fairness, reasonableness, and adequacy of relief available to class members today. As the following pages will demonstrate, some of the gaps and flaws in the 2002 Stipulation have a bearing on the appropriateness of relief to the class in the present proceedings; the relief due now depends largely on how far relief has proceeded under the prior stipulation. And unless significant gaps and flaws in the 2002 Stipulation are addressed under the 2016 Stipulation, they will continue to impede progress and relief to the class in future days.

A primary feature of the 2016 Stipulation is that it explicitly supersedes some provisions of the 2002 Stipulation and preserves others. Evaluating the fairness, reasonableness, and adequacy of the 2016 Stipulation certainly encompasses an examination, not just of its alteration of provisions of the 2002 Stipulation, but also of its extension of other provisions of that Stipulation. At the Fairness Hearing in 2016, Judge Daniels clearly recognized the interrelationship between what had occurred under the 2002 agreement and what needed to be done under the 2016 Stipulation; to counsel for the Plaintiff, the Court commented, "what prompted this [2016] agreement is your obvious dissatisfaction to the city's meeting its obligations under the first agreement. …What were you dissatisfied with in 2016? … I'm trying to figure out what were you dissatisfied with and how this agreement fixes it." (FH Tr. at 71). Judge Daniels also said that he was trying to avoid the possibility that in the future the parties and the Court would end up being "still dissatisfied about the same thing even beyond this agreement." (*Id.*). Counsel for the Plaintiff replied, "We were dissatisfied because the amounts of money that had been committed and expended … had not accomplished the objective of the

original [agreement] and the commitment that the City made in the original agreement." (*Id.* at 72-73). Thus, the virtues and deficits of the 2016 Stipulation can only be assessed in conjunction with the provisions of the 2002 Stipulation and the progress made under it.

1. Extremely Circumscribed Scope

The 2002 Stipulation is extraordinarily narrow in scope. It has a pinpoint focus on installation of new curb ramps. ***Remarkably, the Stipulation nowhere says that the ramps installed under it must comply with ADA standards. It does not address, or even mention, the upgrading of existing curb ramps to achieve compliance with ADA standards.*** The closest it comes to referring to ADA compliance at all is when it declares that "[t]he Federal government, in enacting the ADA, found that the installation of curb ramps at all locations in the City where pedestrian walkways cross curbs is essential to the integration of individuals with disabilities, particularly those who use wheelchairs, into the commerce of daily life." (2002 Stip. at 2, ¶ 1). No funding or performance commitment under the 2002 agreement relates in any way to complying with ADA accessibility standards,[372] in new or existing ramps.

Nothing prohibits a litigant from choosing to frame a lawsuit narrowly or to have it address a single part of a multi-faceted problem, instead of the whole shebang. It may become problematic, however, if the claims or remedies are too constricted to permit fair and adequate relief. In the present case, two vital questions arise: first, whether aspects of the 2002 Stipulation have undercut or reduced progress in bringing City curb ramps up to ADA-required levels; and, second, whether it became apparent, at some interim point in time between the 2002 Stipulation and the beginning of the negotiations that led to the 2016 Stipulation, that the

[372] One of the "whereas" clauses of the Stipulation mentions Title II of the ADA and "its implementing regulations," but only in the context of saying that EPVA had brought suit against the City for alleged violations of them." (2002 Stip. at 2).

measures being meted out under the 2002 Stipulation were insufficient to provide fair and adequate relief to the Plaintiff Class. Answering these questions requires additional scrutiny of progress or lack of progress made during the pertinent years.

2. Diminished Progress

In this context, numerical data, many of them already cited, provide important insights. As to installing ramps at corners where they were needed, an important fact is that ***rates of curb ramp installations have actually fallen drastically since the 2002 Stipulation was signed: From FY1994 to FY2002, 53,333 ramps were installed over 8 years – an average rate of 6,667 per year – while from FY2002 to FY2013, 43,573 ramps were installed over 11 years – an average rate of 3,961 per year.*** Thus, ***ramp installation rates fell 41% from FY1994-FY2002 to FY2002-FY2013.*** This downward spiral has continued until today, with the rates of installations having fallen to an average rate of 2,467 per year for the period from FY2013 to FY 2015, and 198 per year from FY2015 to the present. The 2002 to 2013 decrease took place at the time when the "blitz construction" approach had been agreed upon by the parties, in lieu of linking installations to street alterations, on the rationale that the "blitz" method would speed up the installations because it was "the most efficient and the most cost-effective construction method for the installation of standard curb ramp installations ...." (2002 Stip. at 8, ¶ 11). The data indicate otherwise.

As for upgrading ramps, for most of the relevant years no statistics are available as to how many ramps have been upgraded to ADA standards under the 2002 Stipulation, how many ramps around the City met or did not meet ADA standards, and how many ramps installed under the 2002 Stipulation were not compliant with ADA standards when installed. Such information does not exist for several reasons: first, the 2002 Stipulation did not require any ramp upgrades;

second, it did not require installed ramps to be ADA-compliant; third, the City had (and has) not done a citywide survey of ramps to determine which comply with ADA standards and which do not; and, fourth, the 2002 Stipulation did not require any collecting or reporting of statistics regarding ramp upgrades or ramps compliance with ADA standards. ***Now that we know (based on projections from the survey of 29,165 corners, begun in 2014) that only an estimated 20% of the City's corners comply with ADA standards, and approximately 73.4% of all the corners need to be upgraded, it is apparent that the deficiencies of the 2002 Stipulation are largely to blame for the dearth of ADA-compliant curb ramps.***

The "Purpose" section of the 2016 Stipulation refers to upgrades only for "curb ramps that were installed pursuant to the Stipulation in compliance with the ADA Standards, but which are no longer in compliance with those standards," (2017 Stip. at 3, ¶ 1(b); see also the third Whereas Clause, *id.* at 2), but the "Priorities" section indicates that ramps in Lower Manhattan and those adjacent to streets being resurfaced will be upgraded. (*Id.* at 5-6, ¶¶ 6.B & C). Counsel for the Plaintiff, in explaining the lead-up to the 2016 Stipulation negotiations, stated that the Plaintiff learned "from an exchange of information with the City, … that over the course of those years, many ramps that had been compliant with the ADA, that met ADA standards when they were installed, were in 2013 no longer compliant." (FH Tr. at 73). He indicated that "[o]ne of the categories of ramps that we were concerned with at that time were ramps that lacked detectable warnings, truncated domes …." (*Id.* at 74). At the Fairness Hearing, counsel for the City engaged in a lengthy, confusing dialogue with the Court regarding what the 2016 Stipulation required in regard to ramps that were ADA-compliant when installed but were not currently compliant. (FH Tr. at 55-62).

Given that only 20% of curbs in the City comply with ADA standards and the statistical array of defects of ramps identified in the survey of 29,165 corners, it is obvious that the ADA non-compliance of many ramps is not solely or even primarily due to ramps that slipped from compliance to non-compliance because of changes in the standards. Instead, the high degree of non-compliance likely stems from the 2002 Stipulation's not including a requirement that ramps installed under the Stipulation had to be ADA compliant, or from ignorance, disregard, or shoddy application of the ADA standards. During the Powerpoint presentation at the December 12, 2016, meeting of the Special Master with DOT employees and the parties' attorneys, one of DOT's slides revealed that the need for ramp upgrades was "*due to a number of factors*, including changing ADA requirements, along with deterioration of corners with existing ramps, etc." (EX. 8, Slide 2 (emphasis added)). In any event, the assertion that a significant portion of currently non-compliant ramps were compliant when installed could only be credible if supported by ramp-by-ramp documentation of what the non-complaint features of each ramp are, when the particular ramp was installed or upgraded, and what ADA standard applied. Such evidence has not been provided.

Although it is not a precise analysis, some perspective is provided by examining what the curb ramp accessibility situation could have been without the Stipulations, if the City had merely followed the ADA regulatory mandate that ramps complying with ADA standards be installed or achieved by upgrading along all streets being resurfaced or otherwise altered. If the 1994-2002 rate of installations had continued, all corners would have had ramps by approximately 2010 – which is what the projections in Attachment A ("Projected Number of Ramps to Be Constructed") to the 2002 Transition Plan forecast (with some conditions and provisos). And **based on the City's declarations that all streets are resurfaced in 20 years or less, if the**

ADA regulations' requirement that ramps shall be upgraded to ADA standards on corners adjacent to resurfaced streets, all ramps in the City would have been upgraded between 2002 and 2022; by 2016 approximately 70% would have been upgraded to ADA compliance at least once, instead of only 20% that comply with the standards today. These statistics do not take into account that some ramps may have become non-compliant after installation, but that datum is not available and may be relatively small, and might have been more than offset by the extra funding that would have been available if the installation of ramps at all corners had been completed years earlier. **It is quite plausible that the 2002 Stipulation may actually have slowed down progress in achieving accessibility of the curb ramps of New York City.**

These statistical realities and parsing of the figures need not impugn the motives and good faith of the parties in entering into the 2002 Stipulation. They may have signed the agreement with a genuine belief that it would achieve its objectives in a timely basis and significantly further the interests of curb ramp accessibility in the City. EPVA may have relied on the goodwill of the City and its employees, and assumed that the rates of ramp installations would increase sharply under the Stipulation, and that DOT would install only ADA-compliant ramps, and that eventually all ramps in the City would somehow be made compliant with the ADA. City officials and legal counsel may have sincerely believed that DOT would see to it that the pace of ramp installations and ADA compliance would soar under the terms of the Stipulation. Judge Daniels voiced much the same sentiment at the Fairness Hearing, when, in discussing with counsel for the Plaintiff whether the 2016 Stipulation was sufficient to do what was necessary, he observed, "If I was making this determination in 2002, we both would have been wrong.... We would have thought that that was adequate to get this job done and get the

job done expeditiously, and you would have to stand here and agree with me that that did not occur for whatever reason. It's not saying it's the City's fault or any particular person's fault. It just didn't happen." (FH Tr. at 129-130).

Given the unavailability of pertinent data from the years immediately after 2002, it is impossible to say whether the Stipulation achieved its accessibility goals during its early years. But what the available numbers do show is that at some point after 2002, well before 2013, it became clear that the Stipulation was not having the positive effects that had been expected. Had either of the parties kept an eye on what was happening "on the street" in regard to improving accessibility of curb ramps in the City under the 2002 Stipulation, after a few years, bells would have begun ringing and alarms would have been going off. Whatever great hopes and high expectations the parties may have had, signs were accumulating that the Stipulation was not working. Fewer and fewer ramps were being installed; no information was being collected as to whether the new ramps were compliant with ADA standards and what proportion of existing ones were ADA-compliant; and while the City was reporting the large expenditures the Stipulation called for, little if any information was forthcoming as to how many ramps were being installed for all of those dollars spent. In short, the ramp accessibility train had run off the tracks and the parties seem not to have been aware of it. The ultimate point is not the blameworthiness of either of the parties, nor of any particular official, department, employee, or legal representative, but that the relief, in the form of curb ramp accessibility, to which people with mobility impairments and others who need or desire to use the ramps were legally entitled, was denied.

C. Further Delays of Relief Under the 2016 Stipulation

Subsection B chronicled ways in which the 2002 Stipulation had resulted in unwarranted delays of relief to the Plaintiff Class, by slowing down progress in attaining full compliance with ADA standards in all corners in the City. The inequity of such postponement of relief for denials of ADA-guaranteed rights gives rise to what might be termed "an arrearage in relief" – a responsibility to take corrective action going forward to offset the unjustifiable deprivation under the prior agreement. Far from seeking to make recompense for not having provided timely relief to the Plaintiff Class until now, the 2016 Stipulation actually occasions substantially more delay of relief in the future.

Under the 2002 agreement, the average rate of ramp installations had plummeted to a preposterously low 198 per year (for 2015-2017). But ***the terms of the 2016 Stipulation would actually slow down the process of installing the remaining 4,431 ramps considerably.*** The replacement of the blitz construction method by conditioning installation on resurfacing (2016 Stip. at 4-5, ¶ 6.A) means that it could be 20 years (the period of time during which all streets will be resurfaced) before some of the corners would be addressed. And, as if that were not enough, corners would only be surveyed for their ramp needs as the adjacent streets were coming up for resurfacing, and if the survey noted that a corner would need a complex ramp (which most of the remaining corners do), a "Pedestrian Ramp Exception" process would be begun, normally involving a long designing and planning period before the ramp construction would begin. (*Id.* at 5-7, ¶¶ 6.A & 7). ***The 2016 Stipulation sets no end date for ramps to be installed on all corners in the City.***

Because the 2002 Stipulation did not impose any requirements relating to curb ramp upgrades, the problem of ramps that do not meet ADA standards was disregarded for the last 15 years. Now under the 2016 Stipulation the City is saying upgrading, other than in Lower

Manhattan, will be done in conjunction with resurfacing. (*Id.* at 4-6, ¶¶ 6.A & B; EX. 8, Slide 11). Again, streets are resurfaced on a 20-year cycle. So ***after having been ignored for 15 years, non-compliant ramps will not all be identified and plans begun for their upgrade and repairs for 20 more years.*** And, as with installations, upgrades where a complex ramp is involved will go through a separate and more time-consuming "Pedestrian Ramp Exception" process. (2016 Stip. at 6-7, ¶ 7).

In sum, ***while under the 2002 Stipulation, installations of ramps had proceeded at an ever slowing rate and upgrades of ramps were almost totally ignored, the 2016 Stipulation calls for extending the timeframes another 20 years or much more, and without any hard and fast deadline for the installations or upgrades.***

D. Stipulated Goals

At the Fairness Hearing, one of the things the Court asked the parties for (as noted at p. 142 *supra*) was "a plan pursuant to this agreement for full compliance with the ADA and what full compliance would entail." (FH Tr. at 3-4). The Court also directed the Plaintiff's counsel to describe "what it is that you expect they [the City] are going to accomplish ...." (*Id.* at 112-113). Integral to an adequate settlement agreement is a clear delineation of the objectives to be achieved and the steps to be taken to achieve them.

Subsection VI.A, *supra,* describes the provisions in the Statement of Purpose of the 2002 Stipulation in which the parties committed themselves to "the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs" (2002 Stip. at 2-3, ¶¶ 2 &3), and included a statement that "the Federal government in enacting the ADA found that the installation of curb ramps at all locations in the City where pedestrian walkways cross curbs is essential to the integration of individuals

with disabilities, particularly those who use wheelchairs, into the commerce of daily life." (2002 Stip. at 2, ¶ 1). The City promised to "make its best efforts to ascertain and use the most efficient and the most cost-effective construction method possible for installation of standard curb ramps." (*Id.* at 7-8, ¶ 11).

In the 2016 Stipulation, the parties declared that they were augmenting and expanding the 2002 Stipulation for the purpose of achieving: (1) completion of installation of curb ramps at remaining unramped locations in the City; (2) upgrading of curb ramps installed in compliance with ADA standards that were no longer in compliance with those standards; and (3) improving the City's methods and procedures for responding to complaints regarding unramped corners and non-compliant ramps. (2016 Stip. at 3, ¶ 1). The 2016 Stipulation set three priorities: (A) Installing curb ramps "with a nexus to resurfacing," (B) Upgrading curb ramps in Lower Manhattan, and (C) Upgrading curb ramps "with a nexus to resurfacing." (*Id.* at 4-6, ¶ 6). The 2016 Stipulation fell short of setting an explicit goal of having ADA-compliant ramps at every corner in the City lacking them. Nor did either Stipulation completely fulfill Judge Daniels's request for "a description of what that full compliance would entail."

E. Schedule of Steps to Be Taken

Consistent with Judge Daniels's request at the Fairness Hearing for a plan and schedule for accomplishing full compliance with the ADA, a schedule of steps to be taken by the parties is a central ingredient of an effective settlement agreement. It formalizes the parties' commitments and expectations regarding what is supposed to happen and when; and provides a necessary, agreed-upon itinerary for future compliance that serves as a touchstone and checklist for measuring and monitoring progress in fulfilling the legal mandate to make pedestrian crossings accessible to and usable by persons with disabilities.

The 2002 Stipulation did not contain any numbers related to curb ramps, and the tables and schedules included in it addressed solely commitments of funds. One provision did mention "time frames set forth in the Amended Transition Plan," but only to provide a disclaimer stating that those time frames "are intended only as guides, and may not be asserted against the City in litigation as an enforceable schedule for installation of curb ramps." (2002 Stip. at 15, ¶ 24). Accordingly, ***the 2002 Stipulation not only did not include a binding commitment to a schedule of curb ramp construction, but expressly forswore doing so***. The 2002 Transition Plan included a statement that "[t]he City estimates that, based on current assumptions, the funding described above will result in curb ramp installments as illustrated on the Attachment A hereto." (2002 Transition Plan, EX. 2, at 9). Exhibit A was the short table of "Projected Number of Ramps to Be Constructed" for each fiscal year from 2002 through 2010, which in total would have amounted to 62,695 ramps, but this projection was subject not only to the 2002 Stipulation's express disclaimer of its enforceability, but also from a proviso in the Transition Plan that "[a]ctual curb ramp installations can be expected to vary from these projections" and a long paragraph of conditions, equivocations, and exculpatory language attached to the obligation to meet the projected numbers of installations. (*Id.* at 9-10). Just how far the parties had been from agreeing on any schedule of, or deadline for, curb ramp installations under the 2002 Stipulation is made plain by separate provisions declaring that the City could reduce the funding for standard curb ramps at the point when capital commitments were sufficient for the design and installation of all standard curb ramps in (1) "any Fiscal Year after FY2008," and (2) in "any Fiscal Year between FY2003 and FY2008," (2002 Stip. at 7, ¶ 10), indicating that the parties had no idea when installation of all standard ramps would be funded and completed.

The 2016 Stipulation presents figures for allocations of money for ramp construction for specified years, and thus satisfies the Court's request for information regarding "what moneys are committed to this" (FH Tr. at 4), but provides no numbers of curb ramps to be constructed with these funds. The only scheduled task performance in the Stipulation is a statement that the City "projects completing the curb ramp upgrades in Lower Manhattan, to the maximum extent feasible … within five years from the date of this Agreement." (2016 Stip. at 5-6, ¶ 6.B). No interim goals are set, nor is there any indication of any consequence for not meeting the "projections." Otherwise, no numbers of curb ramps nor a schedule for their installation or upgrade appear in the Stipulation. No schedule is presented for installing ramps at the 4,431 corners where they are still needed, nor any commitments, "projections," or estimates for upgrading the ramps at corners outside of Lower Manhattan.

The 2016 Stipulation does not give any schedule or deadline for completing the survey of 29,165 corners Citywide (perhaps because it is not clear that the City had even acknowledged the survey or provided information to EPVA about it by the time the Stipulation was signed). ***Completion of the survey to determine which ramps need upgrading to meet ADA standards should be a matter of the highest priority.***

Without target figures and scheduled performance dates, the Plaintiff, the Court, disability organizations, and other interested persons cannot properly monitor the fulfillment of the objectives of the Stipulations, nor can the City be held accountable for providing accessible pedestrian ramps on a timely basis.

F. End Date

Neither of the Stipulations sets any target date for completion of the lawsuit. During the Fairness Hearing, Judge Daniels directed counsel for the City to "[t]ell me where we are going

from today and what's the end game. Tell me how this is going to work out." (FH Tr. at 34). He went on to ask, "What do we anticipate per year to be accomplished, and when will we be where we want to be? At what point in the future?" (*Id.* at 36). While the Court elicited comments from the parties about putting in ramps "expeditiously" and abstract statements about looking forward to the day when all corners have ADA-compliant ramps, the parties have not planned for and decided on, and definitely not included in the Stipulations, a date when they expect the litigation to wind up. In fact, the parties have made comments about the difficulty of setting an end date because ramps deteriorate or are damaged, new pedestrian crossings may be created, and the need for maintenance of pedestrian crossings will continue forever. These concerns are largely beside the point – this lawsuit could surely be concluded by getting all the ramps installed and upgraded; and the City could certainly continue to take care of routine maintenance, repairing damaged corners, and addressing the occasional new pedestrian crossing, without being under the shadow of the Court and a pending lawsuit indefinitely. Not settling on a finishing line for the case runs counter to Judge Daniels's clearly expressed desire to have the issues resolved before another 14 or 16 years pass. Working toward a definite end date would be a great opportunity for DOT and the City to get positive publicity by being able to declare that, as of a date certain, all New York City corners will be fully accessible to and usable by people with disabilities.

G. Conformity with Legal Standards and Requirements

A fair, reasonable, and adequate settlement cannot provide relief to the Plaintiff Class that does not satisfy legal requirements. At a minimum, the settlement must provide the class with relief that conforms to applicable legal standards.

1. Compliance with ADA Standards

The 2002 Stipulation did not include any provision requiring that all curb ramps installed by the City had to comply with ADA standards, which constituted the omission of a key federal regulatory requirement. The 2016 Stipulation includes a provision (oddly placed in the "Funding" portion of the document) mandating that "[t]he installation and upgrades required by the Stipulation … will be performed in accordance with the Stipulation, this Agreement and the ADA Standards." (2016 Stip. at 4, ¶ 5). At the Fairness Hearing, counsel for the City assured the Court that "[t]he City will bring all of the curb ramps up to current ADA Standards …." (FH Tr. at 49). However, the 2016 Stipulation defines "ADA Standards" with a string of statutory and regulatory citations that, as discussed in detail *infra* at pp. 11-12, 137-139, are not only erroneous and misguided, but are not even "ADA Standards." ***Accordingly, under the terms of the two Stipulations, the installation and upgrading of curb ramps at the heart of this lawsuit have not been, and are not, governed by any proper accessibility standards under the ADA.***

2. Blitz Construction

As discussed on pp. 114-115, 118, 128-129 *supra*, the 2002 Stipulation included the unique and controversial tradeoff in which the City agreed to install pedestrian ramps on an expedited, "blitz" basis in return for the Plaintiff agreeing to the City being "excused" from installing ramps in connection with street resurfacing projects, as required under the ADA. (2002 Stip. at 7-8, ¶ 11 & 16, ¶ 27). The paragraph on "Resurfacing Requirements" included language of a dubious *ex post facto* (*lex retro non agit*?) nature, that made the "excuse" retroactive to January 1, 1999. (*Id.* at 16, ¶ 27). The Objectors and the United States have expressed strong condemnation of this part of the agreement. On p. 127 *supra*, this report examined the possibility that the parties might have the prerogative to choose one right or one way of providing relief over another and make such a deal. As explained in subsection XI.B, on

pp. 178-179 *supra*, however, regardless of its legality or illegality at the time of its adoption, in practice this arrangement did not live up to its rationale for very long, and actually resulted in seriously diminished progress toward curb ramp accessibility. The 2016 Stipulation reverses the arrangement, rejects the blitz approach, and requires upgrades of non-compliant ramps and installation of new ramps where needed to be done whenever streets are resurfaced. (2016 Stip. at 4-6, ¶ 6). But this reversal does not address the time lost under the prior bargain, and makes it worse by piling on additional postponements of installations and upgrades. (See pp. 183-185 *supra*).

3. Complex/Standard Ramp Distinction

As discussed on pp. 127-128 *supra*, the Objectors and the United States took exception to the distinction made in the 2002 Stipulation between "complex ramps" and "standard ramps. In that earlier discussion, the point was made that making non-statutory distinctions and even including them in a settlement agreement is not illegal, *per se*. The permissibility of such distinctions depends upon the manner in which they are used. The 2002 Stipulation defined "standard curb ramps" as "those which can be installed without a unique design drawing for that location," and "complex curb ramps" as "those which require a unique design drawing for that location, usually due to an obstruction or other unusual site condition." (2002 Stip. at 3, ¶ 5). These terms are in common usage within the City's DOT and have no innate impropriety or taint. The real issue is not whether the terms are bad or impermissible, but the use made of them. As defined, the distinction makes sense, differentiating between simple, straightforward, routine ramps, which can be installed using standard plans and methods, and those that are more complicated and require individually tailored design drawings.

