FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
Amy F. Robertson, pro hac vice
910 - 16th Street
Suite 610
Denver, Colorado 80202
Tel: (303) 595-9700
Fax: (303) 595-9705
Email: arob@foxrob.com

LAWSON LAW OFFICES
Antonio M. Lawson, Cal. Bar No. 140823
835 Mandana Blvd.
Oakland, CA 94610
Tel: (510) 419-0940
Fax: (510) 419-0948
Email: tony@lawsonlawoffices.com

Mari Mayeda, Cal. Bar No. 110947
PO Box 5138
Berkeley, CA 94705
Tel: (510) 917-1622
Fax: (510) 841-8115
Email: marimayeda@earthlink.net

THE IMPACT FUND
Brad Seligman, Cal. Bar No. 83838
Jocelyn Larkin, Cal. Bar No. 110817
125 University Ave.
Berkeley, CA 94710
Tel: (510) 845-3473
Fax:(510) 845-3654
Email: bs@impactfund.org

Attorneys for Plaintiffs

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' REPLY BRIEF IN SUPPORT OF 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

FOX & ROBERTSON, P.C.
Timothy P. Fox, Cal. Bar No. 157750
Amy F. Robertson, pro hac vice
910 - 16th Street
Suite 610
Denver, Colorado 80202
Tel: (303) 595-9700
Fax: (303) 595-9705
Email: arob@foxrob.com

LAWSON LAW OFFICES
Antonio M. Lawson, Cal. Bar No. 140823
835 Mandana Blvd.
Oakland, CA 94610
Tel: (510) 419-0940
Fax: (510) 419-0948
Email: tony@lawsonlawoffices.com

Mari Mayeda, Cal. Bar No. 110947
PO Box 5138
Berkeley, CA 94705
Tel: (510) 917-1622
Fax: (510) 841-8115
Email: marimayeda@earthlink.net

THE IMPACT FUND
Brad Seligman, Cal. Bar No. 83838
Jocelyn Larkin, Cal. Bar No. 110817
125 University Ave.
Berkeley, CA 94710
Tel: (510) 845-3473
Fax:(510) 845-3654
Email: bs@impactfund.org

Attorneys for Plaintiffs

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' REPLY BRIEF IN SUPPORT OF REVISED MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: June 3, 2005

Time: 9:30 a.m.

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."

ARGUMENT

The question presented by the parties is how best to ensure that Defendant's restaurants are accessible to people who use wheelchairs and scooters, as required by state and federal statutes. Plaintiffs submit that this important goal is best achieved using the tools provided by Congress and the California Legislature: the DOJ Standards[1] and California Standards,[2] developed through decades of studies, industry and community input, and field use. Taco Bell asks the Court to disregard those Standards, and rely instead on an expert that Taco Bell hired for this litigation who analyzed a limited number of selected studies using flawed data and methods the expert himself has criticized. In one case, Taco Bell simply manufactures data and argues that they should replace the legally mandated standards.

Plaintiffs simply request that this Court interpret and apply federal and California accessibility standards as drafted, and hold:

- that they are -- as the plain language of the statutes states -- "minimum" standards, 42 U.S.C. §§ 12186(c) & 12204(a); Cal. Gov't Code § 4452;
- that deviations from these standards are justified if they fall within "conventional building industry tolerances for field conditions." DOJ Stds. § 3.2; Cal. Stds. § 1101B.4 (2001);
- that, under the DOJ Standards, "departures from particular technical and scoping requirements" may be justified as "equivalent facilitation" only where they constitute "alternative designs and technologies" that "provide substantially equivalent or greater access to and usability of the facility;" DOJ Stds. § 2.2;

---

[1] Dep't of Justice, Standards for Accessible Design ("DOJ Standards" or "DOJ Stds."), 28 C.F.R. pt 36, app. A.

[2] Cal. Code Regs, tit. 24 (2001) ("California Standards or "Cal. Stds."). For the period 1970 to 1981 this term shall refer to the American Standards Association specifications A117.1- 1961. See People ex rel. Deukmejian v. CHE, Inc., 197 Cal. Rptr. 484, 489 (Cal. Ct. App. 1983).

- that the California Standards do not contain a provision excusing departures from requirements as "equivalent facilitation;" and
- that neither the DOJ Standards nor the California Standards nor the statutes pursuant to which they were adopted permit a "de minimis" defense.

