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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 MJJ ADR

PLAINTIFFS' REVISED MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: June 3, 2005

Time: 9:30 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Miscellaneous

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NOTICE

On June 3, 2005, at 9:30 a.m., or as soon thereafter as this motion may be heard, before the Honorable Martin J. Jenkins, Plaintiffs will, and hereby do, move for an order granting partial summary judgment in their favor in the above-captioned action. This motion is based on this Notice of Motion, and all accompanying attachments hereto.

RELIEF SOUGHT

Plaintiffs seek a ruling that Taco Bell's violations of dimensional standards required under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq., the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq. ("Unruh" or "the Unruh Act"), and the California Disabled Persons Act, Cal. Civ. Code § 54 et seq. (the "CDPA"), may only be justified as "conventional building industry tolerances for field conditions," and may not be excused as "de minimis" or analyzed as "equivalent facilitation."

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

ISSUES TO BE DECIDED

Whether Defendant may excuse deviations from applicable standards -- beyond those that may properly be justified as "conventional building industry tolerances for field conditions" -- on the grounds that such deviations are "de minimis" or constitute "equivalent facilitation."

SUMMARY OF ARGUMENT

Plaintiffs -- a class of individuals who use wheelchairs or scooters for mobility -- bring this lawsuit against Defendant Taco Bell Corporation ("Taco Bell") under the ADA, Unruh and the CDPA, alleging that Taco Bell is in violation of these statutes because its corporate-owned restaurants in California contain architectural barriers to class members. These statutes all require compliance with certain minimum dimensional standards in buildings built or altered after certain dates. Moeller v. Taco Bell Corp., 220 F.R.D. 604, 606-07 (N.D. Cal. 2004). The question before the Court is how to address small deviations from these standards.

Both the ADA and California law contain the answer: "All dimensions are subject to conventional building industry tolerances for field conditions." Department of Justice Standards for Accessible Design ("DOJ Standards" or "DOJ Stds."), 28 C.F.R. pt. 36, app A, § 3.2; Cal. Code Regs., tit. 24 ("California Standards or "Cal. Stds.") § 1101B.4 (2001) (same). Under these provisions, if a dimension falls slightly short of the required standard due to the realities of construction or installation, it is not considered a violation.

Defendant has indicated that it will assert two further defenses for noncompliant dimensions -- presumably beyond deviations that may properly be characterized as "tolerances" or the argument would not be necessary -- by arguing that they may be ignored as "de minimis" or justified as "equivalent facilitation." The former defeats the purpose of establishing minimum standards and is contrary to Ninth Circuit precedent; the latter represents an improper application of an exception intended to encourage creative design solutions, not to excuse a failure to comply.

Furthermore, Defendant's asserted "de minimis" and "equivalent facilitation" defenses will require the Court to revisit technical standards that are based on 30 years of research and development by, among others, the American National Standards Institute ("ANSI"), the federal Architectural and Transportation Barriers Compliance Board ("Access Board"), the federal Department of Justice ("DOJ"), the California Building Standards Commission ("BSC"), and the California State Architect. Defendant is thus ultimately asking this Court to ignore the carefully crafted standards developed over many years by these standards-setting and regulatory bodies, and instead to evaluate afresh evidence relating to various dimensional standards, so as to endorse standards weaker than the standards adopted by these bodies. This is contrary to the language and intent of the ADA and California access laws.

PROCEDURAL STATUS

On October 19, 2004, Plaintiffs moved for summary judgment with respect to certain elements at 19 Taco Bell restaurants. Defendant opposed the motion, asserting various defenses. On December 8, 2004, the Court convened a telephone status conference with the parties to discuss this motion, in which the Court requested that the parties meet and confer concerning the compliance status of the elements covered by Plaintiffs' motion and the legal questions raised by the motion and Defendant's opposition.

Following the telephone status conference, the parties exchanged correspondence concerning the elements and legal questions at issue in Plaintiffs' motion. They were able to come to resolution on most of the physical elements covered by the motion, but disagreed on a

number of legal issues. In their Joint Status Conference Statement, filed February 1, 2005, the parties identified the legal issues on which they were unable to reach agreement, and requested the Court's guidance on those issues. At the February 8, 2005 Status Conference, the Court stated that it would address the two issues raised by Plaintiffs, and one of the issues raised by Defendant. These issues are:

- Whether there is a de minimis exception to compliance with applicable statutes and regulations in this case, Joint Status Conference Statement, ¶ 32(a);
- The application of the "equivalent facilitation" exception under § 2.2 of the Department of Justice Standards for Accessible Design, 28 C.F.R. pt. 36, app. A, id. ¶ 32(b); and
- Whether or not an element in technical violation of applicable accessibility standards establishes liability if the element falls within accepted construction tolerances or there is no effect on accessibility. Id. ¶ 33(k).