Over time, the administrative practice became that, when they encountered a site condition that required a complex ramp, DOT or its contractors would fill out a Pedestrian Ramp Exception form, indicating that special planning and design would be required. This process has been memorialized in the 2016 Stipulation. (2016 Stip. at 6, ¶ 7). Unfortunately, in practice, the inclusion of a potential ramp site being labeled as complex too often has become synonymous with saying "we don't have to deal with that one anytime soon," thus saving the more difficult ones until later, with the result that most of the more time-demanding and costly ramps have not yet been addressed. Moreover, all of the complex ramps are put into a single basket for indefinite delay, without regard to the spectrum of individual differences in the types and degrees of complexity. The survey of 29,165 corners, found that, as of December 2016, over 77% of the corners surveyed that needed curbs installed required complex ramps. A better plan would have been to spread the installations of complex ramps along the way, and, at the least, to prepare reports describing which corners have been declared complex, the reasons why, and when the ramp at each particular corner will be installed.

4. Undue Burden Limitation

Another issue regarding legal standards has to do with limitations on curb ramp requirements that may serve as defenses to claims that a city has not fulfilled its legal obligations to install and upgrade such ramps. As discussed on pp. 116-117, the 2002 Stipulation included several assertions of an "undue financial burden" limitation on the City's obligations under the agreement. (2002 Stip. at 13-14, ¶ 20; 14, ¶ 21; 15, ¶ 23; 16, ¶ 25; 17, ¶31). The United States, in its Statement of Interest, observed that "the undue burden analysis is inapplicable to new construction or alterations." (Dock., #121, at 6). The parties acknowledged the inapplicability of

the undue burden limitation and financial burden defense (See, e.g., FH Tr. at 121), and it is not mentioned in the 2016 Stipulation. However, the 2016 Stipulation did not explicitly countermand or rescind the undue financial burden provisions of the 2002 Stipulation.

5. Infeasibility

Though the 2016 Stipulation avoids mentioning the undue financial burdens limitation, it incorporates other limitations on (or defenses to) requirements for full compliance with ADA standards. These focus on feasibility, variously articulated as performing obligations "to the maximum extent feasible" (2016 Stip. at 5, ¶ 6.A; 6, ¶¶ 6.B & 7), or not being required to do things that are "infeasible" or "technically infeasible" (*Id.* at 6, ¶ 7), or "structurally impracticable" (*Id.* at 6, ¶ 7), and the like. At the Fairness Hearing, counsel for the City and the Court had a lengthy interchange about feasibility and infeasibility (FH Tr. at 13-18, 25-30), during which the Court challenged the City's "carte blanche exception – to the extent feasible," and got counsel to admit that the City had "never made a determination that any particular site fits this category as of today." (*Id.* at 13).

The ADA regulations and regulatory guidance have declared in regard to "maximum extent feasible": "The feasibility meant by this standard is physical impossibility only. A public agency is exempt from meeting the ADA standards in the rare instance where physical terrain or site conditions restrict constructing or altering the facility to the standard"[373]; "Cost is not a factor in determining whether meeting standards has been completed to the maximum extent feasible"[374]; and "The burden of proving technical infeasibility lies with the state or local

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[373] Federal Highway Administration, "Questions and Answers About ADA/section 504 – Civil Rights," Question 25, https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q23, citing ADA Accessibility Guidelines,4.1.6(1)(j).

[374] *Id.,* citing DOJ, ADA TITLE II TECHNICAL ASSISTANCE MANUAL, §§ II-6.3200(3)-(4) (1993) (Sep. 12, 2006).

government that constructed it."[375] As discussed at pp. 89-91, the Second Circuit ruled, in the context of an ADA lawsuit challenging wheelchair inaccessible facilities at a resort, that "to the maximum extent feasible" "requires accessibility except where providing it would be 'virtually impossible' in light of the 'nature of an existing facility.' The statute and regulations require that such facilities be made accessible even if the cost of doing so—financial or otherwise—is high."[376] Thus, "[o]nly if there is some characteristic of the facility itself that makes accessibility 'virtually impossible,' then, may the provision of access be excused."[377] Such limitations are included in the ADA regulations, but have definitively been declared to apply only in the rarest circumstances, which makes the inclusion of them in the 2016 Stipulation and the City's frequent references to them unseemly and begrudging. A better tack would be to state a strong intent to make all the City's curb ramps comply fully with the ADA standards, and, if the extraordinary circumstances ever come to pass, the City will be fully protected by the presence of these limitations within the regulations.

6. Detectable Warnings

"Detectable Warning Surfaces" (truncated domes) have been required on curb ramps since the issuance of the Americans with Disabilities Act Accessibility Guidelines in 1991. To allow additional research, a suspension was placed on the requirement in 1994, which lasted until it was allowed to expire on July 26, 2001. The 2016 Stipulation (like the 2002 Stipulation) does

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[375] *ADA Tool Kit: Curb Ramps and Pedestrian Crossings under Title II of the ADA*, https://www.ada.gov/pcatoolkit/chap6toolkit.htm.

[376] *Roberts v. Royal Atlantic Corp.*, 542 F.3d 363 (2d Cir. 2008), quoting 28 C.F.R. § 36.402(c), *cert. denied*, 556 U.S. 1104 (2009).

[377] *Id.* at 372.

not mention the Detectable Warning Surfaces requirement, an omission with which the Objectors take strong umbrage:

> [T]he agreement does not provide a single term specifically addressing access to pedestrian routes for blind and low-vision persons. To safely navigate the sidewalks and streets, blind and low-vision pedestrians need accessible features that go above and beyond those contemplated in the Settlement, such as installation and maintenance of detectable warning on curb ramps....

(Objection Letter at 6-7, subsection 4.B).

The parties have taken the position that the 2016 Stipulation requires newly installed ramps to comply with current ADA standards, and that those standards require detectable warnings on curb ramps. As counsel for the City put it at the Fairness Hearing, "Under current standards, it's an integral part of the ramp. You can't have the ramp without the tactile warnings. You can no longer install a ramp without tactile warnings." (FH Tr. at 64-65). Counsel also told the Court that, even if it were not legally required to install truncated domes, "the City will be installing them anyway," (*Id.* at 49, and that the City changed its specifications at the end of 2001 to include tactile warnings, (*Id.* at 66-67). In its letter to the Court responding to the Objectors' submissions, the City declared: "[t]he Stipulation Resolving Disputes specifically (and repeatedly) requires curb ramps to be installed and upgraded in compliance with 'the standards of the ADA and its implementing regulations and guidelines,' which include the provision of truncated domes to assist individuals with vision impairments," and added that "the City has agreed to upgrade curb ramps with truncated domes even when not required under the so-called "safe harbor" provision of the relevant regulations." (City Objection Response Letter, at 8 (emphasis in original)). Counsel for the Plaintiff declared that the 2016 Stipulation requires that "every ramp, whether put in ten years ago or put in tomorrow, must comply with the regulations that protect visually impaired people who need those truncated domes. So we are absolutely committed to that." (FH Tr. at 80). The parties' position on detectable warnings

under the 2016 Stipulation is sound; it would seem to be in every one's best interest, however, to have a provision in the Stipulation explicitly endorsing the detectable warning requirement.

7. Other Barriers

The Objectors have challenged the failure of the 2016 Stipulation to address barriers other than corners not having ADA-compliant ramps, including "mid-block barriers on sidewalks and pedestrian routes, such as raised or uplifted sidewalks, permanent or moveable obstacles that block the path of travel for cane or wheelchair users, or the barriers caused by construction zones, or from traveling to the street because the sidewalk is inaccessible"; and have contended that such barriers "obstruct the path of pedestrians with disabilities and put them at grave risk of injury from protruding objects, from inadvertently entering construction zones, or from traveling in the street because the sidewalk is inaccessible." (Objection Letter at 6-7, subsection IV.B). The 2016 Stipulation did include, in a footnote, a statement that "the City has allocated $26,500,000 for general sidewalk repairs in FY2016 and in FY2017. This is in addition to the City's baseline capital commitment of $20,000,000 per year for general sidewalk repair," but there is no designation of such expenditures to disability accessibility. (2016 Stip. at 9, ¶ 4 n.1). The Objectors contend further that "the 2016 Stipulation also fails to even mention or address any commitments or policy changes regarding attention to weather-related impediments at curbs and sidewalks, such as defective drainage and ponding at the bases of curb ramps." (Objection Letter at 7, subsection IV.B). And they make a more general complaint that the 2016 Stipulation contains "[n]o provision for maintenance." ("Deficiencies in 2016 Stipulation," Objectors' Submission, EX. 5, ex. 1, # 6).

To the extent that certain of these issues, such as maintenance of curb ramps and ponding at the bottom of ramps, directly affect the usability of the ramps by members of the class, they

are sufficiently interconnected with the claims in the case that it is reasonable to consider them as within the scope of the lawsuit. And there is a certain clear logic to the view that making curb ramps accessible is futile to the extent that people with disabilities cannot get to the ramps. On the other hand, parties have considerable latitude to frame the issues they choose to litigate (though not at the expense of impinging on the rights of class members). One point is clear, however – if these other issues are construed as not being within the scope of the *EPVA v. City of New York* lawsuit, it would be fundamentally unfair to permit this case and the Stipulations resolving it to be used to preclude members of the class who so choose to do so to litigate these serious issues on their own.

H. Procedures for Ensuring that Stipulation Commitments and Legal Requirements Are Met

Enforcement procedures for the requirements of the 2002 and 2016 Stipulations derive exclusively from the former. The 2016 Stipulation establishes no mechanisms or processes for addressing disputes or enforcing obligations under the Stipulations; its only reference to such procedures is a single provision stating that DOT shall provide Class Counsel with copies of completed PRE Forms; that, in the event of a dispute regarding a corner covered by a PRE Form (i.e., involving or needing a complex ramp), the Plaintiff Class "will have recourse pursuant to the procedures set forth in paragraph 30 of the [2002] Stipulation, which remain in full force and effect as set forth in the Stipulation"; and that such recourse must be taken within 120 days of Class Counsel's receipt of the Forms. (2016 Stip., at 6-7, ¶ 7).

Although the 2016 Stipulation does not establish enforcement mechanisms, it does have a provision that allows the parties to modify the terms of the settlement. Paragraph 10, states: "The terms of this Agreement may be modified by the Parties upon a written agreement signed

by the attorneys for the parties." (*Id.* at 8, ¶ 10). The Objectors have used strong words to denounce the provision:

> [T]he City in this Settlement has given itself the ultimate mechanism to avoid compliance with anything. The non-enforceability and illusory nature of the "Settlement" is made starkly evident with [this] provision that has no place in any class action settlement. … [W]ithout judicial oversight or even notice to the Court or anyone, the Parties have allowed themselves a provision to change anything at all, for any reason at all, at any time.

(Objection Letter at 9, subsection IV.D).

Counsel for the Plaintiff responded to the Objectors' contention as follows:

> The objectors complain that the Stipulation permits the parties' lawyers to unilaterally and without Court approval, change the 2016 Stipulation. This is … incorrect. The 2016 Stipulation is a so-ordered mandate. As such, any changes proposed by the parties will be submitted to the Court to be so ordered – just as the 2016 Stipulation was, and to be binding on the Plaintiff Class, any such changes would be subject to a fairness hearing.

(Stulberg Decl. at 21, ¶ 44).

If the parties' intent was as expressed by Plaintiff's counsel, good legal draftsmanship would call for such intent to be spelled out in the provision, to avoid any misconstruction along the lines that the Objectors identified.

As described previously on pp. 118-119, the 2002 Stipulation includes several paragraphs relating to enforcing its requirements and settling disputes that might arise. It called for a meeting of the parties at the outset to agree on "priorities" to justify use of construction methods other than blitz construction; and requires the City to notify the Plaintiff if it contemplated a policy change from blitz construction to some other methodology, in which case the parties would meet to consider the contemplated change. (2002 Stip., at 8-9. ¶ 12). Such notice and meetings are not required as to decisions regarding particular curb ramps, and the Stipulation specifies that the final decision concerning the appropriate construction method for installation of any particular curb ramp, whether standard or complex, remained with the City. (*Id.*).

The parties formed the "on-going working group" expected to meet at least twice a year to share relevant data, and the City agreed to provide EPVA (at least twice a year or at other intervals as the parties might agree) relevant "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps." (*Id.* at 16-17, ¶¶ 28, 29).

A key part of the 2002 Stipulation, Paragraph 30, requires that any dispute related to the Stipulation, including any assertion that the City has failed to comply with any provision, "will be submitted to this Court"; at such a proceeding, the parties have "the right to raise, and may raise, any legal or factual position," and the Court is authorized to "adjudicate any such dispute and grant all appropriate relief." (*Id.* at ¶ 30). Clearly, the breadth of issues that may be raised by a party under Paragraph 30, the Court's jurisdiction to hear and decide disputes over them, and the scope of relief that the Court may grant, are all extremely expansive.

If the New York City Council fails (in the absence of an "undue financial burden" that prevents it from appropriating such capital funds) to appropriate funding as committed under the Stipulation, EPVA may declare the Stipulation "null and void," and may apply to the Court for "appropriate relief." (*Id.* at 17-18, ¶ 31). If EPVA exercises the null-and-void option and makes application to the Court, the parties "may raise any legal or factual position before the Court," and the Court is authorized to grant appropriate relief. (*Id.* at 18, ¶ 31). Obviously, the null-and-void declaration is a potent remedy, the parties' option to raise any legal or factual position is broad indeed, and the Court's authority to issue whatever remedy it deems to be "appropriate" gives the Court wide leeway.

The absence in the Stipulations of performance schedules for installations and upgrades of curb ramps, requirements of objective, verified surveys of City corners, and other stipulated

"deliverables" obscures the lack of another key part of an effective settlement – measures imposed to address and remedy non-performance or dilatory performance, when scheduled mileposts are not met. Such measures have both a prophylactic purpose – to induce a party to fulfill obligations and meet schedules – and a remedial or compensatory aspect – to rectify lapses and nonfeasance and put things back on track. The Stipulations do not impose any such corrective measures. If the Plaintiff decides that the City has not lived up to some obligation it has agreed to, its only option would be to submit the issue to the Court under paragraph 30 of the 2002 Stipulation.

The 2002 Stipulation declared that, upon the execution and so-ordering of the Stipulation, the Action would be dismissed. (*Id.* at 20, ¶ 40). This eventuality occurred on September 10, 2002, when the Stipulation was signed and entered in the Docket (Dock.: # 38), and closure of the case was filed (Dock. Entry on October 1, 2002). The Stipulation provided, however, that the Court retained jurisdiction to hear and resolve disputes arising under or related to this Stipulation and to otherwise enforce the terms of the Stipulation." (*Id.* at ¶ 40). Such continuing jurisdiction provided the basis of subsequent proceedings in the lawsuit up to the present and beyond.

I. Accountability, Reporting, and Transparency

New York City and DOT have publicly embraced transparency and accountability as important governmental objectives. In its 2016 Strategic Plan, DOT described itself as "an agency committed to transparency and public engagement" (City of New York, Department of Transportation, STRATEGIC PLAN 2016, at 87, http://www.nycdotplan.nyc/PDF/Strategic-plan-2016.pdf). DOT identified "[I]ncreased transparency, coordination, and responsiveness" as an agency aspiration in SUSTAINABLE STREETS: STRATEGIC PLAN FOR THE NEW YORK CITY

DEPARTMENT OF TRANSPORTATION, 2008 AND BEYOND, *Communication, Accountability, Transparency,* at 43, http://www.nyc.gov/html/dot/downloads/pdf/stratplan_custservice.pdf. DOT has heralded the Citywide Performance Reporting tool as helping to make "City agency performance transparent and accountable" (City of New York, Department of Transportation, *About DOT: DOT Performance Reporting,* "Citywide Performance Reporting," http://www.nyc.gov/html/dot/html/about/performance-reporting.shtml. The City operates a New York City Transparency Project, online at http://www1.nyc.gov/nyctp/home.htm.

Such accountability and transparency have been quite limited, however, in the context of curb ramp accessibility in the City. It is difficult to see how genuine accountability could occur in regard to installation and upgrades of pedestrian ramps, when neither of the Stipulations contains enforceable scheduled numbers of ramps to be installed or upgraded by specified dates. Even in regard to the City's monetary commitments, for which the Stipulations do specify some timeframes, real accountability is not possible because no targets are set as to how many ramps are expected to be installed or upgraded for the sums of money allocated. Nor has DOT provided the Court or the Special Master information as to how many ramps were actually installed or upgraded with the amounts of money spent for particular periods of time over the months and years since the 2002 Stipulation was signed. Surely New York City has kept track of how many ramp installations and upgrades it obtained with each expenditure of money it has made; it would mark a nadir of fiscal responsibility to spend the taxpayers' money without knowing what that money bought. Assuming that the City and DOT do have such data, it is disappointing that they have chosen not to marshal that information and provide it to the Court and Special Master in support of the fairness, reasonableness, and adequacy of the stipulation agreements.

In addition, ***accountability in regard to compliance with curb ramp standards under the ADA regulations cannot be achieved without a full and ongoing survey of the curb-ramp status of every corner in the City. Neither the 2002 Stipulation nor the 2016 Stipulation requires or indicates any expectation of such a survey, or, indeed, of any survey of any kind.*** As described previously, the survey of some 18% of corners, mostly in Lower Manhattan, was only begun in the summer of 2014, and current plans by the City are to complete the survey in conjunction with the street resurfacing schedule that will take up to 20 years. "DOT projects to upgrade the remaining corners in conjunction with resurfacing projects." (EX. 8, Slide 11).

The Stipulations cannot engender necessary accountability without: (1) specific commitments and a schedule for installations and upgrades; (2) delineations of what the results are to be, and have been, in terms of ramps installed and upgraded for the sums of money expended; and (3) requirements of independent, verifiable surveys to determine the actual status of work done and still to do over the course of the Stipulations.

Transparency has been sorely lacking in the City's curb ramp efforts. Section X.B *supra* on "Unavailability of Adequate Data" describes problems encountered trying to obtain information about progress and lack of progress in the City's operations relating to pedestrian curb ramps. Such difficulties manifested themselves in the parties' submissions to the Court and to the Special Master, statements at the Fairness Hearing, and the Special Master's extended efforts to procure pertinent data from the parties. If it is challenging for the Court and Special Master to acquire basic information about curb ramp status in the City, it is surely far from accessible to people with disabilities and other members of the public who are not professionals, and even for trained advocates such as the counsel for the Objectors. This lack of transparency has continued even though DOT has developed sophisticated electronic databases, linked to

hand-held devices that make possible individualized information about the accessibility status of pedestrian crossings that can be updated almost instantaneously.

The lack of transparency has also manifested itself in the limited reporting the City has done. Under the 2002 Stipulation, the parties agreed to meet at least twice a year to share relevant data, and the City agreed to provide EPVA "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps." (2002 Stip. at 16-17, ¶¶ 28, 29). Scrutiny of this language reveals that it did not require the City to provide data about the numbers and location of ramps installed or missing, about ramp upgrades or corners needing them, or about the compliance of ramps with ADA standards. Over the years, but mostly after 2013, the City has provided the Plaintiff with some information about progress on curb ramps, typically in the form of spreadsheets with limited data. (See, e.g., EX. 3). Generally, these have consisted of two columns – one designating the item of information and one providing the numerical data (dollars, numbers of corners, or percentages) – and as few as nine rows, with a single entry in each, split roughly between funding information and ramp data. (*Id.*) Commonly, these tiny charts do not list any date of issuance, any identification of the official or agency that developed it, nor any indication of the sources or methodology used to prepare it. The dearth and scantiness of such reports explain the need for the Special Master's protracted pursuit of additional reliable information about the number of corners still needing ramps installed and the number of non-compliant ramps in the City.

The insufficient reporting of information by the City has been exacerbated by the reluctance or total failure of the relevant City agencies to acknowledge and reveal some kinds of information. A prime example, described previously, was the City's failure to share, apparently

even with its own attorneys, the existence of, and information about, the survey of all City corners conducted in 2006-2010. Similarly, the prolonged efforts required for the Master to uncover information about, and documentation of, accurate numbers of non-compliant ramps in the City, and information to support the representation that the number of corners needing ramps installed was about 4,800, were described *supra* at pp.132, 145, 146, 150, 151. Eventually, most of these items of information were forthcoming to some extent with the City's submissions to the Master on May 18, 2017, but the City's foot-dragging in making this important information available was unfortunate, indicative of considerable reticence to share its intramural facts and figures, and the opposite of a "transparency."

XII. PATH FORWARD

The discussion and analysis in many of the preceding sections included critical appraisals of the Stipulations and progress made, or not made, under them – identifying and discussing flaws and failings. Such scrutiny is clearly appropriate in the context of the ruling the Court must make as to the fairness, reasonableness, and adequacy of the settlement of the case. The preceding pages make clear that modification of the conjoined Stipulations to rectify relief to the class will be necessary before they can be deemed fair, reasonable, and adequate.

Counterbalancing the negative perspective on some past events in this litigation, this section of the report examines what might be done going forward to accomplish the goals of the Stipulations – goals that Judge Daniels considered ones the Court, the parties, and the Objectors all agree upon, and that would make New York "a better city." (FH Tr. at 152, 155-156).

A. Need for Modification

It should come as no surprise to anyone who was involved in the Fairness Hearing or in discussions with the Special Master that the 2016 Stipulation needs modification. Judge Daniels noted the possibility of a modification to the Stipulation at the Fairness hearing, when, after observing that "there's still a lot of work to be done," he described the central issue remaining as follows:

> The real question is … whether there is something that should be fatal to this agreement for the class or whether or not, ***with or without some recommended and agreed-upon modification***, that this should just go forward as a binding agreement for the entire class and [those] it represents, and provides for the class all of the relief that any individual or class member or group as a class might seek otherwise.

(FH Tr. at 155 (emphasis added)).

He also indicated that the Special Master's report would assist him "either in coming to some agreement, ***if some adjustments are appropriate***, or for me to make an independent judgment

whether I should … approve this as fair and reasonable to the class ***with or without any modifications recommended by the special master***." (*Id.* at 149-150 (emphases added)). Accordingly, the Court charged the Special Master not only to critique the Stipulations but also to recommend modifications that need to be made. (Order of Appointment of Special Master, September 19, 2016, Dock., #111, at 3-4, ¶¶ 2, 3.c & .d; FH Tr. at 149-150.

The parties themselves mentioned the possibility of a modification to the Stipulation toward the end of 2016, including during a conference call with the Master on December 15. At the January 23, 2017, meeting of the Master with DOT Commissioner Trottenberg, members of her staff, and attorneys representing the parties, the Commissioner raised the prospect of what she called "a potential amendment to the Stipulation." Counsel for both of the parties confirmed that they had been negotiating toward a modification of the Stipulation, and Plaintiff's counsel said that he believed the parties were moving rapidly toward a new agreement. Commissioner Trottenberg mentioned the prospect of commitments of $80 million per year, and said that DOT had not agreed to a completion date.