In contrast, in its attempt to substitute Taco Bell's hired expert for the DOJ and California Standards, Defendant asks this Court to ignore this plain language, to create a nonexistent "de minimis" exception to the Standards, and to expand the "equivalent facilitation" provision to cover -- and excuse -- violations that in no way constitute "alternative designs and technologies." This is not supported by the language of the DOJ or California Standards, and -- as the systemic flaws and distortions in Defendant's factual case demonstrate -- will do nothing to ensure access. Defendant's arguments are legally unsupported and factually misguided and should be rejected in their entirety.

I. There is No Legal Support for Defendant's Interpretation of the "Equivalent Facilitation" Provision or Its Invention of A De Minimis Defense.

A. The "Equivalent Facilitation" Provision Applies Only Under The ADA and Only To Alternative Designs and Technologies.

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.

As Plaintiffs demonstrated in their Revised Motion for Partial Summary Judgment ("Plaintiffs' Revised Motion" or "Pls.' Rev. Mot."), Congress intended this provision to be included in the DOJ Standards 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. Based on the language and intent of the provision, Defendant

must show two things to invoke this provision: (1) that a departure from the DOJ Standards[3] involves alternative designs or technologies; and (2) that it provides substantially equivalent or greater access to and usability of the facility.

Defendant argues that it can ignore the plain language of Section 2.2 limiting its application to "alternative designs and technologies" and use that section to excuse mere noncompliance with measurements already covered in the Standards. Defendant uses two rhetorical tools to make this argument: it distorts the language of Section 2.2; and it misstates Plaintiffs' position.

The second of these is quickly dispatched. Defendant claims that Plaintiffs want to eliminate section 2.2, that we want to limit it to "new technology," and that we claim "only the regulatory agencies are qualified to determine whether Section 2.2. should be applied." (Def.'s Opp'n to Pls.' Revised Mot. for Partial Summ. J. ("Defendant's Opposition" or "Def.'s Opp.") at 4, 8, 9.) None of these is true. Far from eliminating section 2.2, Plaintiffs urge that it be applied based on its plain language, language that, as Plaintiffs make clear, restricts its reach to "alternative designs and technologies," not merely to new technology. Finally, Plaintiffs nowhere suggested that a regulatory agency -- rather than this Court -- should determine what constitutes equivalent facilitation. Indeed, Plaintiffs are here before this Court asking this Court to clarify the requirements for equivalent facilitation so that the Parties can apply those requirements in their meet and confer this summer,[4] and so that this Court can apply them to any elements on which the parties fail to reach agreement.

Defendant's distortion of the language of Section 2.2 is stark. Rather than simply using the language of the provision itself, which applies to "alternative designs and technologies," Defendant states that the first requirement for an equivalent facilitation is that "it is different

---

[3] The California Standards do not contain an equivalent provision; thus, departures from those Standards cannot be excused as "equivalent facilitation." See Pls.' Rev. Mot. at 8.

[4] See Joint Supplemental Case Management Statement and Order at 3-4.

from the DOJ Standards." (Def.'s Opp. at 5.) Defendant provides no support for its substitution of the phrase "different from" -- which is not in section 2.2 -- for "alternative designs and technologies" -- which is. Its motive is clear, though: to excuse violations where an element's dimensions are "different from" those required by the DOJ Standards, but do not involve "alternative designs [or] technologies."

An example may help illustrate the difference between the language of Section 2.2 and Defendant's proposed approach. The DOJ Standards require a certain amount of space -- called "maneuvering clearances" -- on the pull side of a door to permit a person in a wheelchair to have room to wheel up to the door, grasp the handle, pull the door open while wheeling back, and wheel through. See DOJ Stds § 4.13.6 and Fig. 25. In a situation where Taco Bell has not provided the proper maneuvering clearances, Section 2.2 would permit it to install an automatic door opener -- an "alternative technology" -- provided it could show that the solution afforded substantially equivalent or greater access.

Under Defendant's approach, in contrast, "equivalent facilitation" does not mean installing an automatic door where there are noncompliant maneuvering clearances. It means hiring an expert after the fact to justify the noncompliant maneuvering clearances. Based on its plain language and legislative history, this is not what the "equivalent facilitation" provision was intended to do.