The present Motion addresses these three issues.

BACKGROUND

A. The Americans with Disabilities Act.

1. Statutory and Regulatory Requirements.

Title III of the ADA prohibits disability discrimination by those who own or operate places of public accommodation -- such as Taco Bell restaurants[1] -- "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of that public accommodation. 42 U.S.C. § 12182(a). Under Title III, all facilities built for first occupancy after January 26, 1993 are required to be "readily accessible to and usable by" individuals with disabilities. Id. § 12183(a)(1). To comply with section 12183(a)(1), a facility must be built in conformance with the DOJ Standards. 28 C.F.R. pt. 36, app. A; see 28 C.F.R.

[1] See 42 U.S.C. § 12181(7)(B) (restaurants are places of public accommodation under title III).

§ 36.406. The only defense to this obligation is where compliance is "structurally impracticable." 42 U.S.C. § 12183(a)(1).[2]

The DOJ Standards set forth, among other things, precise dimensional requirements for a variety of architectural elements. Section 3.1 of those Standards states that "[d]imensions that are not marked minimum or maximum are absolute, unless otherwise indicated . . ."

Section 3.2 of the DOJ Standards provides that "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." During the meet and confer process, the parties agreed on this provision, and agreed that, once Plaintiffs have established that a dimension is in violation of the Standards, Defendant bears the burden of proving -- with expert testimony -- that the dimension in question falls within conventional building industry tolerances for field conditions. See Joint Status Conference Statement, ¶¶ 17-18.

Section 2.2 of the DOJ Standards reads: "Equivalent Facilitation: Departures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility."

2. The Development of the DOJ Standards.

The DOJ Standards are the product of a lengthy and laborious process involving input from many different affected groups.

This process began more than 40 years ago with ANSI's "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Useable by, the Physically Handicapped."[3] In 1968, Congress passed the Architectural Barriers Act, which mandated accessibility in buildings built or leased by the federal government. 42 U.S.C.

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[2] The "structurally impracticable" defense applies "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c)(1).

[3] See Lucy Harber, Ronald Mace & Peter Orleans, UFAS Retrofit Guide: Accessibility Modifications for Existing Buildings 10 (1993) ("UFAS Retrofit Guide").

§§ 4151 - 4157. In 1973, Congress created the Access Board, and in 1978, authorized it to establish minimum accessibility guidelines to enforce the Architectural Barriers Act. 29 U.S.C. § 792(b). During that period, the ANSI accessibility standards were undergoing a "long and arduous review and approval process," which resulted in the publication of a much expanded verison in 1980, known as ANSI A117.1 (1980).[4] These 1980 ANSI standards, in turn, formed the basis for the Minimum Guidelines and Requirements for Accessible Design ("MGRAD"), first published by the Access Board in 1982. 47 Fed. Reg. 33,962, 33,962 (Aug. 4, 1982), codified at 36 C.F.R. pt. 1190.

When Congress passed the ADA in 1990, it instructed the Access Board to "issue minimum guidelines that shall supplement the existing [MGRAD] for purposes of" Title III, 42 U.S.C. § 12204(a), and instructed the DOJ to issue regulations implementing Title III that included standards consistent with the Access Board's minimum guidelines. Id., § 12186(b) & (c). Pursuant to this mandate, the Access Board developed the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), 56 Fed. Reg. 2296, 2297 (Jan. 22, 1991), codified at 36 C.F.R. pt. 1191 app. A, which the DOJ adopted as the DOJ Standards. 56 Fed. Reg. 35,544, 35,584-85 (July 26, 1991).[5]

The DOJ Standards were thus based on 30 years of research, development, expertise, and commentary. ANSI A117.1, on which the Access Board relied heavily in drafting the ADAAG, was "developed through a consensus process by a committee made up of over 50 organizations representing associations of individuals with disabilities, rehabilitation professionals, designers, builders, manufacturers, and government agencies." 56 Fed. Reg. at 2297; see also DOJ Standards § 1 (technical specifications are the same as ANSI A117.1

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[4] UFAS Retrofit Guide at 10.