More recently, at the end of May, 2017, ***a disagreement between the parties has made it clear that a modification is essential if the 2016 Stipulation is to have any possibility of approval as fair, reasonable, and adequate.*** The reason modification is required is that the City and the Plaintiff disagree about the meaning of one of the Stipulation's principal elements – the requirement to upgrade the more than 116,000 ramps that do not comply with ADA standards. In the Funding section of the 2016 Stipulation, the City agreed to make capital commitments for upgrading existing non-ADA-compliant ramps of $37,600,000 per year in FY2016 and FY2017 for the City generally, and an additional $11,500,000 in FY2016 for upgrading non-ADA-compliant ramps in Lower Manhattan. (2016 Stip. at 4, ¶ 3). In addition, DOT was required "to

seek additional funds through the City's budgetary procedures in future Fiscal Years … in order to continue curb ramp upgrades." (*Id.* at 4, ¶ 4). The Priorities section of the Stipulation included two provisions addressing upgrading of ramps: one of them referred to the upgrading of existing non-compliant ramps in Lower Manhattan within five years; the other dealt with "Upgrade of curb ramps with a nexus to resurfacing" and mentioned resurfacing, apart from that in Lower Manhattan, only in the context of "curb ramps adjacent to streets being resurfaced Citywide…" (*Id.* at 5-6, ¶¶ 6,B - .C).

Though not necessarily obvious, the difference in the language of the two sections has engendered ambiguity as to whether the sums committed for upgrades, and additional amounts obtained for upgrades through the budget process, are to fund only those connected to resurfacing or whether they may be used to fund other upgrades. Counsel for the City clearly had the latter option in mind when she told Judge Daniels at the Fairness Hearing that "the City within ten years will upgrade 116,000 and change," repeated the statement a few times (FH Tr. at 43-44), and cited in support the City's *10 Year Plan to Upgrade All Ramps: Sidewalk Program and CWC In-House Plan* (EX. 13). The alternate interpretation surfaced at the December 12, 2016, meeting of the Special Master with DOT employees and the parties' attorneys, when during a Powerpoint presentation, DOT flashed the following words on the screen: "**DOT projects to upgrade the remaining corners in conjunction with resurfacing projects.**" (EX. 8, Slide 11). Another slide outlined two options for performing ramp upgrades: using contractors to "[f]ocus on corners in resurfacing stretches" and a much smaller effort involving "[f]ollowing resurfacing stretches as well as complaint and high priority locations." (*Id.*, Slide 12). Subsequently, at the January 23, 2017, meeting of the Special Master with Commissioner Trottenberg, DOT employees, and City attorneys, and in subsequent discussions with counsel,

the Special Master suggested that upgrading linked to resurfacing should be construed as a "floor not a ceiling" – that the ADA regulations certainly do not prohibit additional upgrades not connected to resurfacing. At the end of the meeting, Commissioner Trottenberg stated that she and her staff needed to talk all this over and figure out next steps. ***No further communications from the Commissioner or DOT personnel were forthcoming to the Special Master regarding the upgrading question or the possibility of a modification to address it.*** The Special Master assumed that the parties would negotiate about, and hopefully resolve the issue.

In her letter to the Special Master of May 18, 2017 (discussed at p. 169 *supra*), Senior Counsel for the City announced that the City had "increased its pedestrian ramp upgrade funding … to $60 million per year for fiscal years 2017-2027 in the City's latest 10 Year Capital Commitment Plan published on April 26, 2017." (Letter of Sherrill Kurland to Special Master, May 18, 2017, EX. 11 ("Kurland May 18, 2017 Letter")). This might have represented a bit of progress toward resolution of the alternative viewpoints on the resurfacing provisions. Subsequently, on May 30, 2017, the Plaintiff wrote:

> Since the 2016 Stipulation was so ordered, however, the City has taken the position that, under the Stipulation, curb ramp upgrades are only required during resurfacing and that funds committed to upgrades under the Stipulation need only be spent during resurfacing. This position is directly contrary to the parties' intent and the language of the 2016 Stipulation. Moreover, this position ignores the fact that, although the 2002 Stipulation excused the City from installing curb ramps during resurfacing so long as it complied with "blitz construction" requirements, the City was never excused from upgrading non-compliant curb ramps under the 2002 Stipulation. So, the 2016 Stipulation's two-prong approach to upgrades provides funding to remediate those non-compliant curb ramps that the City should have, but did not, upgrade in past years. In short, the two-prong approach to upgrades is fair, reasonable and adequate to the Plaintiff Class, but the City's mistaken position that the 2016 Stipulation requires curb ramp upgrades only on resurfacing is not.

(Letter of Robert B. Stulberg to Special Master, May 30, 2017, EX. 12, at 3-4).

The Plaintiff also declared that "the 2016 Stipulation can only be deemed to be fair, reasonable and adequate as to … upgrade of ramps" if it "is properly interpreted" in a way that "to date, the City has resisted." (*Id.* at 1-2). The Plaintiff's letter shows that ***the parties differ on the proper interpretation of the 2016 Stipulation and provisions of the 2002 Stipulation as well. A common position on this critical issue is essential to the settlement of the lawsuit and must be reflected in an approvable stipulation.***

Also ***palpably essential is a revision to the 2016 Stipulation to replace its blatantly defective and inaccurate definition of "ADA Standards," discussed supra at pp. 11-12, 137-139, 189-190; infra pp. 237-238, Finding 28. As the overarching yardstick against which the compliance with the ADA of installation and upgrading of curbs ramps will be measured, it is absolutely necessary that "ADA Standards" be clearly and correctly specified.***

B. Available Ingredients of an Adequate Modification

Despite problems and shortfalls in the curb ramp situation in New York City, an inventory of potential building blocks for a fair, reasonable, and adequate outcome in the case at bar yields the following:

1. Consensus Points

While the City, the Plaintiff, and the Objectors still differ sharply on a variety of things, some matters on which they are in agreement include the following:

- The 2016 Stipulation is not satisfactory in its current form.
  (See pp. 205-209 *supra*).
- 4,431 corners (down from 4,800 at the time of the Fairness Hearing) still lack curb ramps.
  (EX. 9, Macfarlane Declaration at 4, ¶ 14); see *supra* pp. 154, 155, 167, 172, 173.)
- An estimated 116,530 corners (about 73%) have curb ramps that are not ADA-compliant.
  (FH Tr. at 42-43; *10 Year Plan to Upgrade All Ramps*, EX. 13; see pp. 149-150 *supra*).
- The City, EPVA, and the Objectors have all acknowledged, cited, and relied on, the City's *10 Year Plan to Upgrade All Ramps (2016)*.
  (See pp. 149-150 *supra).*

- The requirement of detectable warnings on curb ramps is a non-issue, because the City has assured the Court, the Special Master, and the Plaintiff that it will install detectable warnings on all pedestrian curb ramps in the city.
  (See pp. 194-196 *supra*).
- Under the 2016 Stipulation in its current form, the City will continue a baseline capital commitment of a minimum of $20 million per year for ramp installations.
  (See p. 145-146 *supra*; 2016 Stip. at 3, ¶ 2; Stulberg Letter to Special Master, May 30, 2017, EX. 12, at 1).
- The City has committed some $11.5 million to install and upgrade ramps in lower Manhattan within three to five years.
  (See pp. 134, 206 *supra*; 2016 Stip. at 4, ¶ 3.B; FH Tr. at 92 ("three to five years").
- The City has made a capital commitment of an average of $60 million per year for fiscal years 2017-2027 for upgrading pedestrian ramps (up from $37.5 per year for two years under the 2016 Stipulation in its current form).
  (See pp. 158, 171, 206 *supra*; Kurland letter to Special Master, May 18, 2017, EX. 11, at 2).

2. List of Corners without Ramps

On May 3, 2017, the City provided the Special Master with a list of 4,431 corners, listed by borough, intersection, and corner number, that were missing pedestrian ramps as of February 2017. (EX. 9, Macfarlane Decl., ex. A). The list was the result of a purportedly comprehensive survey of all of the corners and ramps in the City, conducted from 2006 to 2010 and updated thereafter, though not disclosed outside of DOT. (*Id.* at 3-4, ¶¶ 9-14). It opens up a number of possibilities: the list's accuracy and inclusiveness can be verified by checking each of the individual corners on it; inspections can be done within each of the boroughs to see if any corners without ramps have been omitted; since the information obtained is stored on Microsoft Excel spreadsheets within a Microsoft Access database, it can be easily and quickly updated and summarized; and the results could be made available to the Plaintiff and the public, including members of the class and other people with disabilities who need to check whether a particular corner is accessible for their use. And, obviously, the results can be used to monitor ongoing progress, or lack thereof, in installations of ramps.

3. Survey of Compliance with ADA Standards of 29,165 Corners

The City's attorneys provided the Master the spreadsheet titled "Category Breakdown of 29,165 Corners Surveyed" (EX. 10), on December 9, 2016, but it was not until May 3, 2017, that they provided documentation of the survey, begun in 2014 and involving 29,165 corners, from which DOT extrapolated results to project citywide figures on the numbers of corners having non-ADA-compliant ramps, and the non-complying features of the substandard ramps. (Heyward May Day Decl., EX. 4, at 2, ¶ 6; 3-4 ¶¶ 13-15; see also exs. A & B to the Declaration). The projections made by the City that about three-quarters of existing ramps are not in compliance with ADA curb ramp standards are the best information available to date. Those results are deplorable and alarming; the seriously incomplete survey, however, opens up some promising prospects. Conducting the survey entailed development of a survey instrument (*Id.*, ex. A), and training of inspectors who gained experience doing such surveys. Information from the surveys is entered (with pictures), using the Collector application on iPads, into DOT's Pedestrian Ramp Geographic Information System Database. These functions make it possible to continue and finish the survey over all corners of the City straightforwardly and expeditiously. ***The prompt completion of the survey citywide is a critical priority in resolving this lawsuit.***

4. 10 Year Plan for Upgrading All Ramps

The City's *10 Year Plan to Upgrade All Ramps: Sidewalk Program and CWC In-House Plan* ("*10 Year Plan*"), EX. 13, developed in the summer of 2015, (see p. 149-150 *supra*), which the City submitted in the *CIDNY v. City of New York* lawsuit on February 6, 2016, as an exhibit to the Declaration by counsel for the City, Sherrill Kurland, in Support of Defendants' Cross-

Motion for Summary Judgment ("Kurland Declaration"),[378] is a very important document. Plaintiff's counsel described the document as "a calculation, a budget projection by the Department of Transportation, presumably by a combination of budget and engineers." (FH Tr. at 98-99). ***It provides the City's planning, with numbers of corners and budget requirements, for upgrading, in ten years, i.e., by 2025, all corners in the City where the ramps do not comply with ADA requirements. It anticipates upgrading 11,653 ramps per year, at an annual cost of $44,602,038 and a total 10-year cost of $446,020,382.***

At the rates of upgrades cited in the plan, the remaining upgrades should be completed in under eight years, because the total number of ramps needing upgrades – 116,530 – was calculated in the summer of 2015, two years prior to the date of this report. In the interim, the City has begun making upgrades on an expedited basis in Lower Manhattan, and presumably doing some upgrades elsewhere in the City. Also, assuming that the remaining curb installations are installed on a reasonably expeditious basis, additional monies should be available thereafter for funding more upgrades sooner.

The *10 Year Plan* stated that it costs $3,500 to upgrade one ramp using a contractor, and $1,845 to upgrade a ramp using in-house crews, and projected doing approximately three-fourths of them with contractors and one-fourth using in-house crews.[379]

A most propitious aspect of the *10 Year Plan* is that both parties and the Objectors have explicitly cited, endorsed, and relied upon it, at the Fairness Hearing, and in documents they

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[378] Declaration by Sherrill Kurland in Support of Defendants' Cross-Motion for Summary Judgment ("Kurland Declaration") in *CIDNY v. City of New York*, Feb. 5, 2015, ex. M, Doc. 96-13, at 3. The *10 Year Plan* was also included in the Objectors' May 2, 2016, Submission to the Court in the *EPVA v. City of New York* case, ex. B, doc. #56-3; and provided as Exhibit 2 to Objectors' Submission to Special Master on Oct. 28, 2016, and provided as Exhibit 3 by CIDNY in its October 28, 2016, Submission to the Special Master.

[379] Upgrades per year: 8,478 (72.8%) by contractors, and 3,175 (27.2%) by in-house crews.

have filed. Such consensus has been rare in these proceedings, and it bodes well as a foundation for moving ahead toward an appropriate modification.

C. Three Imperatives for an Acceptable Settlement

1. Completion of Survey of Curb Ramp Status of All City Corners

The Court, the parties and Objectors, DOT, people with disabilities, their families and friends, and the general public all have a critical need for a comprehensive survey of the curb ramp status of all pedestrian crossings in New York City. On May 30, 2017, the Plaintiff argued that the City must "accelerate its efforts to survey the City's street corners and curb ramps." (Stulberg letter to Special Master, May 30, 2017, EX. 12, at 4).

The May 1, 2017, Declaration of Leon Heyward, DOT's Deputy Commissioner of the Division of Sidewalk and Inspection Management, described the so-called "Survey of 29,165 Corners," begun in the summer of 2014, that, as of the date of the Declaration, had recorded information on about 60 different characteristics and circumstances of 43,843 corners. (Heyward May Day Decl., EX. 4, at 2, ¶ 6; 3-4 ¶¶ 13-15; see also exs. A & B to the Declaration). The May 3, 2017, Declaration of Eric C. Macfarlane, DOT's Deputy Commissioner of the Infrastructure Division of Department of Design and Construction, described the 1999 inventory of corners citywide to record the presence or absence of pedestrian ramps, and the 2006-2010 survey that supplanted the inventory, both by updating the accuracy of the information and by using electronic technology to record it. (Macfarlane May 3 Decl., EX. 9, at 2-3, ¶¶6-8; 3, ¶¶ 9-10). Both the "Survey of 29,165 Corners" and the 2006-2010 citywide survey have been updated, and are ongoing.

The two Declarations provide considerable information about the ways in which curb ramp information is obtained, recorded, and stored. For both surveys, the

surveyors/inspectors/field staff use hand-held devices to collect and record information, with data automatically uploaded into DOT's Pedestrian Ramp Geographic Information System Database, stored on DOT servers; they also take photographs of the corners surveyed and record geographical information, including street-intersection identification and GPS coordinates. Individuals conducting the surveys can enter real-time data at individual corners regarding the presence of ramps, and/or their condition and characteristics, relative to curb ramp standards. The ArcGIS platform used by DOT to store survey data permits data to be extracted and analyzed; maps, reports, and spreadsheets to be created on an ad hoc basis; and profiles to be prepared of the status and condition of ramps (or their absence) on any particular corner that has been surveyed.

The two existing surveys and the database on which they are recorded provide sound footing for completing a full and comprehensive survey of all City corners, to provide the Court, the parties, the disability community, and the general public an accurate, verifiable, up-to-date, and ongoing count, map, list, and electronic database of all New York City corners lacking ramps and all corners with ramps that do not comply with ADA Standards. Such an all-inclusive survey is overdue and very much needed. The two existing surveys provide a start, a methodology, a structure, and trained personnel for making it a reality.

What is needed is **a comprehensive survey to provide: An Accurate, Verifiable, Up-to-Date, and Ongoing Count, List, Maps, and Electronic Database of All Pedestrian Crossings in the City, Available to the Public in User-Friendly Electronic and Written Form.** The survey data should:

- Describe the pedestrian curb ramp status of every individual corner in the City;
- Identify, by corner and in a list and maps, all locations that need but are lacking ramps and all locations with ramps that are not in compliance with ADA Standards;

- Identify, by corner and in a list and maps, curb ramp complaints that have been filed and how they have been or are being addressed;
- Include a list and display, by location and in maps, of the City's street construction, resurfacing, and repaving projects involving alterations or improvements to pedestrian pathways; and
- Be made available electronically on or through the City's website, in written form through the office of DOT's ADA Coordinator & Disability Service Facilitator, and, upon request, in multiple accessible formats.[380]

The City's current stance is to continue the survey of ramps' compliance or non-compliance with ADA standards, but on a schedule generally determined by the lead-up to resurfacing of streets, which will take 20 years or so to reach all corners. This stance is unacceptable: the survey should be completed on an expedited basis. DOT staff members who perform the surveys told the Special Master that the surveys usually take only about 15 minutes or so per corner to complete. With the assignment of reasonable numbers of employees or contractors to do the surveys, on a concentrated, one-time basis, the comprehensive citywide survey could be completed in a matter of months. ***This accomplishment is absolutely essential for an appropriate settlement of this lawsuit, and should be an urgent priority of the City.***

2. Detailed Plan for Upgrading All Non-Compliant Ramps

The most distressing and disappointing aspect of the curb ramp situation in the City is that, 23 years after the *EPVA v. City of New York* lawsuit was filed and nearly 15 years since the 2002 Stipulation was so ordered, about three-quarters of the City's curb ramps are not compliant with the requirements of the ADA, according to the City's own reports. And, by the City's own reckoning, the remaining 116,530 ramps can be upgraded in about eight more years. It is unconscionable that the City is considering waiting another 20 years to complete the job of

[380] Some elements presented here are derived in part from the Settlement Agreement and Release of Claims in *Willits v. City of Los Angeles* at 32-34, ¶ 14, discussed at pp. 61-69 *supra*.

upgrading the remaining ramps, by scheduling them based upon DOT's timetable for resurfacing streets. (See, supra pp. 6, 149, 158, 184-185, 202; EX. 8, Slide 11).

This unnecessary and harmful procrastination must be corrected by prompt and dynamic action. What is called for is:

A Detailed Plan for Upgrading within Eight Years All Remaining Ramps that Are Not Fully Compliant with ADA Standards.

A "detailed plan" is one that has the elements of an appropriate settlement agreement discussed on pp. 174-176 *supra*, including:

- a schedule for upgrading ramps that do not comply with ADA standards to bring them up to compliance;
- deadlines and annual target numbers of ramps to be upgraded; standards and procedures for ensuring that requirements and terms are met;
- funding and administrative commitments for enabling the scheduled upgrades; regular reporting and verification of progress in upgrading ramps;
- a description of consequences if the City is not meeting the schedule; and
- a target deadline for completing full compliance.

As discussed on pp. 211-213, based on the City's "*10 Year Plan to Upgrade All Ramps*, the deadline for completing the remaining upgrades should be in fewer than eight years, because the number of corners with ramps needing upgrades has been reduced since the *10 Year Plan* was prepared during the summer of 2015, in part by the upgrades the City has been doing on an expedited basis in Lower Manhattan, and by whatever upgrades it has done in the interim elsewhere in the City. And, as the remaining curb installations are being completed, the pace of ramp upgrades should increase as additional funding previously committed to installations becomes available. Ramp upgrades should be completed for all curb ramps in 2025.

3. Detailed Plan for Installing Ramps at Remaining Corners Needing Them.

The number of corners that need one or more ramps but are missing them – 4.431 – is substantial but not daunting. With a modicum of foresight and resolve, the City could make short shrift of this task. At the pace that the City installed ramps during the years from 2002 to 2013 – 3,961 per year – it would take about 13 months to install ramps at 4,431 corners (See *supra* pp. 166, 179[381]); of course, this statement is misleading, primarily because the City has been saving many of the "complex ramp" sites until the end, and they are expected to take longer (and cost more as materials and labor become more expensive due to the delay). This expectation of slow-going may be overstated, however. Twenty-two percent – 1,137 – of the remaining 5,106 corners lacking ramps on October 20, 2016, needed standard ramps.[382] Thirty-six percent – 1,842 – are what might be termed "ordinary complex,"[383] because they meet the "require a unique design drawing" criterion that DOT and the Stipulations use to define "complex ramp," but are not highly complicated, difficult, and expensive like some of those built above subway structures or in landmark or historic districts.

The term "complex ramp" is used to cover a range of situations. In fact, the complex ramp tag encompasses a broad continuum from ones that may need a unique design drawing but not a great deal of engineering or construction complexity and difficulty, to those that will require considerable designing and engineering expertise, and present a high degree of construction and logistical challenge. At the January 23, 2017, meeting with Commissioner Trottenberg, DOT employees, and City attorneys, someone mentioned the possibility that some

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[381] At the rate at which the City installed pedestrian ramps between 1994 and 2002 – 6,667 per year – 4,431 ramps could have been installed in 8 months. See p. 166.

[382] Pedestrian Ramps Count by Borough and Community Board, EX. 14, item 3, at 3, October 20, 2016. 1,173÷5,106=22%.

[383] *Id.* 1,842÷5,106=36%.

corner might require a "million-dollar ramp," but the DOT personnel admitted that to date they had never identified one. During a phone conference of counsel for the parties with the Special Master on June 26, 2017, counsel for the City again raised the notion that some corners might require a "million-dollar ramp." As of the time the Special Master completed this report, the parties had provided no documentation whatsoever of the existence of such a corner.

Invocation of the specter of extraordinarily problematic curb ramp sites raises echoes of the lengthy discussion between counsel for the City and the Court about feasibility and infeasibility at the Fairness Hearing, (FH Tr. at 13-18, 25-30), during which the Court challenged the City's "carte blanche exception – to the extent feasible," and got counsel to admit that the City had "never made a determination that any particular site fits this category as of today." (*Id.* at 13). Counsel for the City also raised the example of a curb that "sits over a subway tunnel or subway station … with little pieces of glass in the sidewalk … to let light into the underground feature"; which in response to the Court's probing she admitted was a hypothetical." (*Id.* at 15-16). Therefore, projections that installations of ramps on some sites will take a very long time and cost extravagant amounts of money are based, at best, on broad estimates, and, at worst, are largely conjectural. To the extent that those projections have a basis in fact, they accentuate the imprudence of delaying all the more difficult installations until the end, while costs related to the installations rise with each year that passes. The number of, and problems raised by, unusually difficult and expensive ramps should not be accepted without documentation as to which particular corners need these extraordinarily challenging ramps, what it is that makes them so problematic, and how much time and money their installation will involve.

What is needed is:

A Detailed Plan for Installing, within 5 Years, at All Corners without Ramps, Ramps Compliant with ADA Standards.

Parallel to that described *supra* for upgrading noncompliant ramps, a "detailed plan" for installing ramps at all remaining corners without them should include:

- a schedule for installing ramps meeting ADA standards at the 4,431 corners that do not have ramps;
- deadlines and annual target numbers of ramps to be installed;
- standards and procedures for ensuring that requirements and terms are met;
- funding and administrative commitments for enabling the scheduled installations;
- regular reporting and verification of progress in ramp installations;
- a description of consequences if the City is not meeting the schedule; and
- a target deadline for completing all installations.

D. Incorporating Appropriate ADA Standards

The botched definition of "ADA Standards" in the 2016 Stipulation makes it vitally important to settle upon a proper definition going forward. When asked by the Special Master what ADA standards the City was implementing, counsel for the City has answered, "The 2010 Standards." Among other instances, this representation was made at the January 23, 2017, meeting of the Master with Commissioner Trottenberg, DOT employees, and City attorneys, and none of the attendees indicated any objection or reservations. Presumably the "2010 Standards" was a reference to the *2010 ADA Standards for Accessible Design*, in which, on September 15, 2010, the Department of Justice adopted "New ADAAG" as its regulatory standards under Titles II and III of the ADA. (See pp. 48, 50-52 *supra.*)

On October 30, 2006, the U.S. Department of Transportation had issued a regulation adopting New ADAAG as its regulatory standards, with what it termed "minor modifications."[384] One such modification was adding language to continue in effect the requirements of the prior ADAAG regarding detectable warnings on curb ramps. DOT's rationale for this modification is

[384] *Id.*, at 63,263.

discussed on pp. 49-50 *supra*. The Department of Justice and the Department of Transportation have overlapping regulatory jurisdiction over state and local government entities involved relating to transportation. DOT has authority over recipients of federal financial assistance, including the City of New York. Even before the ADA took effect, the City of New York was subject to DOT's Section 504 regulation, including its requirement that "[a]ll pedestrian crosswalks constructed with Federal financial assistance shall have curb cuts or ramps to accommodate persons in wheelchairs ...."[385] (See pp. 34-36 *supra*).

The standards based on New ADAAG adopted by DOT in 2006, and by the DOJ in 2010 are nearly identical. The only significant difference is that the Transportation Department re-inserted the detectable warnings requirement from prior standards, while the Justice Department omitted it. This difference does not really matter in the context of *EPVA v. City of New York,* because the City has committed itself to install ADA-compliant detectable warnings whether or not it is legally required to do. (See pp. 194-196, 210 *supra*).