The two examples Defendant finds in case law and regulations are in keeping with the example of the automatic door opener and provide no support for Defendant's approach: a hotel may make a portable text telephone available at the desk rather than installing a permanent one at the pay phone; and an arena may use folding chairs in lieu of fixed seats for the companions of patrons who use wheelchairs. (See Def.'s Opp. at 5, citing Title III Technical Assistance Manual § 7.2100(2) and Indep. Living Res. v. Oregon Arena Corp., 982

F. Supp. 698, 727 (D. Or. 1997).)[5] After three tries,[6] Taco Bell has not yet identified a single case in which a defendant has been permitted to introduce anthropometric or other data to argue that a measurement that merely falls short of the DOJ Standards constitutes "equivalent facilitation."

B. There is No De Minimis Exception to the DOJ or California Standards.

Under California law, buildings constructed or altered after July 1, 1970 have been required to comply with the California Standards applicable at the time. See Moeller v. Taco Bell Corp., 220 F.R.D. 604, 607 (N.D. Cal. 2004) (citing Cal. Health & Safety Code §§ 19956 & 19959). Under the Americans with Disabilities Act ("ADA"), buildings built after January 26, 1993 and alterations performed after January 26, 1992 have been required to comply with the DOJ Standards. 42 U.S.C. § 12183(a); 28 C.F.R. § 36.402(a)(1). Neither set of Standards contains an exception for de minimis violations.

Plaintiffs have cited binding Ninth Circuit precedent that rejects Defendant's argument for a de minimis exception, Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001), as well as cases from two other district courts doing the same. United States v. AMC Entm't, Inc., 245 F. Supp. 2d 1094, 1100 (C.D. Cal. 2003), Ability Center of Greater Toledo v. Sandusky, 133 F. Supp. 2d 589, 592 (N.D. Ohio 2001). Defendant's attempt to distinguish these cases fails.

Defendant tries to avoid Long's holding by misstating the factual record on which it was based. (See Def.'s Opp. at 12.) Plaintiffs have previously addressed this, and will not

---

[5] In the other case cited by Defendant, Caruso v. Blockbuster-Sony Entertainment Centre, 193 F.3d 730 (3d Cir. 1999), the court refused to apply the "equivalent facilitation" provision to excuse an outdoor arena's failure to provide wheelchair access to the lawn seating area. Id. at 739.

[6] Def.'s Opp'n to Pls.' Mot. for Partial Summ. J. and Conditional Cross Mot. for Partial Summ. J. at 22; Def.s' Opening Brief on Issues 1(c) and 1(d) of the Joint Pre-Trial Briefing Schedule ("Defendant's Opening Brief") at 8-10; Def.'s Opp. at 3-8.

repeat their argument here. (See Pls.' Opp'n to Def.'s Opening Br. on Issues 1(c) and 1(d) of the Joint Pre-Trial Briefing Schedule ("Plaintiffs Opposition" or "Pls.' Opp." at 5-6).)

Defendant asserts that the AMC case "did not discuss the de minimis exception." (Def.'s Opp. at 13.) This is a semantic game. The court did not use the phrase "de minimis," but rejected the defendant's argument that "the Court should shave half an inch or an inch off [the] articulated minimums" of the DOJ Standards. Id. at 1100. In so doing, it rejected precisely the argument Defendant makes here.

Ability Center held that a one and one-half inch violation on a curb cut made it noncompliant despite the defendant's assertion that it caused "slight inconvenience to the user." Defendant argues that the "inconvenience" at issue related not to the small deviation from the Standards but to the fact that other curb cuts existed nearby. (Def.'s Opp. at 12-13.) This ignores the fact that the court recited the applicable dimensional standards and held "[t]here are no exceptions allowed to these requirements." Id. at 592.

Finally, as noted in Plaintiffs' Opposition, the Independent Living Resources cases, 982 F. Supp. 698 (D. Or. 1997) and 1 F. Supp. 2d 1134 (D. Or. 1998), in which Defendant finds a "de minimis" exception, both predated Long, and were therefore effectively overruled by that case. (See also Pls.' Opp. at 8.)

C. Defendant Confuses the Standards Applicable to New Construction and Alterations with Those Applicable to Unaltered Existing Facilities.