[5] The Access Board adopted a new ADAAG this past summer. 69 Fed. Reg. 44,084 (July 23, 2004). It is currently under consideration by the DOJ, but has not yet been adopted by that agency as the Standards for Accessible Design. See 69 Fed. Reg. 58,768 (Sept. 30, 2004).

(1980) except where indicated). The MGRAD, ADAAG and DOJ Standards were all adopted after full notice and comment.[6] The latter two sets of standards were the first federal standards to apply to private businesses; those businesses and other interested parties had extensive input into the rulemaking process.[7]

The DOJ Standards provisions relating to absolute dimensions and tolerances have been in the ANSI standard since at least 1986. ANSI A117.1 (1986) §§ 3.1 & 3.2; see also MGRAD § 1190.6(e). The provision relating to equivalent facilitation was first added by the Access Board in drafting the ADAAG. When initially proposed, section 2.2 read, "Departures from particular technical and scoping requirements of this guideline by the use of other methods are permitted where the alternative methods used will provide substantially equivalent or greater access to and usability of the facility." 56 Fed. Reg. at 2327 (emphasis added). Following notice and comment, the words "designs and technologies" were substituted for the word "methods." The Access Board explained, "[t]he equivalent facilitation provision has been clarified by substituting the words 'designs and technologies' for 'methods.' The purpose of the provision is to allow for flexibility to design for unique and special circumstances and to facilitate the application of new technologies." 56 Fed. Reg. at 35,413.

B. The Unruh Act and the California Disabled Persons Act.

1. Statutory and Regulatory Requirements.

Both the CDPA, which was enacted in 1968, and the Unruh Act, which was amended in 1987 to cover persons with disabilities, prohibit discrimination on the basis of disability in the full and equal access to the services, facilities and advantages of public accommodations. Cal.

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[6] 47 Fed. Reg. at 33,962 (MGRAD); 56 Fed. Reg. 35,408, 35,409-10 (July 26, 1991) (ADAAG); 56 Fed. Reg. at 35,544-45 (DOJ Standards).

[7] See 56 Fed. Reg. at 35,409 (Access Board held 14 public hearings at which 450 people testified and received 12,000 pages of comments and testimony); 56 Fed. Reg. at 35,544 (DOJ held four public hearings at which 329 people testified, and received over 10,000 pages of comments, including "292 comments from entities covered by the ADA and trade associations representing businesses in the private sector").

Civ. Code §§ 51(b) & 54.1(a)(1). All buildings constructed[8] or altered[9] after July 1, 1970, must comply with standards governing the physical accessibility of public accommodations. Moeller, 220 F.R.D. at 607.

Like the DOJ Standards, the California Standards contain a provision stating that "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." Cal. Stds. (2001) § 1101B.4. Unlike the DOJ Standards, California does not permit departures from its standards for equivalent facilitation. Rather, California law requires equivalent facilitation where other defenses -- for example, an unreasonable hardship determination -- excuse full compliance. See, e.g., Cal. Gov't Code § 4451(f); Cal. Stds. § 1104B.5.1, Exception 1 ("In existing buildings, when the enforcing agency determines that compliance with any regulation under this section would create an unreasonable hardship, an exception shall be granted when equivalent facilitation is provided.").

2. The Development of the California Standards.

Like the DOJ Standards, California's accessibility standards resulted from a coordinated process over many years involving many different affected groups.

Pursuant to section 4450 of the California Government Code -- which applied to private buildings starting in 1969[10] -- California's accessibility standards are developed by the State Architect and subject to review and approval by the state Building Standards Commission ("BSC"). Like the DOJ Standards, the California Standards are "minimum requirements." Cal. Gov't Code § 4452. In developing state accessibility standards, the State Architect is required to "consult with the Department of Rehabilitation, the League of California Cities, the California State Association of Counties, and at least one private organization representing and comprised of persons with disabilities." Id. § 4450(b). In addition, the State Architect is

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[8] Cal. Health & Safety Code § 19956.

[9] Cal. Health & Safety Code § 19959.

[10] People ex rel. Deukmejian v. CHE, Inc., 197 Cal. Rptr. 484, 489-90 (Cal. App. 1983).

advised by an Advisory Board, which includes engineers, contractors, and local building officials. Cal. Code Regs., tit. 24, § 4-355.