A better alternative, however, is afforded by the *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way* ("PROWAG") an NPRM issued by the Access Board on July 26, 2011. The content of PROWAG is described in some detail on pp. 52-60 *supra*. It requires detectable warnings on curb ramps and provides the Access Board's current best guidelines for pedestrian accessibility. On the day that PROWAG was issued, the Public Works Group, an online resource providing information and networking in the public works field, published the following on its website:

> A clearer understanding of ADA design seems to be on the horizon. Today, the U.S. Access Board released a formal set of proposed guidelines for accessible rights-of-way, also known as PROWAG, at a public briefing and press conference. This document,

[385] 44 Fed. Reg. 31,422, 31477, § 27.75(a)(2) (May 31, 1979), codified at 49 C.F.R. § 27.75(a)(2).

> once adopted, will finally provide the elusive guidance those of us in the design community have been looking for since the passage of the ADA in 1990.[386]

PROWAG has not yet been finally adopted, but it has become a source of guidance in many jurisdictions around the country (See p. 59 *supra*, and n. 152), and has been lauded by the U.S. Department of Transportation (*Id.* at 59). PROWAG represents the best current thinking about designing and implementing pedestrian accessibility in metropolitan areas. When the federal agencies adopt PROWAG, the parties to this litigation would be ahead of the game and not have to recalibrate their curb ramp specifications. If something were to prevent its adoption, nothing precludes covered entities from exceeding current standards, and the City and its residents and visitors would have gained the advantage of having implemented the best available practices in the interim. For these reasons, PROWAG is the optimal set of standards to serve as "ADA Standards" under the Stipulations in this case.

It is essential that the 2016 Stipulation be modified to designate proper federal accessibility standards as the "ADA Standards," with which the parties are committing themselves to comply.

E. Authority of the Court

The 2016 Stipulation did not establish any specific procedures for addressing disputes or enforcing the Stipulations, but relied upon (and underscored the continuance in full force and effect of[387]) the relief mechanisms created in the 2002 Stipulation that, although they have never been invoked, vested considerable authority in the Court. ***Paragraph 30 of the 2002 Stipulation***

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[386] Public Works Group, "Getting to Know PROWAG," July 26, 2011, http://www.publicworksgroup.com/blog/2011/07/getting-to-know-prowag/

[387] 2016 Stip. at 7, ¶ 7 ("the procedures set forth in paragraph 30 of the Stipulation, which remain in full force and effect").

declares: "Any dispute arising out of or related to this Stipulation … will be submitted to this Court. This Court may adjudicate any such dispute and grant all appropriate relief." (2002 Stip. at 17, ¶ 30). ***Another provision of the 2002 Stipulation accorded the Court ongoing "jurisdiction to hear and resolve disputes arising under or related to this Stipulation and to otherwise enforce the terms of the Stipulation."*** (*Id.* at 20, ¶ 40). These provisions grant the Court expansive powers that empower it to help forge now a modified Stipulation that will fairly, reasonably, and adequately deliver to the Plaintiff Class the appropriate relief that class members were promised in the Stipulations, but have yet to receive.

The Federal Rules of Civil Procedure mandate that parties in a class action suit cannot settle a class action suit without the approval of the Court,[388] and that the Court cannot grant such approval until it has conducted a hearing and made a determination that the settlement is fair reasonable, and adequate.[389] In the provisions of the 2002 Stipulation quoted in the prior paragraph, the parties, by mutual assent, conferred on the Court responsibilities and authority extending beyond the approval/non-approval function (based on the determination whether the settlement is fair, reasonable, and adequate) assigned in the federal procedural rules – responsibilities and authority that the Court accepted when Judge Griesa so-ordered the Stipulation. The requirements under the Federal Rules, plus the power, jurisdiction, and obligation, to adjudicate and resolve any disputes arising under or related to the Stipulations, and to grant "all appropriate relief," provide the Court with considerable authority to induce and facilitate an appropriate settlement in this case.

F. Representation of the Class

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[388] F.R.C.P. 23(e)(1)(A), as amended on Mar. 27, 2003, effective Dec. 1, 2003.

[389] *Id.* at 23(e)(1)C)..

For successful modification and implementation of the settlement agreement in this case, it is essential that the organizational and legal representation of the Plaintiff Class be augmented. In a lawsuit of this scope, complexity, and duration, the large number of individually varying class members cannot be adequately represented by a single organizational plaintiff and (quite unusually in such a case) no named individual plaintiffs. The class of "individuals with a disability" is far too broad, diverse, and varied to be represented by a single disability organization, defined in the 2002 Stipulation as "comprised of veterans who have sustained spinal injury or disease and who use wheelchairs." In pursuing its major objectives, including the enactment of the Americans with Disabilities Act, the disability community has found it necessary and advantageous to operate in coalitions of organizations representing individuals with a multitude of disabilities, ages, needs, and interests. While EPVA (now United Spinal Association) is an esteemed and highly capable organization, it ought not stand alone in this litigation to represent people with the huge range of conditions that are denominated disabilities.

Similarly, effective representation of the Plaintiff Class going forward will require beefed-up legal representation. It was not until May 30, 2017, that counsel for the Plaintiff figured out and complained of, in his letter to the Special Master, the critical contention that the City had not been upgrading ramps other than in conjunction with resurfacing, ramps "that the City should have, but did not upgrade in past years"; and that "the City has completed surveying only about 18% of the City's street corners and, therefore, lacks information as to the number of ramps to be upgraded, the types of upgrades needed on those ramps, and the cost of upgrading those ramps." (Stulberg letter to Special Master, May 30, 2017, EX. 12, at 4). This degree of inattention, delay, or neglect, coupled with the years of inaction during which it was occurring, demonstrates that the Plaintiff Class needs additional legal advocates to supplement current

counsel. In short, adequate representation of the Plaintiff Class requires an additional infusion of organizational and legal advocacy resources.

G. Involvement of Objectors

Since filing their Letter of Objection with the Court on May 2, 2016 (Objection Letter), eight grassroots disability rights organizations in the City of New York – the American Council of the Blind; the Harlem Independent Living Center; the Bronx Independent Living Services; United for Equal Access, Inc.; the Brooklyn Center for Independence of the Disabled; the American Council of the Blind of New York, Inc.; Disabled in Action of Metropolitan New York, Inc.; and the Center for Independence of the Disabled New York – have participated as Objectors in *EPVA v. City of New York*. In addition to filing their objections, along with numerous exhibits, in their initial letter to the Court, the Objectors appeared and presented their views at the Fairness Hearing, and provided substantial submissions of written analysis and attached documents to the Special Master. The Special Master and counsel for the Objectors had a frank and productive face-to-face meeting on December 19, 2016.

The Special Master found the submissions and other input of the Objectors to be informative and helpful. On certain issues, such as the statistical surveys of ADA compliance of corners in the City, which revealed that about 80% of curb ramps did not meet ADA standards, and identification of the City's *10 Year Plan to Upgrade All Ramps* and its significance, it is fair to say that the Objectors have led the way. In regard to the *10 Year Plan*, during the Fairness Hearing, both counsel for the City and counsel for the Plaintiff identified an exhibit to a submission of the Objectors as source documentation for the plan. (FH Tr. at 44-45, 98, 114). The Objectors have provided critical analysis of the content and implementation of the Stipulations, making a number of cogent points. They infused a useful focus on the needs of

blind and low-vision pedestrians that had not been made explicit in the Stipulations. Overall, the Objectors have contributed greatly to the proceedings, deliberations, and information base in this lawsuit, and advanced the interests of people with disabilities, the City, and the general public by their participation.

Despite the antagonistic and combative edges between the parties and Objectors in the course of filings and submissions, counsel for the Plaintiff and the Objectors would be well-advised to team up and collaborate in future representation of the Plaintiff Class. To engage effectively with the City of New York to complete the job of making the City's pedestrian crossings readily accessible to and usable by people with disabilities, those who advocate for the achievement of such a goal ought to put aside their differences and redouble efforts to make accessibility of New York's sidewalks a reality as expeditiously as possible.

H. Verification and Monitoring

To the extent that the City has provided curb ramp facts and figures, the Stipulations do not call for any verification or monitoring. Without such review and oversight, data provided by DOT cannot necessarily be deemed accurate and authoritative. Just because a DOT official or employee (often unidentified) announces or writes a statement or number does not automatically make it accurate and authoritative. The parties have not raised any example of EPVA ever demanding verification, by involvement of outside professional experts or otherwise, of numerical or other information the City has provided. Without monitoring and verification, the terms of a settlement are little more than empty promises. The City appears to have fulfilled its sizeable monetary commitments under the Stipulations, but this is of little consequence to the Plaintiff Class unless the expenditures lead to an appropriate level of demonstrable progress in achieving ADA-compliant ramps throughout the City.

The Objectors have stated that the 2016 Stipulation:

> … lacks critical mechanisms typically found in settlements that are necessary to ensure a public entity's meaningful and effective compliance…. The Settlement does not provide for any system or mechanism to monitor progress achieved at any point in time. There is no provision for a neutral or third-party expert to perform such assessments. The Settlement also fails to require the City to make periodic reports to EPVA or the public regarding work performed, monies spent, or progress achieved in the installation or upgrading of curb ramps.

(Objection Letter at 8, subsection IV.C).

And in its "Deficiencies in 2016 Stipulation" list, under the heading "Implementation Defects," the Objectors included the following: (1) No surveys, (2) No regularly scheduled monitoring, (3) No use of experts, (4) No scheduled reporting with provisions of specific information by the City, (5) No inspection of plans and documents, (6) No revision to the transition plan, (7) No revised written policies, and (8) No provision for detailed accounting of funds spent. (Objectors' Submission, ex. 1).

A few of these points are overstated. While the 2016 Stipulation does not itself require the verification and monitoring mechanisms listed, the 2002 Stipulation, which is still in effect, does contain a provision stating the parties' agreement to establish an "on-going working group" to meet "periodically (at least twice a year) to share data relevant to implementation of the Stipulation," and that the City will provide EPVA (at least twice a year or at other intervals as the parties might agree) with relevant "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps." (2002 Stip. at pp. 16-17, ¶¶ 28, 29). It also contains Paragraph 30, which provides that any dispute related to the Stipulation, including any assertion that the City has failed to comply with any of its provisions "will be submitted to this Court," and the Court "may adjudicate any such dispute and grant all appropriate relief," in the context

of which the parties have "the right to raise, and may raise, any legal or factual position." (*Id.* at 17, ¶ 30). These provisions countenance some reporting and monitoring options, but were not used to any significant effect in the years between 2002 and 2016. Otherwise, the shortcomings asserted by the Objectors in this context are largely on target.

The absence of effective monitoring has been particularly detrimental in this lawsuit. The sluggish and decelerating pace of curb ramp installations and the miniscule percentage of ramps that comply with ADA standards attest clearly to deficiencies in monitoring implementation of the Stipulations. The periods of time that have elapsed, during which a sizeable proportion of City curbs have remained inaccessible and not usable by people with mobility disabilities, demonstrate that performance of agreed-upon obligations has not been adequately overseen and scrutinized. To a great extent monitoring of progress in such a settlement falls to the Plaintiff and its legal counsel. That issue is addressed in Subsection XII.F *supra*.

Another avenue for ensuring effective monitoring was identified by the Objectors in the previous quotation from their Letter of Objection, in which they took issue with the absence of a requirement of "a neutral or third-party expert" to monitor and assess progress. (Objection Letter at 8, subsection IV.C). In the context of settlement agreements, the person who plays such a role is commonly termed a "Monitor." To be maximally effective in a case such as this one, such a "neutral or third-party observer" or Monitor should be experienced in evaluating or assisting public entities regarding accessibility, particularly of pedestrian ramps, under Title II; be knowledgeable of current federal accessibility standards; and be a licensed architect or a registered civil engineer. She or he ought to be given the authority and responsibility to perform various specified duties, including reviewing progress in curb ramp installations and upgrades to

assess compliance with the Stipulation of Settlement; filing detailed reports to the parties and the Court on curb ramp progress and related issues; conducting field spot checks on pedestrian pathways and crossings; and reviewing curb ramp complaints and program access requests. In addition, the Monitor should be authorized to respond to inquiries and complaints from Plaintiff Class members, to recommend changes to the City's policies and procedures, and facilitate the City's adoption of written policies and procedures concerning the construction and maintenance of accessible curb ramps and paths of travel.[390] Given the history of non-compliance and flawed performance in fulfilling the critically important rights of the Class to have full and equal access to City streets and crossings, retention of a neutral and expert Monitor is crucial.

[390] Some elements presented here are derived in part from the Settlement Agreement and Release of Claims in *Willits v. City of Los Angeles* at 34, ¶ 15.1; 36-37, ¶¶ 15.5 & .6.

XIII. DETAILED FINDINGS

Based on information and analysis in the prior sections of this report, this section presents the detailed findings of the Special Master, with headings indicating the general topic they address and the location in the Report to which they correspond where specific citations to sources can be found.

NEW YORK CITY CURB RAMPS BEFORE 2002
(See Section V, pp. 102-111)

Finding 1: Since at least 1975, New York City's laws have required the installation of curb ramps whenever sidewalks are reconstructed or replaced at intersections, and DOT has reported that, since the late 1970s, it has made it a standard practice in its Capital Reconstruction projects to construct pedestrian ramps on each intersection within the scope of these projects. In 1984, DOT created its Pedestrian Ramp Installation Program ('PRIP'), a program specifically dedicated to pedestrian ramp construction.

Finding 2: On May 13, 1994, the City issued its TRANSITION PLAN FOR THE INSTALLATION OF PEDESTRIAN RAMPS ON NEW YORK CITY STREETCORNERS ("1994 Transition Plan", EX. 1). In the plan, the City indicated that the City contained approximately 40,000 intersections and 160,000 corners. It estimated that it had "constructed ADA-conforming ramps on at least 52,172 corners, or approximately one-third of all corners citywide" – a figure it called "a very conservative estimate."

Finding 3: In the 1994 Transition Plan, DOT described its curb ramp accomplishments in each of three categories of its programs:

- **Its Capital Reconstruction projects had resulted in the installation of pedestrian ramps on approximately 14,080 corners (9% of all City corners), from FY 1979 through FY 1993.**
- **DOT's Contract Resurfacing work from FY84 through FY93 resulted in the installation of ramps on approximately 27,237 corners (17% of all corners citywide).**
- **The Pedestrian Ramp Installation Program ("PRIP") accounted for the installation of pedestrian ramps on approximately 10,856 corners (7% of all corners in the City) between 1984 and 1994.**

Finding 4: **The 1994 Transition Plan contained a declaration that "[t]he City of New York, through DOT, is committed to constructing as expeditiously as possible pedestrian ramps on all corners which currently lack ADA-conforming ramps," but cautioned that this was "an enormous undertaking" that "will require a long-term commitment of financial and administrative resources." Despite the ADA regulation's directive that ADA transition plans were to identify the steps to be taken in each year of the transition period, the City's 1994 Plan did not include any yearly targets or projections of the numbers of pedestrian ramps to be installed. In the City's Answer in this case, it admitted that "the City's ADA transition plan for DOT did not contain a schedule for installation of curb ramps."**

Finding 5: **In the 1994 Transition Plan, the City recognized that the Title II regulation set January 26, 1995, as the date for the completion of "structural changes" necessary to bring "existing facilities" into compliance with the ADA, but indicated that the requirement was subject to the defense that meeting it "would fundamentally alter the service, program or activity or would result in undue financial and administrative burdens." The City declared that the "City of New York, through DOT, has determined that it will not be able to complete the installation of all streetcorner pedestrian ramps by January 26, 1995."**

Finding 6: **The City indicated that upon completion of projects funded through FY94, 106,176 corners would remain to be ramped, and, while the City was "committed to constructing as expeditiously as possible pedestrian ramps on all corners that currently lack ADA-conforming ramps," it expected that pedestrian ramps would be installed on 67.9% of all City corners by the end of FY2003, and, if funding levels were continued at Ten-Year Capital Plan levels after 2003, "by FY2012 DOT could construct or let contracts to construct pedestrian ramps on all of the New York City corners then remaining to be ramped."**

Finding 7: **To accompany the 1994 Transition Plan, the City issued a "Commissioner's Determination of Undue Financial and Administrative Burden" ("Commissioner's Determination"), in which the Commissioner of DOT deemed it "logistically impossible to**

construct pedestrian ramps on 106,176 corners by January 1995," and asserted that undertaking to do so would impose undue financial and administrative burdens on the City. The Commissioner's Determination presented an overall gross estimate of what it would cost to install ADA-compliant ramps throughout the City: based upon an average $2,300 cost per corner for ramp installation, adjusted to account for corners requiring special treatments to remove obstacles or provide special construction materials, the Commissioner estimated that it would take $294 million in FY94 dollars to install ADA-conforming ramps on all remaining corners.

2002 STIPULATION AND AMENDED TRANSITION PLAN: ISSUANCE AND CONTENT

(See Subsection VI.A, pp. 112-121)

Finding 8: After eight years of litigation and negotiation, the parties entered into a Stipulation of Settlement on August 27, 2002. Judge Thomas P. Griesa so ordered that stipulation on September 9, 2002. The parties declared that they were "committed to the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs," and they agreed that the terms and conditions of settlement in the stipulation would result in such curb ramp installation.

Finding 9: In the 2002 Stipulation, the parties drew a distinction between standard curb ramps, which do not require a unique design drawing, and complex curb ramps, which do (usually due to an obstruction or other unusual site condition), and then presented agreed-upon funding commitments for installation of each of the two types of curb ramps. Such funding commitments fell into three categories: one for funding commitments made by the City in 2000 and 2001 before the stipulation was signed; one for the commitments in 2002 when the stipulation was finalized; and one for commitments being made under the stipulation for each of the years from 2003 to 2008 or beyond. The amounts of the capital commitments are set out in Tables A and B, *supra* at pp. 113 & 115.

Finding 10: The City pledged to "make its best efforts to ascertain and use the most efficient and the most cost-effective construction method possible for installation of

standard curb ramps," and the parties agreed that the most efficient and most cost-effective construction method for installation of standard curb ramps at the time was "blitz" construction – which would target installation of standard curb ramps to designated geographic areas of the City – and would be the primary method used for standard curb ramp installations under the stipulation, except in exceptional circumstances.

Finding 11: The City agreed to authorize each of the capital commitments referenced in the Stipulation, "unless the City, as a whole, has an undue financial burden that prevents it from authorizing such capital commitments or carry-overs of capital funds." The parties agreed that "the City will make its best efforts" to: "commit the authorized capital funds referenced ... herein"; "draft the underlying contracts, process the contract bids, award the contracts, and take all other steps to have the contracts registered"; and "require the contractors to install the curb ramps required by the contracts as soon as practicable, and to otherwise fulfill their obligations under the contracts." The requisite "best efforts" the City was obligated to make are those efforts "that are limited only by an undue financial or administrative burden," and the parties recognized "that among the circumstances that might bring about an undue financial or administrative burden are: a civil emergency, involvement of the nation in a war or armed conflict, a natural or manmade disaster, a severe economic crisis, or a large budget gap reflected in the City's Financial Plan."

Finding 12: The Stipulation required the City to issue an Amended Transition Plan for the installation of curb ramps no later than December 6, 2002. The plan was to set forth the yearly capital funding and funding carryover commitments of the Stipulation, and year-by-year "current estimates of standard and complex curb ramp installations, the methods of curb ramp installations planned by the City, and other aspects of the City's curb ramp installation plan set forth in this Stipulation." The City agreed to "use its best efforts to install curb ramps in accordance with the Amended Transition Plan."

Finding 13: The 2002 Stipulation contained a provision declaring that "[t]he City is excused from the installation of any curb ramps, which were otherwise required to be installed at the time of street resurfacing projects, commencing from January 1, 1999, and

continuing to the date of this Stipulation," and continuing so long as the City is in compliance with the terms of the Stipulation.

Finding 14: The parties agreed to establish an "on-going working group" to meet "periodically (at least twice a year) to share data relevant to implementation of the Stipulation," and that the City would provide EPVA (at least twice a year or at other intervals as the parties might agree) with relevant "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps."

Finding 15: Paragraph 30 of the Stipulation provides that any dispute related to the Stipulation, including any assertion that the City has failed to comply with any of its provisions "will be submitted to this Court," and the Court "may adjudicate any such dispute and grant all appropriate relief." In the context of such a dispute, the parties have "the right to raise, and may raise, any legal or factual position."

Finding 16: The Stipulation includes an acknowledgement by the parties that "all financial amounts referenced in this Stipulation are subject to appropriation by the New York City Council." However, if the Council does not appropriate capital funds referred to in the Stipulation, in the absence of an "undue financial burden that prevents it from appropriating such capital funds," EPVA may declare the Stipulation to be null and void and apply to the Court for appropriate relief.

Finding 17: Although the lawsuit had not been litigated as a class action up to that time, the 2002 Stipulation provided that the settlement of the lawsuit should proceed as a class action, agreed that the standards for class action status were met, and stipulated to the entry of an order granting class certification. The class was defined as "qualified individuals with a disability, as defined in [the ADA], who use or seek to use curb ramps in the City."

Finding 18: EPVA agreed to release the City and its agencies and personnel from all claims and rights arising from acts and omissions complained of in the lawsuit "up to and including the date of the execution and 'so ordering' of this Stipulation."

Finding 19: Another provision declared that "[u]pon the execution and 'so ordering' of this Stipulation, the Action will be dismissed. The Court will retain jurisdiction to hear and resolve disputes arising under or related to this Stipulation and to otherwise enforce the terms of the Stipulation."

Finding 20: On December 9, 2002, the City issued a new ADA transition plan titled "Curb Ramps – Amended Transition Plan" ("2002 Transition Plan," EX. 2), as called for in the 2002 Stipulation. In addition to recapitulating things addressed in the 2002 Stipulation, it declared that "DOT estimates that curb ramps have been installed on 99,867 corners as of December 3rd, 2000, Citywide." It also included an attachment A of the City's estimates of curb ramp installations that, "based on current assumptions, the funding described above will result in." The estimates in attachment A are included, in reformatted form, in Table C on p. 121.

2002 STIPULATION AND AMENDED TRANSITION PLAN: ASSESSMENT
(See Subsection VI.B, pp. 121-131)

Finding 21: The Objectors have strongly denounced the 2002 Stipulation. In a Statement of Interest to the Court, the United States has challenged the legality of several of its provisions. Charges by either the Objectors, the United States, or both have included that the Stipulation:

- **Permitted the City to violate the ADA by agreeing to "excuse" the City from installing curb ramps adjacent to street resurfacing projects; drawing a distinction between "standard" and "complex" curb ramps; and by conceding defenses such as "undue financial burden" not based in law.**
- **Ignored essential substantive aspects of accessibility of access to sidewalks, such as not addressing maintenance of curb ramps; providing no protections (such as detectable warnings) for blind pedestrians; ignoring the need for alternate accessible routes when construction blocks access; and not addressing other barriers to sidewalk access, including steep cross-slopes, raised and cracked sidewalks, narrow paths of travel, and protruding objects on paths of travel.**
- **Failed to provide procedural mechanisms necessary to provide effective enforcement by omitting provisions regarding transparency and checks and balances, limiting information-sharing to the "working group" process, having an inadequate pledge that the City would provide EPVA with "relevant and non-**

privileged information and documents," and affording EPVA no means of obtaining any information the City does not turn over voluntarily.

An additional Objector complaint was that they were not provided adequate notice when the Stipulation was being considered in 2002, preventing the Objectors from the opportunity to make objections, to help fashion a better remedy, and to be a part of the working group – a dereliction that "infected the entire process from the start."