The BSC consists of ten members, including four representatives of the building and construction professions, an individual with a physical disability, and an expert in barrier-free design. Cal. Health & Safety Code § 18921(a) & (b). In addition, the BSC receives advice from a Coordinating Council that includes "representatives appointed by the State Director of Health Services, the Director of the Office of Statewide Health Planning and Development, the Director of Housing and Community Development, the Director of Industrial Relations, the State Fire Marshal, the Executive Director of the State Energy Resources Conservation and Development Commission, and the Director of General Services." Id. § 18926(a).

By statute, the BSC is required to evaluate proposed standards to ensure compliance with nine criteria, including that the standards are in the public interest, that the "cost to the public is reasonable, based on the overall benefit to be derived from the building standards," and that "[t]he applicable national specifications, published standards, and model codes have been incorporated therein . . . where appropriate." Id. § 18930(a). Proposed standards are also required to be adopted in compliance with California's Administrative Procedure Act. Id. § 18929(a) (requiring compliance with Cal. Gov't Code § 11346 et seq). This process requires public notice, as well as public discussion, comments and/or hearings. Cal. Gov't Code §§ 11346.2, 11346.45, 11346.8.

The State Architect did not develop accessibility standards immediately after passage of section 19956. Pending development of such standards, "Government Code section 4451 required builders adhere to the American Standards Association specifications A117.1- 1961." People ex rel. Deukmejian v. CHE, Inc., 197 Cal. Rptr. 484, 489 (Cal. Ct. App. 1983). These were the standards applicable to California public accommodations from 1969, when section 19956 was passed, to 1981, when the State Architect first enacted state accessibility standards. See id. at 491. Section 4450, as originally enacted, instructed that the California Standards track the Uniform Building Code ("UBC"). Donald v. Sacramento Valley Bank, 260 Cal. Rptr.

49, 54 (1989). The UBC was first developed by the International Conference of Building Officials in 1927, and has been amended periodically since that time.[11] The first set of California accessibility standards were developed in the late 1970s based on these model codes, and were adopted by the BSC after a series of public hearings.[12] These standards have been revised approximately seven times since 1981, each time based on both the UBC[13] and, as explained above, public comment and expert input.

ARGUMENT

The ADA and California law both include a reasonable provision to address small deviations from dimensional standards: they are permitted where they result from the realities of construction or installation. Neither set of standards permits deviations to be ignored as de minimis, and the "equivalent facilitation" provision of the DOJ Standards does not cover such deviations. Ultimately, Defendant's reliance on these two defenses to excuse noncompliance would require this Court to redo 30 years of regulatory and code development. Plaintiffs respectfully request that the Court decline the Defendant's invitation to rewrite the Standards and rely, instead, on the provision developed by the state and federal regulatory bodies to address small deviations: conventional building industry tolerances for field conditions.

I. There is No "De Minimis" Exception to Compliance with DOJ or California Standards.

Defendant has indicated that it will seek to excuse deviations from the DOJ and California Standards as "de minimis." The Ninth Circuit has explicitly rejected Defendant's argument, holding that there is no exception for "substantial compliance" or "technical violations" in the application of the DOJ Standards. Long v. Coast Resorts, Inc., 267 F.3d 918,

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[11] Int'l Conference of Bldg. Officials, 1 Uniform Building Code 1-iii (1994).

[12] San Francisco Mayor's Office on Disability, "The History, Overview and Application of State and Federal Disability Access Laws and Regulations: History Background," at http://www.sfgov.org/site/sfmod_page.asp?id=5722 (last visited 02/25/2005).

[13] Cal. Stds. (1981) § 2-106; Cal. Stds. (1984) § 2-106; Cal. Stds. (1987) § 2-111; Cal. Stds. (1989) § 111A; Cal. Stds. (1994) § 111; Cal. Stds. (1999) § 101.5; Cal. Stds. (2001) § 101.5.

923 (9th Cir. 2001). The district court in Long had found that the width of bathroom doors in a hotel were out of compliance but refused to order injunctive relief because of "'the near absence of hardship and . . . minimal inconvenience to wheelchair users.'" Id. (quoting district court decision). This is precisely Defendant's argument: that where there is minimal hardship or inconvenience to wheelchair users, "technical violation[s]" from the standards may be excused. See Joint Status Conference Statement ¶ 33(k). The Ninth Circuit rejected that argument, holding that the lower court's ruling "was in error," that "there is no room for discretion" under 42 U.S.C. § 12182(a), and that there was only one defense to compliance with that section: structural impracticability. Id.

Similarly, the court in Ability Center of Greater Toledo v. Sandusky, 133 F. Supp. 2d 589, 592 (N.D. Ohio 2001), held that a one and one-half inch lip on a curb cut made it noncompliant despite the defendant's assertion that it caused "slight inconvenience to the user." Like the Ninth Circuit, the Ability Center court held that "[t]here are no exceptions allowed to [the] requirements" of the DOJ Standards. Id. And the court in United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094 (C.D. Cal. 2003), rejected the defendant's argument that violations that deviate a small amount from the DOJ Standards should be excused, holding that many of those standards "speak in terms of minimums that must be provided. AMC's argument suggests that the Court should shave half an inch or an inch off [the] articulated minimums [in the DOJ Standards]. . . . This argument is simply not persuasive." Id., 245 F. Supp. 2d at 1100. Rather, the court properly treated AMC's "small deviation" theory as an argument for "tolerances," and subjected it to the requirement, discussed above, that AMC produce expert testimony concerning conventional building industry tolerances. Id.

Plaintiffs respectfully request that this Court follow the courts in Long, Ability Center and AMC, reject the de minimis defense, and analyze any deviations from required standards under the provision for tolerances.

II. The Equivalent Facilitation Provision Was Meant to Encourage Alternative Designs and Technologies, Not to Excuse Violations.

The DOJ Standards provide that "[d]epartures from particular technical and scoping requirements . . . by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." DOJ Stds. § 2.2 (emphasis added).[14] Congress, in passing the ADA, indicated that an "equivalent facilitation" provision would be appropriate because "[a]llowing these departures will provide public accommodations and commercial facilities with necessary flexibility to design for special circumstances and will facilitate the application of new technologies." H. Rep. 101-485, pt. 2, at 119, reprinted in 1990 U.S.C.C.A.N. 303, 402; see also Architectural and Transportation Barriers Compliance Board, ADAAG Manual: a Guide to the Americans with Disabilities Act Accessibility Guidelines 7 (1998) (The provision "provides flexibility for new technologies and innovative designs [sic] solutions that may not have been taken into account when ADAAG was developed."). And, as discussed above, the Access Board went out of its way, in the final version of the ADAAG, to change the language "alternative methods" to "alternative designs and technologies." 56 Fed. Reg. at 35,413.

Thus, the plain language of section 2.2 of the DOJ Standards, its legislative history, and the Access Board's interpretation demonstrate that equivalent facilitation must be an alternative design or technology. Covered elements that simply deviate from the standards do not qualify. This is best illustrated by Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698 (D. Or. 1997). Section 4.33.3 of the DOJ Standards requires, in arenas, "[a]t least one companion fixed seat" next to each accessible seat. In Oregon Arena, the court endorsed the use of folding chairs, instead of fixed seats, as a more flexible solution for companions of persons who use wheelchairs. Id. at 726; see also United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094, 1101 (C.D. Cal. 2003) (rejecting equivalent facilitation argument both because there was no

[14] As noted above, California law does not permit departures from its standards for equivalent facilitation. See supra at 8.

evidence of greater access and because "[t]here is no evidence that the documented violations were the result of designs and technologies that were implemented in order to provide substantially equivalent or greater access to and usability of the facility.").

In sum, both Congress and the Access Board concur that the equivalent facilitation provision was intended to provide flexibility for alternatives in design for special circumstances and in new technologies. It is clear -- especially in light of the Access Board's amended language -- that this provision was not intended simply to excuse noncompliant elements or dimensions. Thus, where Defendant can demonstrate that a departure from the DOJ Standards was based on an alternative design or technology intended to provide substantially equivalent or greater access, that departure would not constitute a violation of those Standards. However, in the absence of such evidence, this provision does not excuse Defendant's noncompliance.

III. Defendant's Proposed Defenses Would Improperly Require This Court To Substitute its Judgment for that of Responsible Regulatory Agencies and Rewrite the Standards.

Defendant's asserted defenses will force this Court to reinvent the regulatory wheel and have the potential to produce inconsistent and unpredictable conditions for people who use wheelchairs or scooters seeking access to places of public accommodation.

As set forth in detail above, the DOJ and the California Standards are the results of complex and highly technical standards-setting and regulatory processes. Both were developed over 30 to 45 years by experts in the design and construction fields, and both have been subjected repeatedly to public comment. Taco Bell -- which has been in existence since the early 1960's[15] -- has had ample and repeated opportunity to comment on both sets of standards.