Finding 22: Many of the criticisms of the 2002 Stipulation by the Objectors and the United States are well-founded. Those issues, including the provisions giving the City an "excuse" for not complying with the ADA regulatory requirement that cities install curb ramps in connection with road resurfacing work, are addressed later in this report in the core analysis of the adequacy, fairness, and reasonableness of the 2016 Stipulation. Some of the negative commentary about the 2002 Stipulation is, however, largely based on hindsight, applying perspectives and interpretations that were not established or prevalent in 2002. While aspects of the 2002 stipulation are certainly problematic, some of the flaws complained of have been attacked from the vantage point of the present instead of from the perspective at the time the agreement was executed.

Finding 23: Neither the Objectors nor the U.S. has sought to have the 2002 Stipulation declared null and void ab initio. Even if they had, it would hardly be possible legally and procedurally to invalidate retroactively a Stipulation agreed upon by the parties and "so ordered" by a federal court, that has been in place for nearly fifteen years, without challenge for most of those years. The issue of voiding the 2002 Stipulation retrospectively was not a focus of the Fairness Hearing, and the Special Master was not given the responsibility to investigate and provide the Court with input as to the fairness, adequacy, and reasonableness of the 2002 Stipulation at the time it was executed.

Finding 24: The 2002 Stipulation continues to matter and to affect the determination of the fairness, reasonableness, and adequacy of the 2016 Stipulation in providing relief to the Plaintiff Class. The 2016 Stipulation did not terminate or replace the 2002 Stipulation, but expressly embraced its continuation. Inadequacies of the 2002 Stipulation, particularly in regard to gaps and omissions in requirements, enforcement mechanisms, performance schedules, and target end date, and their effect on relief to the Plaintiff Class (including

whether the number of ramps installed under the agreement was commensurate with the sums of money expended on them and whether such ramps were adequate and ADA-compliant), are discussed in detail in Subsection XI.B of this report.

Finding 25: Significant parts of the 2002 agreement made sense in the circumstances at the time and led to some important progress. In lieu of total condemnation of the 2002 Stipulation as worthless, and castigation of the parties and their counsel for their roles in developing and signing on to it, another narrative that has some merit would say that EPVA had reason to enter into the 2002 Stipulation as the best deal it could obtain at the time. Similarly, the role of the City in the 2002 agreement could be characterized, not as resistant or disinterested regarding accessibility of New York sidewalks and intersections, but as having anted up large sums money to increase the number of curb ramps in the City. Instead of being considered a setback or an obstacle to progress in installing ADA-compliant ramps in New York, the 2002 Stipulation might be viewed as a seriously flawed advancement, but an advancement nonetheless, in the struggle to make the pedestrian network in the City accessible to people with disabilities.

2016 STIPULATION: ISSUANCE AND CONTENT
(See Section VII, pp. 132-141)

Finding 26: Prompted by concerns expressed by Plaintiff's counsel that about 5,000 City corners where pedestrian ramps were needed did not have them, and EPVA's conclusion that merely continuing $20 million a year in funding for ramp installations under the 2002 Stipulation was insufficient, beginning in 2013 the parties began negotiating their disagreements through the On-going Working Group and dispute resolution processes of the 2002 agreement. Eventually, the parties reached an agreement resulting in a Stipulation Resolving Disputes that was "so ordered" by Judge Thomas P. Griesa on February 11, 2016.

Finding 27: The 2016 Stipulation provided that the 2002 Stipulation was to remain in full force and effect, though specific provisions of the 2002 document would be subordinated to corresponding provisions of the 2016 Stipulation; and declared that the 2016 agreement

grew out of disputes about: the City's obligation under the 2002 Stipulation to complete installation of curb ramps at all remaining locations in the City where pedestrian walkways cross curbs; the need to upgrade curb ramps that were installed in compliance with ADA standards, but which might no longer be in compliance with the ADA Standards; and certain enhancements to the City's 311 system relating to the City's responses to accessibility complaints.

Finding 28: A Whereas clause in the 2016 Stipulation refers to "compliance with the standards of the ADA and its implementing regulations and guidelines, including but not limited to, 29 U.S.C. §§ 12132, 28 C.F.R. §§ 150(d)(2), 28 C.F.R. §§ 35.151 (b) and (i), and ADA Accessibility Guidelines for Buildings and Facilities § 4.1.6(1)(j) (collectively, 'the ADA Standards')." At the Fairness Hearing, counsel for the City told the Court that this language served to "define" "ADA Standards." This is the only definition that the parties have ever proffered for that term. It has a number of problems:

- **There is no statute in the United States Code designated "29 U.S.C. § 12132, much less an ADA provision. Presumably what was intended was 42 U.S.C. § 12132, the general prohibition of discrimination in Title II of the ADA; this is a broad nondiscrimination mandate, not an accessibility standard.**
- **The regulatory provision at 28 C.F.R. § 35,150(d)(2) is from the July 26, 1991 Title II regulation that obligated public entities having responsibility or authority over streets, roads, or walkways to include in their transition plans a schedule for providing curb ramps. It is not an accessibility standard.**
- **28 C.F.R. § 35.151(b) deals with alterations of facilities by public entities and says that if an alteration affects the usability of the facility, it should be done in such a manner that, to the maximum extent feasible, the altered portion is readily accessible to and usable by individuals with disabilities, and calls for accessible paths of travel; the provision does not, however, establish specifications for accessible facilities or paths of travel, and is not an accessibility standard.**
- **28 C.F.R. § 35.151(i) reiterates the ADA statutory requirement of curb ramps at newly constructed or altered streets, roads, or highways, but it provides no standards for such curb ramps.**
- **The final part of the 2016 Stipulation's definition of "ADA Standards," "ADA Accessibility Guidelines for Buildings and Facilities § 4.1.6(1)(j)," is at least a reference to a guideline provision, but far from a helpful one. The "Accessibility Guidelines for Buildings and Facilities" were the former 2004 ADA and ABA Accessibility Guidelines that the Department of Justice incorporated into its 2010**

ADA Standards. The cited provision is, however, not an accessibility standard; it is an exception to the application of such standards for "technical infeasibility" in alteration work.[391]

None of the components of the "ADA Standards" set out in the 2016 Stipulation provides specifications or benchmarks to guide the installation, upgrade, or repair of pedestrian curb ramps, and cannot serve as "ADA Standards" to govern the installation and upgrading of curb ramps in this lawsuit. The is a serious deficiency in the Stipulation, and one that the parties have not raised to the Court nor to the Special Master.

Finding 29: The 2016 Stipulation identified that its purpose was to achieve three things: (1) completion of installation of curb ramps at remaining unramped locations in the City; (2) upgrading of curb ramps installed in compliance with ADA standards, but that are no longer in compliance with those standards; and (3) improved City methods and procedures for responding to complaints concerning unramped corners and non-compliant ramps.

Finding 30: The 2016 Stipulation provided that the City would continue to "make a baseline capital commitment of a minimum of $20,000,000 per Fiscal Year to complete the installation of curb ramps at remaining unramped locations in the City where pedestrian walkways cross curbs," and would make capital commitments of $37,600,000 per year in FY2016 and FY2017 for upgrading existing non-ADA-compliant ramps in the City generally, and an additional $11,500,000 in FY2016 for upgrading non-ADA-compliant ramps in Lower Manhattan. The City's DOT was charged with seeking additional funds through the City's budgetary process in future fiscal years, "subject to appropriations."

Finding 31: Two major changes included in the 2016 agreement were that the City would cease installing new curb ramps through "blitz" construction – deemed "no longer necessary," because "approximately 97% of street corners City-wide are now ramped"; and that, when streets are resurfaced, if a new "standard" ramp or an upgraded standard

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[391] The provision reads as follows: "(j) EXCEPTION: In alteration work, if compliance with 4.1.6 is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible. Any elements or features of the building or facility that are being altered and can be made accessible shall be made accessible within the scope of the alteration."

ramp is needed at a corner on a street adjacent to a street being resurfaced, the ramp shall be installed or upgraded before the resurfacing operation is completed.

Finding 32: Under the 2016 Stipulation, "complex" curb ramps are not governed by the requirement that installations and upgrades are to be completed before resurfacing is completed, and disputes about installation or upgrades of complex ramps are subject to Court review under the 2002 Stipulation.

Finding 33: A "Public Outreach" section of the 2016 Stipulation provides: (1) that DOT has added search terms to assist 311 operators to better direct "City-wide accessibility complaints" to the appropriate agency and units; (2) that DOT has modified its website to include links to the Accessibility Coordinator, including "nyc.gov/accessibility," and is making changes to "capture curb ramp specific complaints"; and (3) that DOT commits itself to "mount an educational campaign that includes creation of a pamphlet to distribute to construction permit applicants," to train inspectors to better identify and address accessibility issues at construction sites, and to ascertain the type of guidance it can provide to its permit applicants and provide such guidance to applicants.

Finding 34: The 2016 Stipulation provides that "[t]he terms of this agreement may be modified by the Parties upon a written agreement signed by the attorneys for the parties." No mention is made of presentation to and approval by the Court, or of notice to and comments from the members of the class or the general public, prior to such modification.

PARTIES' AND OBJECTORS' POSITIONS ON THE 2016 STIPULATION
(See Section VIII, pp. 142-150)

Finding 35: The parties have proclaimed the virtues of the 2016 Stipulation. *Inter alia*, Plaintiff's counsel characterized it as "an eminently fair, reasonable, and adequate resolution for the Plaintiff Class, which provides substantial and on-going relief that will hasten the day when every street corner in New York City is ramped in compliance with the ADA," while the City has declared that it "comprised a significant achievement on behalf of the City and class counsel to resolve their disputes without resorting to litigation and the inevitable drain on resources that could instead be used to benefit the certified

class through improvements in accessibility of the City's pedestrian infrastructure," and that it is "fair, reasonable, and adequately protects the interests of the certified class."

Finding 36: The Objectors have vigorously condemned the 2016 Stipulation in its entirety, contending that it "is procedurally and substantively deficient and fails to fairly or adequately protect the rights and interests of the class," and that it "is in violation of the basic safeguards established to protect absent members of a class in class action lawsuits and denies the purported class justice under the Americans with Disabilities Act." The Objectors submitted to the Special Master and the parties' counsel an outline of 26 "Deficiencies in 2016 Stipulation," included *supra* at pp. 143-144.

Finding 37: At the Fairness Hearing on May 31, 2016, Judge Daniels began by describing the kinds of information he wished to obtain from the participants, as described *supra* at pp. 144-145. He obtained a modicum of the information he was seeking at the hearing, but far from all of it. Two major pieces of information that the parties stressed were that ramps had been installed at 97% of the corners in the City, and that the City was committing funding for: continuing installation of curb ramps in the amount of $20 million per year for fiscal years 2016-2019, totaling $80 million; and funds for upgrades for FY2016 & FY2017 amounting to $87.6 million (including $10 million for lower Manhattan), and $74.2 million for FY2018 & FY2019. Those figures add up to $241.8 million for installations and upgrades for 2016-2019. Adding to that number funding commitments of $53 million for repair of defective sidewalks for 2016 & 2017 yielded a grand total of $294.8 million for installations, upgrades & repairs from 2016 through 2019.

Finding 38: When the Court endeavored to find out how many corners and curbs were involved, what the schedule for installations and upgrades was per year, and when these tasks would be completed, the parties were indefinite and somewhat evasive at times, and sometimes admitted that they did not have the information requested. As to a timetable for completing new ramp installations, Judge Daniels was told by the City's counsel that "it is hoped that within five years it will be accomplished within Lower Manhattan. And hopefully within the decade they will be finished citywide." When the Court pursued the matter further by asking, "So you believe that $20 million will be sufficient to make all

citywide curbs compliant at some point within 20 years?" he was told "It's hoped that that is the case, yes." Counsel for the Plaintiff could only add that the installations would be made "expeditiously."

Finding 39: When Judge Daniels focused on the issue of upgrading existing curb ramps to bring them up to ADA compliance, he asked counsel for the City what percentage of curbs were compliant with current ADA standards, and was told, "We do not have that." Counsel for the Plaintiff added "upgrades isn't something that lends itself easily to a set date, because that can move and that can change." Subsequently, the City's counsel told the Court that since upgrading would be done in connection with roadway upgrading or other alterations, she reasoned (apparently on the spot) that since "on average a street will be resurfaced with 20 years. Any street will be resurfaced within 20 years," and then concluded, "It's likely to be done within 20 years."

Finding 40: Later in the Fairness Hearing, after having confessed to not knowing when the upgrades would be completed and then telling the Court it would take 20 years, counsel for the City reversed herself and told the Court that she had found the necessary information contained in a 10-year plan developed by the City – the *10 Year Plan to Upgrade All Ramps: Sidewalk Program and CWC In-House Plan* (EX. 13). This led her to exclaim that for "the total number of ramps [corners] upgraded in one year, the estimate is 11,653 .... [T]his estimate would have everything upgraded in ten years ... the total would be 116,530 ramps [corners] in ten years and that's 100 percent of the ramps [corners]." To drive the point home, a few minutes later, counsel reiterated the gist of the commitment – "the City within ten years will upgrade 116,000 and change."

Finding 41: The 10 Year Plan is significant both because it shows (with expenditures amounts and corners numbers) what DOT views as accomplishable in upgrading existing non-compliant ramps, and because the 116,530 figure (about 73% of the total corners) represents DOT's best estimate, though not based on a count or comprehensive survey, of the number of corners in the City having non-ADA-compliant ramps.

Finding 42: The Fairness Hearing highlighted the participants' relative consensus on several major matters: (1) the parties' agreement that about 4,800 corners still need ramp

installations; (2) the several funding commitments in the 2016 Stipulation, totaling $294.8 million for installations, upgrades & repairs from 2016 through 2019; (3) the parties' and Objectors' recognition of the City's estimate of 116,530 (about 73% of the total corners) as the number of corners in the City not having ADA-compliant ramps; and the City's, EPVA's, and the Objectors' acknowledgment of, and reliance on, the City's *10 Year Plan to Upgrade All Ramps*.

PURSUIT OF CERTAIN KEY INFORMATION
(See Section IX, pp. 151-160)

Finding 43: Through a variety of means and forums, including submissions of documents and numerous exhibits, face-to-face meetings (one including a slide presentation), telephone conferences, email exchanges, site visits to some New York corners, and the Fairness Hearing transcript, the parties and the Objectors have provided a large quantity of information and viewpoints to the Special Master.

Finding 44: The Master considered it critical to document and verify two key facts: the number of corners (about 4,800) still needing installations, and the number of corners needing upgrading (116,530). The answers were not quickly forthcoming. After a protracted chain of exchanges between the Master and the City, set out at length in the text, information was obtained piece-by-piece.

Finding 45: As to the number of corners that need but do not yet have ramps, the Master noted that the parties had accepted and trumpeted the statistic that 97% of pedestrian crossings in New York City have curb ramps, but set out to "pin down and be able to cite what person or agency made such a determination, on what date, how exactly it was computed or estimated, and in what document it originated." That search led to information that, around 1999, the City had engaged students from the Cooper Union to compile an inventory of the City's pedestrian ramps – an inventory that was updated over the years, and periodically reviewed for accuracy and consistency. The Master continued to probe for more primary source documentation, and asked the parties to provide him with "a list of intersection/corners in New York City having pedestrian crossings that are currently without ramps."

Finding 46: During a phone conference on February 28, 2017, the City came forward with information regarding the existence of a survey of all corners in the City conducted in 2006 to 2010, which the counsel for the City had only just learned of. Despite the Master's repeated requests for more information about the newly acknowledged survey, no more information was forthcoming for the next two months.

Finding 47: On May 3, 2017, the City sent the Master an electronic bundle of documents, which included a list of 4,431 City corners needing pedestrian ramps (EX. 9. Ex. A), and a Declaration by Mr. Eric Macfarlane, the Deputy Commissioner of the Infrastructure Division of the New York Department of Design and Construction (DDC), who provided information about both the "1999 Inventory" and the "2006-2010 Survey." According to Deputy Commissioner Macfarlane, the "1999 Inventory" began in the summer of 1999, when DDC assigned student interns (mostly college engineering students from the Cooper Union in New York City) to conduct a citywide pedestrian ramp inventory. The results of the Inventory were stored on Microsoft Excel spreadsheets and within a Microsoft Access database, which were updated by DDC staff to add new locations where curb ramps had been installed.

Finding 48: Deputy Commissioner Macfarlane also indicated that in 2006 DDC began a new comprehensive survey conducted by DDC staff and a consulting firm, which was completed in 2010. Survey personnel used hand-held devices that recorded GPS coordinates of each location, took photographs of each corner, and recorded data regarding site-specific issues "that would require an individualized engineering design and longer construction period to install pedestrian ramps at that corner." (*Id.* at 3, ¶ 10). The collected data were automatically uploaded into DDC's Pedestrian Ramp GIS (Geographic Information System) Database, linked to the hand-held devices used to conduct the survey, permitting data extraction and analysis, and creation of geographical maps, reports, and Microsoft Excel spreadsheets on an ad hoc basis.

Finding 49: Mr. Macfarlane reported further that "DDC's Pedestrian Ramp GIS Database is continuously updated by DDC," and that, as of May 3, 2017, it reflected that

"4,431 corners are missing pedestrian ramps throughout the City," reflected in a list, current as of February 2017, appended as exhibit A to the Declaration (EX. 9).

Finding 50: The Special Master also undertook to obtain solid data regarding how many corners with curb ramps need upgrading to comply with ADA standards, which did not bear any fruit until December 9, 2016, when the City's attorneys sent a message, with an attachment headed "Category Breakdown of 29,165 Corners Surveyed" that the senders said would provide "the data regarding curb ramp upgrades you requested. The City has surveyed approximately 30,000 corners so far (mostly in Lower Manhattan), and has extrapolated these results to project its citywide programmatic needs." The document, attached to this report as Exhibit 10, consisted of columns of figures recording the curb ramp status of the corners surveyed, primarily in terms of whether they had ramps that were ADA compliant (or no ramp was necessary) or were non-ADA compliant.

Finding 51: Key statistics from the "Category Breakdown of 29,165 Corners Surveyed" were that over 80% of the corners surveyed were not ADA compliant, and either needed to be upgraded or to have ramps installed, and that 12.1% of the corners surveyed needed ramps installed. The survey also identified and tabulated categories of deficits that made ramps ADA non-compliant, such as slope issues, width issues, defective tiles, curb reveal issues, and defective sidewalks or curbs. Around 25% of the ramps surveyed did not have tiles with detectible warning devices (truncated cones) – percentages that likely represented serious undercounts.

Finding 52: In the slide show presentation at the Master's meeting with DOT employees on December 12, 2016, one of the slides (EX. 8, Slide 11), headed "Pedestrian Ramps: Upgrading Existing Ramps," contained a precise current number of the corners in the City – 162,355 – and an estimate of the number of corners needing to be upgraded citywide – 119,184, larger by 2,654 than the 116,530 figure quoted previously. The slide also contained two statements of DOT intentions going forward: (1) "DOT plans to upgrade all corners in Lower Manhattan within an anticipated 5 year period"; and (2) "DOT projects to upgrade the remaining corners in conjunction with resurfacing projects."

Finding 53: At the January 23, 2017, meeting with Commissioner Trottenberg, DOT employees, and City attorneys, Commissioner Trottenberg underscored that upgrades would be made to corners adjacent to streets being repaved or resurfaced, and she and other DOT personnel described the survey of 29,165 corners as a "living survey" that would be ongoing and would take seven to ten years to complete. The DOT General Counsel stated unequivocally that the survey would involve a review process after five years and would take seven to ten years in all to complete. DOT's position was that corners would be surveyed as they were being scheduled for upgrading in connection with street resurfacing.

Finding 54: Commissioner Trottenberg stated that funding of $80 million per year ($20 million for installations plus $60 million for upgrades each year) would continue for 20 years, amounting to $1.6 billion over 20 years, that would permit installations and upgrades of about 6,000 corners per year. She added, however, that there was "no finishing date." Regarding installations of ramps at corners lacking them, she said that she did not see all the ramps being installed in the next five years.

Finding 55: As part of the packet of materials the City submitted to the Master on May 3, 2017, the City's counsel included a Declaration of the Deputy Commissioner of DOT's Division of Sidewalk and Inspection Management, Mr. Leon Heyward, signed on May 1, 2017. In his Declaration, Deputy Commissioner Heyward indicated that "[s]tarting in the summer of 2014, DOT staff began to survey the condition of corners in the City containing pedestrian ramps." He indicated that the results of the survey are entered into DOT's Pedestrian Ramp ("GIS") Database by using an application on an iPad, which serves as an online extension of the GIS database. Deputy Commissioner Heyward noted that survey data derived from the GIS database were summarized in the "Category Breakdown of 29,165 Corners Surveyed" table. He stated that the database "is continuously being updated by DOT staff," and that, as of May 1, 2017, the database "contains information for approximately 43,843 corners in the City of New York."

APPRAISING CURB RAMP PROGRESS IN NEW YORK CITY

(See Section X, pp. 161-173)

Finding 56: For many years and in a variety of modes described *infra* at pp. 161-163, the City of New York has declared its steadfast dedication to making the City's pedestrian crossings accessible to and usable by people with disabilities by installing curb ramps at all of its corners. In the City's *1994 Transition Plan*, the 1994 Commissioner of Transportation's Determination, the 2002 Stipulation, and at the Fairness Hearing, the City committed itself to accomplishing compliant ramp installation at curbs throughout the City in an "expeditious" manner. Similar commitments were made by DOT in its *Street Design Manual*, its HIGHWAY RULES, and on its website. These various forms of commitment and requirements are in addition to those in the 2016 Stipulation.

Finding 57: Attempting to determine the status of pedestrian curb ramp accessibility in the City, or of a particular corner or area in it, is a daunting and often fruitless quest. At the Fairness Hearing, when the Court sought to find out what percentage of curbs were compliant with current ADA standards, what the City's planned completion date was for full ADA compliance, what the schedule was for achieving it, what sums of money were committed to it, when the parties expected to install curb ramps at the approximately 4,800 corners still needing them, and what percent of curbs were anticipated to fall into the "infeasibility" category, counsel for the City was unable to provide the information. To the Court's query regarding when upgrades of all non-compliant ramps would be completed, the answer received was erratic, beginning with the City not having any estimate, to a projection of approximately 20 years, and finally arriving at a consensus by the parties (supported by the City's "10 Year Plan") that all the needed upgrades would be completed in 10 years.

Finding 58: The parties and the Objectors provided considerable information to the Special Master, on their own initiative or at his request. The City's DOT employees, along with Commissioner Trottenberg, and legal representatives provided a great deal of information, much of it focused on the complexities involved in installing and upgrading curb ramps; the sums of money committed annually to curb ramp construction; the realities of budget constraints; and the intricacies of budget-allocation and funding processes, the construction planning process, and general bureaucratic hurdles and limitations.

At times, however, the parties have fallen short of providing reliable and timely pieces of consequential information. Through an extended process, described in Section IX, the Special Master sought, with mixed success, to obtain accurate numbers of non-compliant ramps in the City and information to support the frequently repeated representation that the number of corners needing to have ramps installed was about 4,800. Also problematic was the unexpected revelation on February 28, 2017, of the existence of a survey that had been conducted in 2006-2010 of all corners in the City – information to which even the City's counsel had not been privy until then. Certain types or items of relevant information were either not known by DOT, not shared with counsel, or not readily provided to the Master and the Plaintiff.

Finding 59: Data regarding the progress that the City has made toward a pedestrian crossing network that is readily accessible to and usable by people with disabilities are messy and incomplete at times, and not always reliable. Some enlightening, core facts can be gleaned, however, by aggregating and synthesizing figures from various available sources, to produce the information in Findings 60 and 61.

Finding 60: CURB RAMP INSTALLATIONS – An estimated one-third of City corners had curb ramps in 1994; two-thirds had curb ramps in 2002; and all but 4,431 (2.77%) had ramps in February, 2017. Annual installation data are not available for all of the intervening years, but figures are available for 2013; 2015; December, 2016; and February, 2017. The following is a summary of the data, based on the estimate of 160,000 corners in the City and using the current 2017 figures:

Year	Corners with Ramps	Corners Without Ramps
1994	53,333 (33%)	106,666 (67%)
2002	106,666 (67%)	53,333 (33%)
2013	150,040 (93.9%,)	9,760 (6.1%)
2015	155,173 (97%)	4,827 (3%)
2017	155,569 (97.23%)	4,431 (2.77%)

Finding 61: The preceding figures permit a determination of how many curb ramps were installed in each of the intervals: 1994 to 2002, 2002 to 2013, 2013 to 2015, and 2015 to 2017, as follows:

- **1994-2002: 53,333 ramps were installed over 8 years – an average rate of 6,667 per year.**
- **2002-2013: 43,573 ramps were installed over 11 years – an average rate of 3,961 per year.**
- **2013-2015: 4,933 ramps were installed over 2 years – an average rate of 2,467 per year.**
- **2015-2017: 396 ramps were installed over 2 years – an average rate of 198 per year.**

As to percentage declines in curb ramp installation rates:

- **The average yearly rate of installations in the 2015-2017 period is 97% lower than it was during the 1994-2002 period.**
- **The average yearly rate of installations decreased by 41% from the 1994-2002 period to the 2002-2013 period.**
- **The average yearly rate of installations fell another 49% from the 2002-2013 period to the 2013-2015 period.**
- **The average yearly rate of installations went down by 92% from the 2013-2015 period to the 2015-2017 period.**

At the 2015-2017 rate, it would take 22.4 more years to install the remaining 4,431 ramps. On the other hand, if the 1994-2002 rate of installations had continued in ensuing years, all the corners would have had curb ramps installed by about 2010.

Finding 62: Information generated by the City as of October 20, 2016, shows that, of the 15,127 corners in the City that did not have curb ramps, 10,021 reportedly were sites where no ramp was required (usually because the pedestrian crossing was level, without a curb to traverse), leaving 5,106 corners where ramps were needed but not yet installed. DOT grouped the 5,106 corners needing ramps into the following categories as to the type of ramp they needed:

Ramp Category	Number
Simple	1,137
Project Interference	534
Complex (ordinary complex)	1,842
Landmark/Historic	539
TA (Transit Authority) Structure	834
Survey Monument	28

Vault	**37**
Other	**155**
(Non-DDC construction, wetland, trees, steps, encroachment, private property, etc.)	

The City's October 20, 2016, report also presented information on a Borough-by-Borough basis, including the following totals of corners in need of curb ramp installations:

Borough	Corners Needing Ramps
Bronx	**495**
Brooklyn	**1,657**
Manhattan	**1,047**
Queens	**1,007**
Staten Island	**900**
TOTAL	**5,106**

Finding 63. In his May 30, 2017, letter, the Plaintiff's counsel declared:

> **In May 2016, the City estimated the approximate cost of [installing] "standard ramps" at $6,000 each, the cost of most "complex ramps" at $32,000 each, the cost of complex ramps built above subway entrances at $50,000 to $100,000 each, and the cost of "complex ramps" built in landmark districts at $50,000 each.**

At the Fairness Hearing, City's counsel reported to the Court that the estimated average installation cost for a standard ramp is about $5,880, and that the average cost for installing a complex ramp is about $32,000. To date, the City has not been able to document the $50,000 figure and $50,000 to $100,000 range quoted by Plaintiff's counsel nor the (perhaps apocryphal) references to "a million-dollar ramp." Given the variety of complexities that may be present at any particular site, including being over or adjacent to a subway station or other transportation facility; being located in a historic or landmark district; or presence of a wetland, a vault, a survey monument, steps, trees, or non-Department-of-Design-and-Construction construction interference, and individual differences in sites within any of these complication categories, the "average" and range of

cost estimates for "complex" ramps provided by the City are not reliable in the absence of site-by-site evaluations linked to precise expense data.

Finding 64: ADA NON-COMPLIANT RAMPS NEEDING UPGRADING – The City does not actually know how many corners in its jurisdiction have ramps that do not comply with ADA standards, because it has not done a citywide survey of them. Since 2014, it has conducted a survey of 29,165 corners, mostly in Lower Manhattan, amounting to about 18% of total corners in the City; DOT has summarized the results in the document titled "Category Breakdown of 29,165 Corners Surveyed." DOT has estimated that 119,184 corners need to be upgraded citywide, approximately 73% - 74% of all corners. The projected percentages are, however, extrapolated from a sample that is small (18% of corners) and derived principally from an area – Lower Manhattan – that does not adequately represent the City as a whole.

Taken at face value, the DOT projections provide some insight into the deficiencies of a sizeable proportion of City ramps. Twenty-five percent of non-compliant ramps surveyed had no detectible warning tiles, and the other 75% had problems with slopes, ramp widths, and a variety of other defects of tiles, ramps, curbs, and sidewalks. Some of these presumably involved curb ramps that were not ADA-compliant when installed; others that initially were compliant with ADA standards but became non-compliant due to changes in the standards; and some that became substandard due to deterioration, damages, accidents, construction, and other causes.

Apart from the 2014-2017 survey, no data have been presented to indicate how many or what percentage of ramps in New York City have been compliant or non-compliant with ADA standards over the years since the lawsuit was filed and during the application of the 2002 and 2016 Stipulations. The projections made by the City that about three-quarters of existing ramps are not in compliance with ADA curb ramp standards are the best information presently available.

Finding 65. Regarding the costs of upgrading ramps, Plaintiff's counsel wrote in his May 30, 2017, letter, that "the City advised us last week that the cost of upgrades can vary widely depending upon what work is needed and who does the work (e.g., a ramp in need of a detectable surface can cost from $1,860 for an in-house crew to $3,576 for an outside

contractor, and a ramp requiring reconstruction can cost from $8,601 for an in-house crew to $13,284 for an outside contractor. These figures are too imprecise, with too many variables, to provide the basis for useful calculations.

Finding 66: Progress has been made in the curb ramp situation since 2002 under the two stipulations, including the following:

- **Installing curb ramps to the point where 97% of City corners – 155,169 – now have curb ramps.**
- **Expending large sums of money under the Stipulations – approximately $243 million under the original stipulation, and commitments in the 2016 Stipulation totaling $294.8 million for installations, upgrades, and repairs from 2016 through 2019. Together that would total $537.8 million over 18 years, or about $29.9 million per year.**
- **Proceeding under the 2016 Stipulation to upgrade curb ramps on a priority basis in Lower Manhattan.**
- **Increasing the City's pedestrian ramp upgrade funding $60 million per year for fiscal years 2017-2027 in the City's latest 10 Year Capital Commitment Plan.**
- **Doing a citywide survey of corners, on a has/does-not-have-curb-ramps basis, identifying the 4,431 corners that need ramps but do not have them, and providing the list of all corners so identified to the Special Master, the Plaintiff, and the Objectors. (EX. 9, ex. A).**
- **Surveying, since 2014, 29,165 corners to assess their compliance with ADA standards, reporting the results, and making projections for the entire City based on the survey.**
- **Pursuant to the 2016 Stipulation, modifying DOT's website to add links to its Accessibility Coordinator, and making some enhancements to the City's 311 system, including adding search terms to assist operators to properly direct accessibility complaints.**

Finding 67: The task of achieving full accessibility of pedestrian crossing accessibility in the City is not nearly completed. The statistic on ramps installed overall (97%), is greatly tarnished by three facts: first, that 14 years after the 2002 Stipulation, 4,431 corners that need ramps still do not have them; second, that the average yearly rate of ramps installed has plummeted dramatically; and third, that the City's numbers indicate that 80% of the corners in the City either do not comply with ADA standards, or do not have a ramp at all even though one is needed.

Finding 68: Impressiveness of hefty amounts of money committed to ramp construction and upgrades is lessened by the City's failure to provide direct documentation of the linkage between the funds expended and the number of ramps they underwrote, leaving some doubt as to whether the funds have been spent efficiently and productively.

Finding 69: The City's survey of ADA compliance of 29,265 corners is merely a start, and a belated one, that does not provide a sufficient and representative sample for citywide projections.

Finding 70: Two of the most substantial unfinished tasks are upgrading the three-quarters of City corners having ramps that do not come up to ADA standards, and installing ramps on the 4,431 corners without them. To make that possible, the detailed survey of ADA compliance and non-compliance of corners needs to be completed over the whole City as soon as possible, and its results verified and made available. Feedback from disability organizations and the public needs to be solicited to augment and verify the results obtained.

FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE 2016 STIPULATION

(See Subsections XI.A, .B, & .C, pp. 174-185)

Finding 71: The Court's queries at the Fairness Hearing; Federal Rule of Civil Procedure 23(e); the ADA regulations' requirements for an ADA transition plan regarding curb ramps; and the components and terms of various settlement agreements resolving curb ramp disputes together identify the following necessary elements of a fair and adequate settlement agreement in metropolitan curb ramp accessibility cases:

- **a schedule for the defendant municipality to install ADA-compliant ramps and upgrade ramps that do not comply with current ADA standards to make them compliant, with deadlines and target numbers of ramps;**
- **standards and procedures for ensuring that legal requirements and agreed-upon terms are met;**
- **funding and administrative commitments for enabling the scheduled ramp construction and upgrades;**

- **a requirement for regular reporting and verification of progress in installing (or upgrading) ramps;**
- **a description of consequences if the defendant municipality is not meeting the schedule; and**
- **a target deadline for completing full compliance.**

Finding 72: The 2002 Stipulation continues to matter significantly on the issue of the fairness, reasonableness, and adequacy of the 2016 Stipulation in providing relief to the Plaintiff Class. The 2016 Stipulation did not terminate or replace the 2002 Stipulation, but expressly embraced its continuation. Many provisions of the 2002 Stipulation continue to be applicable to govern relief that the class will receive under the combination of the two Stipulations going forward. Some gaps and flaws in the 2002 Stipulation have a bearing on the appropriateness of relief to the class in the present proceedings; the relief due now depends largely on how far relief has proceeded under the prior stipulation. A primary feature of the 2016 Stipulation is that it explicitly supersedes some provisions of the 2002 Stipulation and preserves others. Evaluating the fairness, reasonableness, and adequacy of the 2016 Stipulation certainly encompasses an examination, not just of its alteration of provisions of the 2002 Stipulation, but also of its extension of other provisions of that Stipulation. And, as the Court recognized at the Fairness Hearing, unless significant gaps and flaws in the 2002 Stipulation are addressed under the 2016 Stipulation, they will continue to impede progress and relief to the class in future days. Virtues and deficits of the 2016 Stipulation can only be assessed in conjunction with the provisions of the 2002 Stipulation and the progress made under it.

Finding 73: The 2002 Stipulation is extraordinarily narrow in scope. It has a pinpoint focus on installation of new curb ramps. The Stipulation nowhere says that the ramps installed under it must comply with ADA standards. It does not address, or even mention, the upgrading of existing curb ramps to achieve compliance with ADA standards. No funding or performance commitment under the 2002 agreement relates in any way to complying with ADA accessibility standards, in new or existing ramps.

Finding 74: Nothing prohibits a litigant from choosing to frame a lawsuit narrowly or to have it address a single part of a multi-faceted problem, instead of the whole shebang. It

may become problematic, however, if the claims or remedies are too constricted to permit fair and adequate relief. The present case raises two vital questions: first, whether aspects of the 2002 Stipulation have undercut or reduced progress in bringing City curb ramps up to ADA-required levels; and, second, whether it became apparent, at some interim point in time between the 2002 Stipulation and the beginning of the negotiations that led to the 2016 Stipulation, that the measures being meted out under the 2002 Stipulation were insufficient to provide fair and adequate relief to the Plaintiff Class.

Finding 75: Numerical data, many of them cited in the prior Findings, provide important insights regarding progress or lack of progress made under the Stipulations during the pertinent years. As to installing ramps at corners where they were needed, an important fact is that rates of curb ramp installations have actually fallen drastically since the 2002 Stipulation was signed. From FY1994 to FY2002, 53,333 ramps were installed over 8 years – an average rate of 6,667 per year – while from FY2002 to FY2013, 43,573 ramps were installed over 11 years – an average rate of 3,961 per year. Thus, ramp installation rates fell 41% from FY1994-FY2002 to FY2002-FY2013. This downward spiral has continued until today, with the rates of installations having fallen to an average rate of 2,467 per year for the period from FY2013 to FY 2015, and 198 per year from FY2015 to the present. The 2002 to 2013 decrease took place at the time when the "blitz construction" approach had been agreed upon by the parties, in lieu of linking installations to street alterations, on the rationale that the "blitz" method would speed up the installations because it was the most efficient and the most cost-effective construction method for the installation of standard curb ramp installations. The data indicate otherwise.

Finding 76: In regard to ramp upgrades, for most of the relevant years no statistics are available as to how many ramps have been upgraded to ADA standards under the 2002 Stipulation, how many ramps around the City met or did not meet ADA standards, and how many ramps installed under the 2002 Stipulation were not compliant with ADA standards when installed. Such information does not exist for several reasons: first, the 2002 Stipulation did not require any ramp upgrades; second, it did not require installed ramps to be ADA-compliant; third, the City had (and has) not done a citywide survey of ramps to determine which comply with ADA standards and which do not; and, fourth, the

2002 Stipulation did not require any collecting or reporting of statistics regarding ramp upgrades or ramps compliance with ADA standards. Based on projections from the survey of 29,165 corners, (begun in 2014), only an estimated 20% of the City's corners comply with ADA standards, and approximately 73.4% of all the corners need to be upgraded, it is clear that the deficiencies of the 2002 Stipulation are largely to blame for the dearth of ADA-compliant curb ramps.

Finding 77: Suggestions by counsel for the parties that the main source of the noncompliance of most City ramps is due to curb ramps that were installed pursuant to the Stipulation in compliance with the ADA standards, but are no longer in compliance with those standards, including particularly ramps that lacked detectable warnings, are undercut by the City's own statistics and admissions. The fact is that the need for ramp upgrades is due to a number of factors, including deterioration of corners with existing ramps, and installations of curbs not in compliance with then-current ADA standards, in addition to changes in ADA requirements. The assertion that a significant portion of currently non-compliant ramps were compliant when installed could only be credible if supported by ramp-by-ramp documentation of what the non-compliant features of each ramp are, when the particular ramp was installed or upgraded, and what ADA standard applied. Such evidence has not been provided.

Finding 78: Perspective is provided by examining what the curb ramp accessibility situation could have been without the Stipulations, if the City had merely followed the ADA regulatory mandate that ramps complying with ADA standards be installed or achieved by upgrading along all streets being resurfaced or otherwise altered. If the 1994-2002 rate of installations had continued, all corners would have had ramps by approximately 2010 – which is what the projections in Attachment A ("Projected Number of Ramps to Be Constructed") to the 2002 Transition Plan forecast (with some conditions and provisos). And based on the City's declarations (unverified) that all streets are resurfaced in 20 years or less, if the ADA regulations' requirement that ramps shall be upgraded to ADA standards on corners adjacent to resurfaced streets, all ramps in the City would have been upgraded between 2002 and 2022; by 2016 approximately 70% would have been upgraded to ADA compliance at least once, instead of only 20% that comply with the standards

today. The 2002 Stipulation may actually have slowed down progress in achieving accessibility of the curb ramps of New York City.

Finding 79: Given the unavailability of pertinent data from the years immediately after 2002, it is impossible to say whether the Stipulation achieved its accessibility goals during its early years. But what the available numbers do show is that at some point after 2002, well before 2013, it became clear that the Stipulation was not having the positive effects that had been expected. Whatever great hopes and high expectations the parties may have had, signs were accumulating that the Stipulation was not working. The ultimate point is not the blameworthiness of either of the parties, nor of any particular official, department, employee, or legal representative, but that the relief, in the form of curb ramp accessibility, to which people with mobility impairments and others who need or desire to use the ramps were legally entitled, was denied.

Finding 80: The 2002 Stipulation resulted in unwarranted delays of relief to the Plaintiff Class, by slowing down progress in attaining full compliance with ADA standards in all corners in the City. The inequity of such postponement of relief for denials of ADA-guaranteed rights gives rise to what might be termed "an arrearage in relief" – a responsibility to take corrective action going forward to offset the unjustifiable deprivation under the prior agreement. Far from seeking to make recompense for not having provided timely relief to the Plaintiff Class until now, the 2016 Stipulation will actually occasion substantially more delay of relief in the future.

Finding 81: Under the 2002 agreement, the average rate of ramp installations plummeted to a preposterously low 198 per year (for 2015-2017). But the terms of the 2016 Stipulation would actually slow down the process of installing the remaining 4,431 ramps considerably. The replacement of the blitz construction method by conditioning installation on resurfacing (2016 Stip. at 4-5, ¶ 6.A) means that it could be 20 years (the period of time during which all streets will be resurfaced) before some of the corners would be addressed. And corners would only be surveyed for their ramp needs as the adjacent streets were coming up for resurfacing, and if the survey noted that a corner would need a complex ramp (which most of the remaining corners do), a "Pedestrian Ramp Exception" process

would be begun, normally involving a long designing and planning period before the ramp construction would begin. (*Id.* at 5-7, ¶¶ 6.A & 7). The 2016 Stipulation sets no end date for ramps to be installed on all corners in the City.

Finding 82: The 2002 Stipulation did not impose any requirements relating to curb ramp upgrades, so the problem of ramps that do not meet ADA standards was disregarded for the last 15 years. Now under the 2016 Stipulation upgrading, other than in Lower Manhattan, will be done in conjunction with resurfacing, which occurs on a 20-year cycle. So after having been ignored for 15 years, non-compliant ramps will not all be identified and plans begun for their upgrade and repairs for 20 more years. And, as with installations, upgrades where a complex ramp is involved will go through a separate and more time-consuming "Pedestrian Ramp Exception" process.

STIPULATED GOALS
(See Subsection XI.D, pp. 185-186)

Finding 83: Integral to an adequate settlement agreement is a clear delineation of the objectives to be achieved and the steps to be taken to achieve them. In the Statement of Purpose of the 2002 Stipulation the parties committed themselves to "the mutually advantageous, efficient and expeditious installation of curb ramps at all remaining unramped locations in the City where pedestrian walkways cross curbs," and the City promised to "make its best efforts to ascertain and use the most efficient and the most cost-effective construction method possible for installation of standard curb ramps." In the 2016 Stipulation, the parties declared that they were seeking to achieve (1) completion of installation of curb ramps at remaining unramped locations in the City; (2) upgrading of curb ramps installed in compliance with ADA standards that were no longer in compliance with those standards; and (3) improving the City's methods and procedures for responding to complaints regarding unramped corners and non-compliant ramps, and set as priorities: installing curb ramps "with a nexus to resurfacing," upgrading curb ramps in Lower Manhattan, and upgrading curb ramps "with a nexus to resurfacing." (*Id.* at 4-6, ¶ 6). The 2016 Stipulation fell short of setting an explicit goal of having ADA-compliant ramps

at every corner in the City requiring them. Nor did either Stipulation completely fulfill Judge Daniels's request for "a description of what that full compliance would entail."

SCHEDULE OF STEPS TO BE TAKEN

(See Subsection XI.E, pp. 186-188)

Finding 84: A schedule of steps to be taken by the parties is a central ingredient of an effective settlement agreement. It formalizes the parties' commitments and expectations regarding what is supposed to happen and when; and provides a necessary, agreed-upon itinerary for future compliance that serves as a touchstone and checklist for measuring and monitoring progress.

Finding 85: The 2002 Stipulation did not contain any numbers related to curb ramps, and the tables and schedules included in it addressed solely commitments of funds. Not only did it not include a binding commitment to a schedule of curb ramp construction, but expressly forswore doing so. Instead of the parties agreeing on any schedule of, or deadline for, curb ramp installations, the 2002 Stipulation contained provisions simultaneously declaring that the City could reduce the funding for standard curb ramps at the point when capital commitments were sufficient for the design and installation of all standard curb ramps, in (1) "any Fiscal Year between FY2003 and FY2008," and (2) "any Fiscal Year after FY2008," indicating that the parties had no idea when installation of all standard ramps would be funded and completed.

Finding 86: The 2016 Stipulation presents figures for allocations of money for ramp construction for specified years, and thus satisfies the Court's request for information regarding "what moneys are committed to this," but provides no numbers of curb ramps to be constructed with these funds. The only scheduled task performance in the Stipulation is a statement that the City "projects completing the curb ramp upgrades in Lower Manhattan, to the maximum extent feasible, ... within five years from the date of this Agreement." No interim goals are set, nor is there any indication of any consequence for not meeting the "projections." Otherwise, no numbers of curb ramps nor a schedule for their installation or upgrade appear in the Stipulation. No schedule is presented for

installing ramps at the 4,431 corners where they are still needed, nor any commitments, "projections," or estimates for upgrading the ramps at corners outside of Lower Manhattan. The 2016 Stipulation also does not give any schedule or deadline for completing the survey of 29,165 corners Citywide. Completion of the survey to determine which ramps need upgrading to meet ADA standards should be a matter of the highest priority.

END DATE
(See Subsection XI.F, pp. 188-189)

Finding 87: Neither of the Stipulations sets any target date for completion of the lawsuit. While the Court elicited comments from the parties about putting in ramps "expeditiously" and abstract statements about looking forward to the day when all corners have ADA-compliant ramps, the parties have not planned for and decided on, and definitely not included in the Stipulations, a date when they expect the litigation to wind up. Working toward a definite end date would be a great opportunity for DOT, the City, and EPVA to get positive publicity by being able to declare that, as of a date certain, all New York City corners will be fully accessible to and usable by people with disabilities.

CONFORMITY WITH LEGAL STANDARDS AND REQUIREMENTS
(See Subsection XI.G, pp. 189-197)

Finding 88: A fair, reasonable, and adequate settlement cannot provide relief to the Plaintiff Class that does not satisfy legal requirements. At a minimum, the settlement must provide the class with relief that conforms to applicable legal standards. Findings 89 to 95 address the degree to which the Stipulations comply with pertinent legal standards and requirements.

Finding 89: <u>Compliance with ADA Standards.</u> The 2002 Stipulation did not include any provision requiring that all curb ramps installed by the City shall comply with ADA standards, which constituted the omission of a key federal regulatory requirement. The 2016 Stipulation includes a provision mandating that "[t]he installation and upgrades required by the Stipulation ... will be performed in accordance with the Stipulation, this

Agreement and the ADA Standards. At the Fairness Hearing, counsel for the City assured the Court that "[t]he City will bring all of the curb ramps up to current ADA Standards ...." However, the 2016 Stipulation defines "ADA Standards" with a string of statutory and regulatory citations that are not only erroneous and misguided, but are not even "ADA Standards." Under the terms of the two Stipulations, the installation and upgrading of curb ramps at the heart of this lawsuit have not been, and are not, governed by any proper accessibility standards under the ADA.

Finding 90: Blitz Construction. The 2002 Stipulation included the unusual, controversial tradeoff in which the City agreed to install pedestrian ramps on an expedited, "blitz" basis in return for the Plaintiff agreeing to the City being "excused" from installing ramps in connection with street resurfacing projects, as required under the ADA. The Objectors and the United States have expressed strong condemnation of this part of the agreement. Regardless of its legality or illegality at the time of its adoption, in practice this arrangement did not live up to its rationale for long, and actually resulted in seriously diminished progress toward curb ramp accessibility. The 2016 Stipulation reverses the arrangement, rejects the blitz approach, and requires upgrades of non-compliant ramps and installation of new ramps where needed to be done whenever streets are resurfaced. The reversal does not, however, address the time lost under the prior bargain, and exacerbates the situation by tacking on additional postponements of installations and upgrades.