Defendant's asserted "de minimis" and "equivalent facilitation" defenses will force this Court to stand in the shoes of, among others, the Access Board, the DOJ, the California State Architect, and the Building Standards Commission, to ignore the technical evidence and public comment supporting the DOJ and California Standards, and endorse -- based on the evidence

[15] Taco Bell Corp., "Interesting Facts About Taco Bell," http://www.tacobell.com/ourcompany/facts.htm (last visited 02/25/2005).

of experts retained in litigation -- weaker sets of standards. For example, Defendant has indicated that it will rely, in invoking these defenses, on the testimony of a physical anthropologist concerning the percentage of people using wheelchairs or scooters who can and cannot use a given element in its noncompliant state.[16] If this Court were to accept Defendant's argument, it would have to consider -- with respect to each of the elements at issue in this litigation -- Defendant's expert's statistics and any contrary evidence submitted by Plaintiffs' expert and determine whether a standard weaker than that adopted by the DOJ and the BSC would be acceptable.

Plaintiffs respectfully submit that this would not be appropriate. The DOJ was directed by statute to develop the DOJ Standards. 42 U.S.C. § 12186(b). The State Architect and the Building Standards Commission were directed by statute to develop and approve, respectively, the California Standards. Cal. Gov't Code § 4450(b). The United States Supreme Court has held that, "[a]s the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the [DOJ's] views are entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 626 (1998) (citations omitted); see also Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 876 (9th Cir. 2004) (quoting Bragdon and holding, with respect to the DOJ's Technical Assistance Manual, that "[a]s this regulation was issued pursuant to an express statutory authorization, makes sense of an ambiguous statutory provision, and is fully consistent with the purposes and history of the ADA, it is binding upon us."). California courts give similar deference to the Building Standards Commission. See Plastic Pipe and Fitting Ass'n. v Calif. Building Standards Comm'n, 22 Cal. Rptr.3d 393, 402-03 (Cal. App. 2004) (holding that "[t]he [Building Standards] Commission's approval of building standards under the Building Standards Law is a quasi-legislative act of administrative

[16] See Def.'s Opp'n to Pls.' Mot. for Partial Summ. J. and Conditional Cross-Mot. for Partial Summ. J. at 14-15, 22.

rulemaking," and that "[a] court reviewing a quasi-legislative act cannot reweigh the evidence or substitute its own judgment for that of the agency.")

Several courts have explicitly declined a litigant's invitation to substitute their judgment for that of the DOJ to rewrite the Standards. For example, in United States v. National Amusements, Inc., 180 F. Supp. 2d 251 (D. Mass. 2001), the plaintiff asked the court to apply the general anti-discrimination language of the ADA to require physical access that went beyond the language of the DOJ Standards. The court declined to do so, stating that this would "place the judiciary in the uncomfortable position of having to fashion complex, technical rules of design under the guise of statutory interpretation." Id. at 261. "'The courts are ill-equipped to evaluate such claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable.'" Id. (quoting Indep. Living Res., 982 F. Supp. at 746). Where the regulatory bodies -- acting pursuant to statutory mandates -- have explicitly delineated the circumstances under which deviation from the standards will be acceptable -- conventional building industry tolerances for field conditions -- Plaintiffs urge that it would be inappropriate to add judicially-created exceptions that will require litigants and courts to redo the work of those regulatory bodies.

Ultimately, both the DOJ and the California Standards are minimum standards. 42 U.S.C. §§ 12186(c) & 12204(a); Cal. Gov't Code § 4452. As Defendant has acknowledged, "the dimensions set forth in ADAAG and Title 24 do not assure that all persons confined [sic] to wheelchairs or scooters will be able to use fully compliant facilities." (Def.'s Mot. for Modification of Class Definition at 11.) Should courts adopt Defendant's proposed "de minimis" and "equivalent facilitation" defenses, even fewer facilities will be accessible, and people who use wheelchairs and scooters will lose the predictability and consistency that even these minimum standards now provide.

CONCLUSION

Plaintiffs respectfully request that this Court hold that Taco Bell's violations of applicable dimensional standards may only be justified as "conventional building industry tolerances for field conditions," and may not be excused as "de minimis" or analyzed as "equivalent facilitation."

Respectfully submitted,

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