Finding 91: Complex/Standard Ramp Distinction. The Objectors and the United States took exception to the distinction made in the 2002 Stipulation between "complex ramps" and "standard ramps. The 2002 Stipulation defined "standard curb ramps" as "those which can be installed without a unique design drawing for that location," and "complex curb ramps" as "those which require a unique design drawing for that location, usually due to an obstruction or other unusual site condition." These terms are in common usage within the City's DOT and have no innate impropriety or taint. Over time, the administrative practice became that, when they encountered a site condition that required a complex ramp, DOT or its contractors would fill out a Pedestrian Ramp Exception form, indicating that special planning and design would be required. This process has been

memorialized in the 2016 Stipulation. In practice, the complex ramps are put into a single basket for indefinite delay, without regard to the spectrum of individual differences in the types and degrees of complexity. The result is that, as of December 2016, over 77% of the corners surveyed that needed curbs installed required complex ramps.

Finding 92: Undue Burden Limitation. The 2002 Stipulation included several assertions of an "undue financial burden" limitation on the City's obligations under the agreement. The United States, in its Statement of Interest, observed that "the undue burden analysis is inapplicable to new construction or alterations." At the Fairness Hearing, the parties acknowledged the inapplicability of the undue burden limitation and financial burden defense, and it is not mentioned in the 2016 Stipulation. However, the 2016 Stipulation did not explicitly countermand or rescind the undue financial burden provisions of the 2002 Stipulation.

Finding 93: Infeasibility. The 2016 Stipulation incorporates certain limitations on (or defenses to) requirements for full compliance with ADA standards. These focus on feasibility, variously articulated as performing obligations "to the maximum extent feasible," or not being required to do things that are "infeasible" or "technically infeasible," or "structurally impracticable," and the like. At the Fairness Hearing, counsel for the City and the Court had a lengthy interchange about feasibility and infeasibility, during which the Court challenged the City's "carte blanche exception – to the extent feasible," and got counsel to admit that the City had "never made a determination that any particular site fits this category as of today." The ADA regulations and regulatory guidance, and the Second Circuit's ruling in *Roberts v. Royal Atlantic* Corp. have all declared definitively that, while the ADA regulation include such limitations, they apply only in the rarest circumstances, which makes the inclusion of them in the 2016 Stipulation and the City's frequent references to them unseemly and begrudging. A better tack would be to state a strong intent to make all the City's curb ramps comply fully with the ADA standards, and, if the extraordinary circumstances ever come to pass, the City will be fully protected by the presence of these limitations within the regulations.

Finding 94: Detectable Warnings. **"Detectable Warning Surfaces" (truncated domes) have been required on curb ramps since the issuance of the Americans with Disabilities Act Accessibility Guidelines in 1991. To allow additional research, a suspension was placed on the requirement in 1994, which lasted until it was allowed to expire on July 26, 2001. The 2016 Stipulation (like the 2002 Stipulation) does not mention the Detectable Warning Surfaces requirement, an omission with which the Objectors have taken strong umbrage. The parties have taken the position that the 2016 Stipulation requires newly installed ramps to comply with current ADA standards, and that those standards require detectable warnings on curb ramps. The parties' position on detectable warnings under the 2016 Stipulation is sound. It would seem to be in every one's best interest, however, to have a provision in the Stipulation explicitly endorsing the detectable warning requirement.**

Finding 95: Other Barriers. The Objectors have challenged the failure of the 2016 Stipulation to address barriers other than corners not having ADA-compliant ramps, including "mid-block barriers on sidewalks and pedestrian routes, such as raised or uplifted sidewalks, permanent or moveable obstacles that block the path of travel for cane or wheelchair users, or the barriers caused by construction zones, or from traveling to the street because the sidewalk is inaccessible." The 2016 Stipulation did include, in a footnote, a statement that "the City has allocated $26,500,000 for general sidewalk repairs in each of FY2016 and FY2017," but there is no designation of such expenditures to disability accessibility. The Objectors contend further that the 2016 Stipulation does not address "weather-related impediments at curbs and sidewalks, such as defective drainage and ponding at the bases of curb ramps," and contains "[n]o provision for maintenance." To the extent that certain of these issues, such as maintenance of curb ramps and ponding at the bottom of ramps, directly affect the usability of the ramps by members of the class, they are sufficiently interconnected with the claims in the case that it is reasonable to consider them as within the scope of the lawsuit. A certain logic inheres in the view that making curb ramps accessible is futile to the extent that people with disabilities cannot get to the ramps, but it is also true that parties have considerable latitude to frame the issues they choose to litigate. If, however, the Court was to construe these other issues raised by the Objectors as not being within the scope of the *EPVA v. City of New York* lawsuit, it would be fundamentally unfair to permit this case and the Stipulations resolving it to be used to

preclude members of the class who choose to do so to litigate these serious issues on their own.

PROCEDURES FOR ENSURING THAT STIPULATION COMMITMENTS AND LEGAL REQUIREMENTS ARE MET
(See Subsection XI.H, pp. 197-200)

Finding 96: The 2016 Stipulation establishes no mechanisms or processes for addressing disputes or enforcing obligations under the Stipulations; its only reference to such procedures is a single provision stating that, in the event of a dispute regarding a corner covered by a PRE Form, the Plaintiff Class "will have recourse pursuant to the procedures set forth in paragraph 30 of the [2002] Stipulation, which remain in full force and effect as set forth in the Stipulation." Although the 2016 Stipulation does not establish enforcement mechanisms, it does have a provision stating that the terms of the Agreement "may be modified by the Parties upon a written agreement signed by the attorneys for the parties," a provision which the Objectors have denounced as giving the City "the ultimate mechanism to avoid compliance with anything ... to change anything at all, for any reason at all, at any time." Counsel for the Plaintiff responded that "[t]he 2016 Stipulation is a so-ordered mandate. As such, any changes proposed by the parties will be submitted to the Court to be so ordered ... [and] would be subject to a fairness hearing." If the parties' intent was as expressed by Plaintiff's counsel, good legal draftsmanship would call for such intent to be spelled out in the provision, to avoid any misconstruction along the lines that the Objectors identified.

Finding 97: The 2002 Stipulation includes several paragraphs relating to enforcing its requirements and settling disputes, including a meeting of the parties at the outset to agree on priorities to justify use of construction methods other than blitz construction, notification to the Plaintiff if the City contemplates a policy change from blitz construction to some other methodology, the "on-going working group" expected to meet at least twice a year to share relevant data, and the provision to EPVA of relevant "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps."

Any dispute related to the Stipulation, including any assertion that the City has failed to comply with any provision, was to be submitted to the Court, and the parties were accorded "the right to raise, and may raise, any legal or factual position," and the Court is authorized to "adjudicate any such dispute and grant all appropriate relief." (*Id.* at ¶ 30). Clearly, the breadth of issues that may be raised by a party under Paragraph 30, the Court's jurisdiction to hear and decide disputes over them, and the scope of relief that the Court may grant, are all extremely expansive.

Finding 98: If the New York City Council fails to appropriate funding as committed under the 2002 Stipulation, EPVA may declare the Stipulation null and void, and apply to the Court for "appropriate relief." If EPVA exercises the null-and-void option and makes application to the Court, the parties "may raise any legal or factual position before the Court," and the Court is authorized to grant appropriate relief. The absence in the Stipulations of performance schedules for installations and upgrades of curb ramps, requirements of objective, verified surveys of City corners, and other stipulated "deliverables" obscures the lack of another key part of an effective settlement – measures imposed to address and remedy non-performance or dilatory performance, when scheduled mileposts are not met. Such measures have both a prophylactic purpose – to induce a party to fulfill obligations and meet schedules – and a remedial or compensatory aspect – to rectify lapses and nonfeasance and put things back on track.

ACCOUNTABILITY, REPORTING, AND TRANSPARENCY
(See Subsection XI.I, pp. 200-204)

Finding 99: New York City and DOT have publicly embraced transparency and accountability as important governmental objectives in a variety of documents, modes, and venues. Such accountability and transparency have been quite limited, however, in the context of curb ramp accessibility in the City. Genuine accountability could hardly occur in regard to installation and upgrades of pedestrian ramps, when neither of the Stipulations contains enforceable scheduled numbers of ramps to be installed or upgraded by specified dates. Even in regard to the City's monetary commitments, for which the Stipulations do specify some timeframes, real accountability is not possible because no

targets are set as to how many ramps are expected to be installed or upgraded for the sums of money allocated. Nor has DOT provided the Court or the Special Master information as to how many ramps were actually installed or upgraded with the amounts of money spent for particular periods of time over the months and years since the 2002 Stipulation was signed. Assuming that the City and DOT have such data, it is disappointing that they have chosen not to marshal that information and provide it to the Court and Special Master in support of the fairness, reasonableness, and adequacy of the stipulation agreements.

Finding 100: Accountability in regard to compliance with curb ramp standards under the ADA regulations cannot be achieved without a full and ongoing survey of the curb-ramp status of every corner in the City. Neither the 2002 Stipulation nor the 2016 Stipulation requires or indicates any expectation of such a survey, or, indeed, of any survey of any kind. The survey of some 18% of corners, mostly in Lower Manhattan, was only begun in the summer of 2014, and current plans by the City are to complete the survey in conjunction with the street resurfacing schedule that will take up to 20 years.

Finding 101: The Stipulations cannot engender necessary accountability without: (1) specific commitments and a schedule for installations and upgrades; (2) delineations of what the results are to be, and have been, in terms of ramps installed and upgraded for the sums of money expended; and (3) requirements of independent, verifiable surveys to determine the actual status of work done and still to do over the course of the Stipulations.

Finding 102: Transparency has been sorely lacking in the City's curb ramp efforts. Subsection X.B of the Report on "Unavailability of Adequate Data" describes problems encountered trying to obtain information about progress and lack of progress in the City's operations relating to pedestrian curb ramps. Such difficulties manifested themselves in the parties' submissions to the Court and to the Special Master, statements at the Fairness Hearing, and the Special Master's extended efforts to procure pertinent data from the parties. It is challenging for the Court and Special Master to acquire basic information about curb ramp status in the City, and surely for people with disabilities and other members of the public who are not professionals, and even for trained advocates such as the counsel for the Objectors. This lack of transparency has continued even though DOT

has developed sophisticated electronic databases, linked to hand-held devices that make possible individualized information about the accessibility status of pedestrian crossings that can be updated almost instantaneously.

Finding 103: The lack of transparency has also manifested itself in the limited reporting the City has done. Under the 2002 Stipulation, the parties agreed to meet at least twice a year to share relevant data, and the City agreed to provide EPVA "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps." Scrutiny of this language reveals that it did not require the City to provide data about the numbers and location of ramps installed or missing, about ramp upgrades or corners needing them, or about the compliance of ramps with ADA standards. Over the years, but mostly after 2013, the City has provided the Plaintiff with some information about progress on curb ramps, typically in the form of spreadsheets with limited data. The dearth and scantiness of such reports explain the need for the Special Master's protracted pursuit of additional reliable information about the number of corners still needing ramps installed and the number of non-compliant ramps in the City.

Finding 104: Insufficient reporting of information by the City has been exacerbated by the reluctance or total failure of the relevant City agencies to acknowledge and reveal some kinds of information. A prime example was the City's failure to share, apparently even with its own attorneys, the existence of, and information about, the survey of all City corners conducted in 2006-2010. Similarly, prolonged efforts were required for the Master to uncover information about, and documentation of, accurate numbers of non-compliant ramps in the City, and information to support the representation that about 4,800 corners needed ramps installed. The City's foot-dragging in making these kinds of important information available was unfortunate, and may indicate reticence to share its intramural facts and figures.

NEED TO MODIFY STIPULATION
(See Subsection XII.A, pp. 205-209)

Finding 105: Modification of the conjoined 2002 and 2016 Stipulations is necessary to rectify relief to the class before the Stipulations can be deemed fair, reasonable, and adequate. At the Fairness Hearing, Judge Daniels recognized the possibility of a modification to the 2016 Stipulation when he observed that "[t]he real question[s]" were whether or not, "*with or without some recommended and agreed-upon modification*, ... this should just go forward as a binding agreement...," and whether he should "approve this as fair and reasonable to the class *with or without any modifications recommended by the special master*" (emphases added)). The parties mentioned the possibility of a modification to the Stipulation toward the end of 2016, and at the January 23, 2017, meeting of the Master with DOT Commissioner Trottenberg, members of her staff, and attorneys representing the parties, the Commissioner raised the prospect of what she called "a potential amendment to the Stipulation." Counsel for both of the parties confirmed that they had been negotiating toward a modification of the Stipulation, and Plaintiff's counsel said that he believed the parties were moving rapidly toward a new agreement.

Finding 106: Recently the City and the Plaintiff have disagreed about the meaning of one of the Stipulation's principal elements – the requirement to upgrade the more than 116,000 ramps that do not comply with ADA standards – centered on ambiguity as to whether the funds committed by the City for upgrades are to fund only those connected to resurfacing or whether they may be used to fund other upgrades. On May 30, 2017, the Plaintiff wrote:

> **Since the 2016 Stipulation was so ordered, ... the City has taken the position that, under the Stipulation, curb ramp upgrades are only required during resurfacing and that funds committed to upgrades under the Stipulation need only be spent during resurfacing. This position is directly contrary to the parties' intent and the language of the 2016 Stipulation. Moreover, this position ignores the fact that, although the 2002 Stipulation excused the City from installing curb ramps during resurfacing so long as it complied with "blitz construction" requirements, the City was never excused from upgrading non-compliant curb ramps under the 2002 Stipulation. So, the 2016 Stipulation's two-prong approach to upgrades provides funding to remediate those non-compliant curb ramps that the City should have, but did not, upgrade in past years. In short, the two-prong approach to upgrades is fair, reasonable and adequate to the Plaintiff Class, but the City's mistaken position that the 2016 Stipulation requires curb ramp upgrades only on resurfacing is not.**

(Stulberg letter to Special Master, May 30, 2017, EX. 12, at 3-4).

The Plaintiff also declared that "the 2016 Stipulation can only be deemed to be fair, reasonable and adequate as to ... upgrade of ramps" if it "is properly interpreted" in a way that "to date, the City has resisted." (*Id.* at 1-2). The Plaintiff's letter shows that the parties differ on the proper interpretation of the 2016 Stipulation and provisions of the 2002 Stipulation as well. A common position on these critical issues is essential to the settlement of the lawsuit and must be reflected in an approvable stipulation.

Finding 107: Another essential modification to the 2016 Stipulation is replacement of its blatantly defective and inaccurate definition of "ADA Standards," discussed *supra* at pp. 11-12, 137-139, 189-190. As the overarching yardstick against which the compliance with the ADA of installation and upgrading of curbs ramps will be measured, it is absolutely necessary that "ADA Standards" be clearly and correctly specified.

CONSENSUS POINTS
(Subsubsection XII.B.1, pp. 209-210)

Finding 108: While the City, the Plaintiff, and the Objectors differ sharply on a variety of things, some matters on which they are in agreement include the following:

- **The 2016 Stipulation is not satisfactory in its current form.**
  (See pp. 205-209 *supra*).
- **4,431 corners (down from 4,800 at the time of the Fairness Hearing) still lack curb ramps.**
  (EX. 9, Macfarlane Declaration at 4, ¶ 14; see *supra* pp. 154, 155, 167, 172, 173).
- **An estimated 116,530 corners (about 73%) have curb ramps that are not ADA-compliant).**
  (FH Tr. at 42-43; *10 Year Plan to Upgrade All Ramps*; EX. 13; see pp. 149-150 *supra*).
- **The City, EPVA, and the Objectors have all acknowledged, cited, and relied on, the City's *10 Year Plan to Upgrade All Ramps* (2016).**
  (See pp. 149-150 *supra).*
- **The requirement of detectable warnings on curb ramps is a non-issue, because the City has assured the Court, the Special Master, and the Plaintiff that it will install detectable warnings on all pedestrian curb ramps in the city.**
  (See pp. 194-196, 210 *supra*).
- **Under the 2016 Stipulation in its current form, the City will continue a baseline capital commitment of a minimum of $20 million per year for ramp installations.**

(See p. 145-146, 208 *supra*; 2016 Stip. at 3, ¶ 2; Stulberg Letter to Special Master, May 30, 2017, EX. 12, at 2).

- **The City has committed some $11.5 million to install and upgrade ramps in Lower Manhattan within three to five years.**
  (See pp. 134, 206 *supra*; 2016 Stip. at 4, ¶ 3.B; FH Tr. at 92 ("three to five years")).
- **The City has made a capital commitment of an average of $60 million per year for fiscal years 2017-2027 for upgrading pedestrian ramps (up from $37.5 million per year for two years under the 2016 Stipulation in its current form).**
  (See pp. 158, 171, 206 *supra*; Kurland letter to Special Master, May 18, 2017, EX. 11, at 2).

LIST OF CORNERS WITHOU RAMPS
(Subsubsection XII.B.2, p. 210)

Finding 109: On May 3, 2017, the City provided the Special Master with a list of 4,431 corners, listed by borough, intersection, and corner number, that were missing pedestrian ramps as of February 2017. The list was the result of a purportedly comprehensive survey of all of the corners and ramps in the City, conducted from 2006 to 2010 and updated thereafter, though not disclosed outside of DOT. It opens up a number of possibilities: the list's accuracy and inclusiveness can be verified by checking each of the individual corners on it; inspections can be done within each of the boroughs to see if any corners without ramps have been omitted; since the information obtained is stored on Microsoft Excel spreadsheets within a Microsoft Access database, it can be easily and quickly updated and summarized; and the results could be made available to the Plaintiff and the public, including members of the class and other people with disabilities who need to check whether a particular corner is accessible for their use. And, obviously, the results can be used to monitor ongoing progress in installing ramps.

SURVEY OF COMPLIANCE WITH ADA STANDARDS OF 29,165 CORNERS
(Subsubsection XII.B.3, pp. 210-211)

Finding 110: The City's attorneys provided the Master the spreadsheet titled "Category Breakdown of 29,165 Corners Surveyed" (EX. 10), on December 9, 2016, but it was not until May 3, 2017, that they provided documentation of the survey, begun in 2014 and involving 29,165 corners, from which DOT extrapolated results to project citywide figures

on the numbers of corners having non-ADA-compliant ramps, and the non-complying features of the substandard ramps. (EX. 4, ex. B). The projections made by the City that about three-quarters of existing ramps are not in compliance with ADA curb ramp standards are the best information available to date. Those results are deplorable and alarming; the seriously incomplete survey, however, opens up some promising prospects. Conducting the survey entailed development of a survey instrument (EX. 4, ex. A), and training of inspectors who gained experience doing such surveys. Information from the surveys is entered (with pictures), using the Collector application on iPads, into DOT's Pedestrian Ramp Geographic Information System Database. These functions make it possible to continue and to complete the survey over all corners of the City straightforwardly and expeditiously. The prompt completion of the survey citywide is a critical priority in resolving this lawsuit.

10 YEAR PLAN FOR UPGRADING ALL RAMPS
(Subsubsection XII.B.4, pp. 211-213)

Finding 111: The City's *10 Year Plan to Upgrade All Ramps: Sidewalk Program and CWC In-House Plan* ("*10 Year Plan,*" EX.13) was described by Plaintiff's counsel as "a calculation, a budget projection by the Department of Transportation, presumably by a combination of budget and engineers." It provides the City's planning, with numbers of corners and budget requirements, for upgrading, in ten years, all corners in the City where the ramps do not comply with ADA requirements. It anticipates upgrading 11,653 ramps per year, at an annual cost of $44,602,038 and a total 10-year cost of $446,020,382. At the rates of upgrades cited in the plan, the remaining upgrades should be completed in under eight years, because the total number of ramps needing upgrades – 116,530 – was calculated during the summer of 2015. In the interim, the City has begun making upgrades on an expedited basis in Lower Manhattan, and presumably doing some upgrades elsewhere in the City. Also, assuming that the remaining curb installations are installed on a reasonably expeditious basis, additional monies should be available thereafter for funding more upgrades sooner. Both of the parties and the Objectors have explicitly cited, endorsed, and relied upon the *10 Year Plan.*

FIRST IMPERATIVE FOR AN ACCEPTABLE SETTLEMENT: COMPLETION OF SURVEY OF CURB RAMP STATUS OF ALL CITY CORNERS (Subsubsection XII.C.1, pp. 213-215)

Finding 112: The Court; the parties and Objectors; DOT; people with disabilities, their families, and friends; and the general public all have a critical need for a comprehensive survey of the curb ramp status of all pedestrian crossing in New York City. On May 30, 2017, the Plaintiff argued that the City must "accelerate its efforts to survey the City's street corners and curb ramps."

The so-called "Survey of 29,165 Corners" begun in the summer of 2014, had recorded information as of May 1, 2017, on about 60 different characteristics and circumstances of 43,843 corners. The 1999 inventory of corners citywide recorded the presence or absence of pedestrian ramps, and the 2006-2010 survey supplanted the inventory by updating the accuracy of the information and using electronic technology to record it. Both the "Survey of 29,165 Corners" and the 2006-2010 citywide survey have been updated, and are ongoing.

For both surveys, the surveyors/inspectors/field staff use hand-held devices to collect and record information, with data automatically uploaded into DOT's Pedestrian Ramp Geographic Information System Database, stored on DOT servers; they also take photographs of the corners surveyed and record geographical information, including street-intersection identification and GPS coordinates. Individuals conducting the surveys can enter real-time data at individual corners regarding the presence of ramps, and/or their condition and characteristics, relative to curb ramp standards. The ArcGIS platform used by DOT to store survey data permits data to be extracted and analyzed; maps, reports, and spreadsheets to be created on an ad hoc basis; and profiles to be prepared of the status and condition of ramps (or their absence) on any particular corner that has been surveyed. The existing "Survey of 29,165 Corners," the 2006-2010 citywide survey, and the database on which they are recorded provide sound footing for completing a full and comprehensive survey of all City corners.

Finding 113: What is necessary is to expand the existing surveys to complete a comprehensive survey that provides an accurate, verifiable, up-to-date, and ongoing count,

list, maps, and electronic database of all pedestrian crossings in the City, available to the public in user-friendly electronic and written form. The survey data should:

- **Describe the pedestrian curb ramp status of every individual corner in the City;**
- **Identify, by corner and in a list and maps, all locations that need but are lacking ramps and all locations with ramps that are not in compliance with ADA Standards;**
- **Identify, by corner and in a list and maps, curb ramp complaints that have been filed and how they have been or are being addressed;**
- **Include a list and display, by location and in maps, of the City's street construction, resurfacing, and repaving projects involving alterations or improvements to pedestrian pathways; and**
- **Be made available electronically on or through the City's website, in written form through the office of DOT's *ADA Coordinator* & Disability Service Facilitator, and, upon request, in multiple accessible formats.[392]**

Such an all-inclusive survey is overdue and very much needed. The two existing surveys provide a start, a methodology, a structure, and trained personnel for making it a reality.

Finding 114: The City's current stance is to continue the survey of ramps' compliance or non-compliance with ADA standards, but on a schedule generally determined by the lead-up to resurfacing of streets, which will take 20 years or so to reach all corners. This stance is unacceptable: the survey should be completed on an expedited basis. DOT staff members who perform the surveys informed the Special Master that the surveys usually take only about 15 minutes or so per ramp to complete. With the assignment of reasonable numbers of employees or contractors to do the surveys, on a concentrated, one-time basis, the citywide survey could be completed in a matter of months. This accomplishment is absolutely essential for an appropriate settlement of this lawsuit, and should be an urgent priority of the City.

SECOND IMPERATIVE FOR AN ACCEPTABLE SETTLEMENT: DETAILED PLAN FOR UPGRADING ALL NON-COMPLIANT RAMPS (Subsubsection XII.C.2, pp. 215-216)

[392] Some elements presented here are derived from the Settlement Agreement and Release of Claims in *Willits v. City of Los Angeles* at 32-34, ¶ 14, discussed at p. 61-69 *supra*.

Finding 115: A most distressing and disappointing aspect of the curb ramp situation in the City is that, 23 years after the *EPVA v. City of New York* lawsuit was filed and nearly 15 years since the 2002 Stipulation was so ordered, about three-quarters of the City's curb ramps are not compliant with the requirements of the ADA, according to the City's own reports. And, by the City's own reckoning, the remaining 116,530 ramps can be upgraded in fewer than 8 years, *i.e.*, by 2025. And yet the City is considering waiting another 20 years to complete the job of upgrading the remaining ramps, by scheduling them based upon DOT's timetable for resurfacing streets. (See pp. 183-185: EX. 8, Slide 11).

The unnecessary and harmful procrastination must be corrected by prompt and dynamic action. What is called for is:

> **A Detailed Plan for Upgrading within Eight Years All Remaining Ramps that Are Not Fully Compliant with ADA Standards.**

A "detailed plan" is one that has the elements of an appropriate settlement agreement discussed on p. 174-176, including:

- **a schedule for upgrading ramps that do not comply with ADA standards to bring them up to compliance;**
- **deadlines and annual target numbers of ramps to be upgraded; standards and procedures for ensuring that requirements and terms are met;**
- **funding and administrative commitments for enabling the scheduled upgrades; regular reporting and verification of progress in upgrading ramps;**
- **a description of consequences if the City is not meeting the schedule; and**
- **a target deadline for completing full compliance.**

Based on the rate of ramp upgrades projected in the City's *10 Year Plan to Upgrade All Ramps*, ramp upgrades should be completed for all curb ramps sometime in 2025.

THIRD IMPERATIVE FOR AN ACCEPTABLE SETTLEMENT: DETAILED PLAN FOR INSTALLING RAMPS AT REMAINING CORNERS (Subsubsection XII.C.3, pp. 216-219)

Finding 116: The number of corners that need one or more ramps but are missing them – 4.431 – is substantial but not daunting. With a modicum of foresight and resolve, the City could make short shrift of this task. At the pace that the City installed ramps during the years from 2002 to 2013 – 3,961 per year – it would take about 13 months to install ramps

at 4,431 corners (See p. 215[393]); of course, this statement is misleading, primarily because the City has been saving many of the "complex ramp" sites until the end, and they are expected to take longer (and cost more as materials and labor become more expensive due to the delay). This expectation of ramp installations taking longer is likely overstated, however. Twenty-two percent – 1,137 – of the remaining 5.106 corners lacking ramps on October 20, 2016, needed standard ramps. Thirty-six percent – 1,866 – are what might be termed "ordinary complex," because they meet the "require a unique design drawing" criterion that DOT and the Stipulations use to define "complex ramp," but are not highly complicated, difficult, and expensive like some of those built above subway structures or in landmark or historic districts. (See pp. 217-218).

Finding 117: The "complex ramp" designation encompasses a broad continuum from ramps that may need a unique design drawing but not a great deal of engineering or construction complexity and difficulty, to those that will require considerable designing and engineering expertise, and present a high degree of construction and logistical challenge. DOT personnel and City attorneys have mentioned the possibility that some corner might require a "million-dollar ramp," but the DOT personnel admitted that to date they had never identified one. As the Special Master completed this report, the parties had provided no documentation whatsoever of the existence of such a corner. The number of, and problems raised by, unusually difficult and expensive ramps should not be accepted without documentation as to which particular corners need these extraordinarily challenging ramps, what it is that makes them so problematic, and how much time and money their installation will involve.

Finding 118: To address the remaining corners lacking needed ramps, what is needed is:

> **A Detailed Plan for Installing, within 5 Years, at All Corners without Ramps, Ramps Compliant with ADA Standards.**

Parallel to that described *supra* for upgrading noncompliant ramps, a "detailed plan" for installing ramps at all remaining corners without them should include:

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[393] At the rate at which the City installed pedestrian ramps between 1994 and 2002 – 6,667 per year – 4,431 ramps could have been installed in eight months. See *supra* pp. 166, 179.

- **a schedule for installing ramps meeting ADA Standards at the 4,431 corners that do not have ramps;**
- **deadlines and annual target numbers of ramps to be installed;**
- **standards and procedures for ensuring that requirements and terms are met;**
- **funding and administrative commitments for enabling the scheduled installations;**
- **regular reporting and verification of progress in ramp installations;**
- **a description of consequences if the City is not meeting the schedule; and**
- **a target deadline for completing all installations.**

INCORPORATING APPROPRIATE ADA STANDARDS
(Subsection XII.D, pp. 219-221)

Finding 119: The botched definition of "ADA Standards" in the 2016 Stipulation makes it vitally important to settle upon a proper definition going forward. Counsel for the City has indicated to the Special Master that the City applies the "2010 Standards," a reference to the *2010 ADA Standards for Accessible Design*, in which, on September 15, 2010, the Department of Justice adopted "New ADAAG" as its regulatory standards under Titles II and III of the ADA. (See pp. 48, 50-52 *supra.*) On October 30, 2006, the U.S. Department of Transportation issued a regulation adopting New ADAAG as its regulatory standards, with what it termed "minor modifications."[394] One such modification was adding language to continue in effect the requirements of the prior ADAAG regarding detectable warnings on curb ramps.

Finding 120: The Department of Justice and the Department of Transportation have overlapping regulatory jurisdiction over state and local government entities involved relating to transportation. DOT has authority over recipients of federal financial assistance, including the City of New York. Even before the ADA took effect, the City of New York was subject to DOT's Section 504 regulation, including its requirement that "[a]ll pedestrian crosswalks constructed with Federal financial assistance shall have curb cuts or ramps to accommodate persons in wheelchairs ...."[395] (See p. 220 *supra*). The

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[394] *Id.* at 63,263.

[395] 44 Fed. Reg. 31,422, 31,477, § 27.75(a)(2) (May 31, 1979), codified at 49 C.F.R. § 27.75(a)(2) (emphasis added).

standards based on New ADAAG adopted by DOT in 2006, and by the DOJ in 2010 and are nearly identical. The only significant difference is that the Transportation Department re-inserted the detectable warnings requirement from prior standards, while the Justice Department omitted it. This difference does not really matter in the context of *EPVA v. City of New York,* because the City has committed itself to install ADA-compliant detectable warnings whether or not it is legally required to do. (See pp. 194-196, 220 *supra*).

Finding 121: A better alternative to the DOJ 2010 and the DOT 2006 standards, however, is afforded by the *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way* ("PROWAG") an NPRM issued by the Access Board on July 26, 2011. The content of PROWAG is described in some detail on pp. 52-60 *supra*. It requires detectable warnings on curb ramps and provides the Access Board's current best guidelines for pedestrian accessibility. PROWAG has not yet been finally adopted, but it has become a source of guidance in many jurisdictions around the country (See p. 59 supra, and n. 152), and has been lauded by the U.S. Department of Transportation (See pp. 59, 221 *supra*). PROWAG represents the best current thinking about designing and implementing pedestrian accessibility in metropolitan areas. PROWAG is the optimal set of standards to serve as "ADA Standards" under the Stipulations in this case. It is essential that the 2016 Stipulation be modified to designate proper federal accessibility standards as the "ADA Standards" with which the parties are committing themselves to comply.

AUTHORITY OF THE COURT
(Subsection XII.E, pp. 221-222)

Finding 122: Paragraph 30 of the 2002 Stipulation declared: "Any dispute arising out of or related to this Stipulation ... will be submitted to this Court. This Court may adjudicate any such dispute and grant all appropriate relief." Another provision of the 2002 Stipulation accorded the Court ongoing "jurisdiction to hear and resolve disputes arising under or related to this Stipulation and to otherwise enforce the terms of the Stipulation." These provisions grant the Court expansive powers that empower it to help forge a modified Stipulation that will fairly, reasonably, and adequately deliver to the Plaintiff Class the appropriate relief that class members were promised in the Stipulations, but have yet to receive. In the quoted provisions of the 2002 Stipulation, the parties, by mutual

consent, conferred on the Court responsibilities and authority extending beyond the approval/non-approval function (based on the determination whether the settlement is fair, reasonable, and adequate) assigned in the federal procedural rules – responsibilities and authority that the Court accepted when Judge Griesa so-ordered the Stipulation. The requirements under the Federal Rules plus the power, jurisdiction, and obligation, to adjudicate and resolve any disputes arising under or related to the Stipulations, and to grant "all appropriate relief," provide the Court with considerable authority to induce and facilitate an appropriate settlement in this case.

REPRESENTATION OF THE CLASS
(Subsection XII.F, pp. 222-224)

Finding 123: For successful modification and implementation of the settlement agreement in this case, it is essential that the organizational and legal representation of the Plaintiff Class be augmented. In a lawsuit of this scope, complexity, and duration, the large number of individually varying class members cannot be adequately represented by a single organizational plaintiff and (quite unusually in such a case) no named individual plaintiffs. The class of "individuals with a disability" is far too broad, diverse, and varied to be represented by a single disability organization, defined in the 2002 Stipulation as "comprised of veterans who have sustained spinal injury or disease and who use wheelchairs." In pursuing its major objectives, including the enactment of the Americans with Disabilities Act, the disability community has found it necessary and advantageous to operate in coalitions of organizations representing individuals with a multitude of disabilities, ages, needs, and interests. While EPVA (now United Spinal Association) is an esteemed and highly capable organization, it ought not stand alone in this litigation to represent people with the huge range of conditions that are denominated disabilities.

Finding 124: Effective representation of the Plaintiff Class going forward also will require beefed-up legal representation. It was not until May 30, 2017, that counsel for the Plaintiff figured out and complained of, in his letter to the Special Master, the critical fact that the City had not been upgrading ramps other than in conjunction with resurfacing, ramps "that the City should have, but did not upgrade in past years"; and that "the City has

completed surveying only about 18% of the City's street corners and, therefore, lacks information as to the number of ramps to be upgraded, the types of upgrades needed on those ramps, and the cost of upgrading those ramps." This degree of inattention, delay, or neglect, coupled with the years of inaction during which it was occurring, demonstrates that the Plaintiff class needs additional legal advocates to supplement current counsel. In short, adequate representation of the Plaintiff class requires an additional infusion of organizational and legal advocacy resources.

INVOLVEMENT OF OBJECTORS
(Subsection XII.G, pp. 224-225)

Finding 125: Since filing their Letter of Objection with the Court on May 2, 2016, eight grassroots disability rights organizations in the City of New York – the American Council of the Blind; the Harlem Independent Living Center; the Bronx Independent Living Services; United for Equal Access, Inc.; the Brooklyn Center for Independence of the Disabled; the American Council of the Blind of New York, Inc.; Disabled in Action of Metropolitan New York, Inc.; and the Center for Independence of the Disabled New York – have participated as Objectors in *EPVA v. City of New York*. In addition to filing their objections, along with numerous exhibits, in their initial letter to the Court, the Objectors appeared and presented their views at the Fairness Hearing, and provided substantial submissions of written analysis and attached documents to the Special Master. The Special Master and counsel for the Objectors had a frank and productive face-to-face meeting on December 19, 2016.

Finding 126: The Special Master found the submissions and other input of the Objectors to be informative and helpful. On certain issues, such as the statistical surveys of ADA compliance of corners in the City, which revealed that about 80% of curb ramps did not meet ADA standards, and identification of the City's *10 Year Plan to Upgrade All Ramps* and its significance, it is fair to say that the Objectors have led the way. In regard to the *10 Year Plan*, during the Fairness Hearing, both counsel for the City and counsel for the Plaintiff identified an exhibit to a submission of the Objectors as source documentation for the plan. The Objectors have provided critical analysis of the content and implementation

of the Stipulations, making a number of cogent points. They infused a useful focus on the needs of blind and low-vision pedestrians that had not been made explicit in the Stipulations. Overall, the Objectors have contributed greatly to the proceedings, deliberations, and information base in this lawsuit, and advanced the interests of people with disabilities, the City, and the general public by their participation.

Finding 127: Despite the antagonistic and combative edges between the parties and Objectors in the course of filings and submissions, counsel for the Plaintiff and the Objectors would be well-advised to team up and collaborate in future representation of the Plaintiff class. To engage effectively with the City of New York to complete the job of making the City's pedestrian crossings readily accessible to and usable by people with disabilities, those who advocate for the achievement of such a goal ought to put aside their differences and redouble efforts to make accessibility of New York's sidewalks a reality as expeditiously as possible.

VERIFICATION AND MONITORING
(Subsection XII.H, pp. 225-228)

Finding 128: The Stipulations unfortunately do not call for any verification or monitoring of curb ramp facts and figures provided by the City. Without such review and oversight, data provided by DOT cannot necessarily be deemed accurate and authoritative. Just because a DOT official or employee (often unidentified) announces or writes a statement or number, does not automatically make it accurate. The parties have not raised any example of EPVA ever demanding verification, by involvement of outside professional experts or otherwise, of numerical or other information the City has provided.

Finding 129: The Objectors have stated that the 2016 Stipulation:

> **... lacks critical mechanisms typically found in settlements that are necessary to ensure a public entity's meaningful and effective compliance.... The Settlement does not provide for any system or mechanism to monitor progress achieved at any point in time. There is no provision for a neutral or third-party expert to perform such assessments.... The Settlement also fails to require the City to make periodic reports to EPVA or the public regarding work performed, monies spent, or progress achieved in the installation or upgrading of curb ramps.**

And in its "Deficiencies in 2016 Stipulation" list, under the heading "Implementation Defects," the Objectors included the following: (1) No surveys, (2) No regularly scheduled monitoring, (3) No use of experts, (4) No scheduled reporting with provisions of specific information by the City, (5) No inspection of plans and documents, (6) No revision to the transition plan, (7) No revised written policies, and (8) No provision for detailed accounting of funds spent. (Objectors' Submission, ex. 1).

Finding 130: While the 2016 Stipulation does not itself require the verification and monitoring mechanisms listed, the 2002 Stipulation, which is still in effect, does contain a provision stating the parties' agreement to establish an "on-going working group" to meet "periodically (at least twice a year) to share data relevant to implementation of the Stipulation," and that the City will provide EPVA (at least twice a year or at other intervals as the parties might agree) with relevant "non-privileged information and documents, including information and documents related to budgeting, allocation, funding, contracting and planning for design and installation of curb ramps." It also contains Paragraph 30, which provides that any dispute related to the Stipulation, including any assertion that the City has failed to comply with any of its provisions "will be submitted to this Court," and the Court "may adjudicate any such dispute and grant all appropriate relief," in the context of which the parties have "the right to raise, and may raise, any legal or factual position." These provisions countenance some reporting and monitoring options, but were not used to any significant effect in the years between 2002 and 2016. Otherwise, the shortcomings asserted by the Objectors in this context are largely on target.

Finding 131: The absence of effective monitoring has been particularly detrimental in this lawsuit. The sluggish and decelerating pace of curb ramp installations and the miniscule percentage of ramps that comply with ADA standards attest clearly to deficiencies in the monitoring of implementation of the Stipulations. The periods of time that have elapsed, during which a sizeable proportion of City curbs have remained inaccessible and not usable by people with mobility disabilities, demonstrate that performance of agreed-upon obligations has not been adequately overseen and scrutinized. To a great extent monitoring of progress in such a settlement falls to the Plaintiff and its legal counsel.

Finding 132: Another avenue for ensuring effective monitoring was identified by the Objectors in the above quotation from their Letter of Objection, in which they took issue with the absence of requirement of "a neutral or third-party expert," commonly termed a "Monitor," to monitor and assess progress. To be maximally effective in a case such as this one, such a Monitor should be experienced in evaluating or assisting public entities regarding accessibility, particularly of pedestrian ramps, under Title II; be knowledgeable of current federal accessibility standards; and preferably be a licensed architect or a registered civil engineer. She or he ought to be given the authority and responsibility to perform various specified duties, including reviewing progress in curb ramp installations and upgrades to assess compliance with the Stipulation of Settlement; filing detailed reports to the parties and the Court on curb ramp progress and related issues; conducting field spot checks on pedestrian pathways and crossings; and reviewing curb ramp complaints and program access requests. In addition, the Monitor should be authorized to respond to inquiries and complaints from Plaintiff Class members, recommend changes to the City's policies and procedures, and facilitate the City's adoption of written policies and procedures concerning the construction and maintenance of accessible curb ramps and paths of travel.[396] Given the history of non-compliance and flawed performance in fulfilling the critically important rights of the Class in *EPVA v. City of New York* to have full and equal access to City streets and crossings, retention of a neutral and expert Monitor is crucial.

[396] Some elements presented here are derived in part from the Settlement Agreement and Release of Claims in *Willits v. City of Los Angeles* at 34, ¶ 15.1; 36-37, ¶¶ 15.5 & .6.

XIV. RECOMMENDATIONS

A primary responsibility assigned to the Special Master in Judge Daniels's appointment was "[t]o make recommendations to the Court that will enable the Court to make an informed judgment as to whether the 2016 Stipulation, with or without modifications, is fair, reasonable, and adequate under Fed. R. C.P. 23(e)." (Dock., #111, ¶3(d)). Based on information and findings included in the prior sections of this report, this section presents the recommendations of the Special Master.

Recommendation 1: The Court should not approve the 2016 Stipulation in its present form as fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e)(2).

Recommendation 2: The Court should approve the 2016 Stipulation only if it is modified in accordance with Recommendations 3-14.

Recommendation 3: The 2016 Stipulation should be modified to require the City to complete, within 90 days, a comprehensive survey, as described in XII.C.1 on pp. 213-215 *supra*, that provides an accurate, verifiable, up-to-date, and ongoing count, list, maps, and electronic database of all pedestrian crossings in the City, available to the public in user-friendly electronic and written forms.

Recommendation 4: The 2016 Stipulation should be modified to include a detailed plan, as described in XII.C.2 on pp. 215-216 *supra*, for installing, within five years, at all corners without ramps, ramps compliant with the ADA Standards.

Recommendation 5: The 2016 Stipulation should be modified to include a detailed plan, as described in XII.C.3 on pp. 216-219 *supra*, for upgrading, within eight years, all remaining ramps that are not fully compliant with the ADA Standards.

Recommendation 6: The 2016 Stipulation should be modified to designate the *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way* (PROWAG) as the "ADA Standards" under the Stipulation.

Recommendation 7: The 2016 Stipulation should be modified to require that all pedestrian ramps installed, repaired, or upgraded by the City or its contractors shall comply with the "ADA Standards."

Recommendation 8: The 2016 Stipulation should be modified to require that all ramps installed, repaired, or upgraded by the City or its contractors shall have detectable warnings.

Recommendation 9: The 2016 Stipulation should be modified to require the City to procure and provide the funding necessary to fulfill the obligations and meet the schedules set out in the modified Stipulation.

Recommendation 10: The 2016 Stipulation should be modified to add additional named organizational and other plaintiffs, and secure additional legal representation of the Plaintiff Class.

Recommendation 11: The 2016 Stipulation should be modified to include a provision ensuring that the Stipulation does not prevent people with disabilities from pursuing legal and other remedies for types or forms of inaccessibility of public sidewalks, pedestrian crossings, and public facilities other than those directly and explicitly addressed in the *EPVA v. City of New York* lawsuit.

Recommendation 12: Paragraph 10 of the 2016 Stipulation should be modified to add, after the words "The terms of this Agreement may be modified by the parties upon a written agreement signed by the attorneys for the parties," the words "after notice to the class and with the approval of the Court."

Recommendation 13: The 2016 Stipulation should be modified to require the appointment by the Court of a Monitor, as described, *supra,* on pp. 227-228, and in Finding 132 on pp. 280-281; the Monitor, preferably a licensed architect or registered civil engineer, should have experience evaluating and assisting public entities regarding accessibility, particularly of pedestrian ramps, and knowledge of current ADA accessibility standards; and be charged with reviewing progress in curb ramp installations and upgrades, assessing compliance with the Stipulation of Settlement, filing detailed reports to the parties and the

Court on curb ramp progress and related issues, conducting field spot checks on pedestrian pathways and crossings, and performing related tasks agreed upon by the parties with the approval of the Court.

Recommendation 14: The 2016 Stipulation should be modified to require DOT and the City to issue, within 90 days of the Court's approval of the modified Stipulation, an updated Transition Plan reflecting the City's commitments under the modified Stipulation, available for public inspection, and describing the steps to be taken and a schedule for completing them.

XV. CONCLUSORY REMARKS

This legal action is at a pivotal crossroads. Progress has been made since the lawsuit was filed over 23½ years ago, but far too little. The parties, and ultimately the Court, must decide whether class members will continue to have their well-established rights under the Americans with Disabilities Act to a readily accessible and fully usable pedestrian network, including curb ramps meeting federal regulatory standards, deferred and ignored; or whether they will embrace a dynamic and forward-looking course to provide the "expeditious" relief the Plaintiff Class has so long been denied.

Considering the significant number of people with disabilities affected, the life-and-death safety issues involved, how long the resolution of this issue has dragged on, and the "urgent mission" for equal access for people with disabilities that Mayor de Blasio has committed the City to,[397] the Special Master sincerely hopes that the parties, and especially the City, will seize this opportunity to promptly finish making all of the City's corners ADA-compliant, and move to

[397] Letter of Mayor Bill de Blasio, City of New York, *AccessibleNYC: Annual Report on the State of People with Disabilities Living in New York City* (2017 Edition) at p. 5, http://www.nyc.gov/html/mopd/downloads/pdf/accessiblenyc2017.pdf.

the forefront of American cities as a shining example of a metropolis with accessible pedestrian walkways and crossings.

The Special Master urges the parties and the Objectors to seek common ground for working together toward the goal of a barrier-free pedestrian network. In particular, the United Spinal Association and the Objector organizations should collaborate on shared objectives and overlapping constituencies in seeking a final resolution to the existing legal conflicts. Ultimately, the City, the Plaintiff, and the Objectors would be well-advised to redouble their efforts to resolve this lawsuit and fulfill the promise of the ADA in New York City.

Respectfully submitted,

Robert L. Burgdorf Jr.

Special Master

July 31, 2017

EXHIBITS LIST

1. New York City Department of Transportation, TRANSITION PLAN FOR THE INSTALLATION OF PEDESTRIAN RAMPS ON NEW YORK CITY STREETCORNERS (May 13, 1994).
2. New York City, CURB RAMPS – AMENDED TRANSITION PLAN (December 9, 2002).
3. New York City Department of Transportation, *Pedestrian Ramp Installation Summary* (April 2015).
4. Declaration of Leon Heyward (May 1, 2017).
5. Objectors' Submission to Special Master (Oct. 28, 2016).
6. Kurland Declaration in *CIDNY v. City of New York*, Feb. 5, 2015.
7. Objector Center for Independence of the Disabled New York, Submission to Special Master, (October 28, 2016).
8. New York City Department of Transportation, *Sidewalk Program: Pedestrian Ramp Program*, Powerpoint slide presentation (Dec. 12, 2016).
9. Declaration of Eric Macfarlane, P.E., *EPVA v. City of New York* (May 3, 2017).
10. New York City Department of Transportation, "Category Breakdown of 29,165 Corners Surveyed."
11. Letter of Sherrill Kurland to Special Master, May 18, 2017.
12. Letter of Robert B. Stulberg to Special Master, May 30, 2017.
13. *10 Year Plan to Upgrade All Ramps* (Summer 2015).
14. New York City Department of Transportation, October 20, 2016, Report, including *Pedestrian Ramp Installation Summary*, *$ Registered on Pedestrian Ramp Installation Since 2001*, *Pedestrian Ramps Count by Borough and Community Board*, and contracts status spreadsheet.