The question before the Court is the application of the DOJ Standards and California Standards to new construction and alterations. (See, e.g., Def.'s Opp. at 2, citing 42 U.S.C. §§ 12183(a)(1); 28 C.F.R. § 36.402(a)(1).) As explained above, new construction and alterations are required to comply with the DOJ and/or California Standards. See supra at 6. The ADA also contains a requirement that barriers be removed from "existing facilities" --

facilities built before its new construction date -- if it is "readily achievable" to do so. 42 U.S.C. § 12182(b)(2)(A)(iv). California law does not contain an equivalent requirement.[7]

Virtually all of the elements in all of the restaurants in this case will be analyzed under the new construction or alterations standards. This is because approximately 200 of the 220 restaurants at issue here were built after 1970 -- the date on which new and altered California buildings were first required to comply with the California Standards -- and virtually all 220 have been altered since that time. Thus the ADA's "readily achievable" standard will apply to only a very few elements in a very few restaurants.

The ADA's "readily achievable" standard considers two types of evidence that are not relevant to the application of the DOJ or California Standards to new construction or alterations. In unaltered existing facilities, a court may consider whether an element is a barrier, 42 U.S.C. § 12182(b)(2)(A)(iv), and may consider financial factors such as the cost to remove the barrier and the defendant's resources. Id. § 12181(9). The Ninth Circuit has explicitly held that these factors are not relevant when analyzing new construction. Long, 267 F.3d at 923 ("No Substantial Compliance or Undue Burden Exception").

Defendant confuses these standards. In attempting to introduce improper exceptions in the application of the DOJ and California Standards to new construction or alterations, Defendant cites regulatory language and case law that in fact address the application of the "readily achievable" provision to unaltered existing facilities. For example, Defendant announces that "the ADA was intended to strike a balance between access and the cost of doing business" and cites 28 C.F.R. § 36.304. The language quoted by Defendant comes from the commentary to the regulations, rather than from section 36.304 itself. See Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991) ("Preamble"), 28 C.F.R. pt 36, app B at 687

---

[7] Although the Unruh Civil Rights Act and the California Disabled Persons Act both state that a violation of the ADA is a violation of that statute, see Moeller, 220 F.R.D. at 607 (citing Cal. Civ. Code §§ 51(f) & 54(c)), neither statute includes an independent requirement of barrier removal in pre-1970 buildings.

(2002). And this commentary is making the precise point that Plaintiffs are here: different standards apply in new construction and alterations, on the one hand, and existing facilities, on the other. The entire quote reads:

> In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities, which are the subject of § 36.304, where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations (see §§ 36.401-36.406) where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.

Id. (emphasis added). Section 36.406, to which this passage refers, unambiguously requires new construction and alterations to comply with the DOJ Standards.

Defendant also relies on the case of Access Now, Inc. v. South Florida Stadium Corp., 161 F. Supp. 2d 1357 (S.D. Fla. 2001). (See Def.'s Opp. at 11.) This case analyzed an existing facility under the "readily achievable" provision. Id. at 1360, 1362-63. The court made the distinction clear: "[f]ailure to abide by the [DOJ Standards] in new construction evidences intentional discrimination against disabled persons," id. at 1362, while in existing facilities, it constitutes only a rebuttable presumption of a barrier. Id. at 1368. Thus it is only with respect to an existing facility -- indeed, in a section titled "Readily achievable" -- that the court used the language quoted by Defendant concerning de minimis violations. Id. at 1369-70, quoted in Def.'s Opp. at 11. Similarly, the passage quoted in footnote 7 of Defendant's Opposition is, as the text makes clear, addressing existing facilities.

Ultimately, Defendant's de minimis defense will be valid only in analyzing unaltered existing facilities under the ADA -- a very small fraction of the elements in this case. In that context, it will be one of a number of factors this Court will consider. See 42 U.S.C. §§ 12181(9) & 12182(b)(2)(A)(iv). With respect to the vast majority of post-1970 construction or alterations (under California law), and post-1992 alterations and post-1993 construction (under the ADA), there is no authority for such an exception.

II. Defendant's Misuse and Distortion of Facts Underscore the Danger of Substituting Its Approach for Legally Mandated Standards.

Defendant's Opposition Brief is full of grandiose recitations of the purposes of the ADA and California access laws and pronouncements that it is Taco Bell -- and not Plaintiffs -- who care deeply about ensuring access. (See, e.g., Def.'s Opp. at 1, 3, 6, 8, 10, 11). Ironically, however, the present discussion concerns Defendant's violations of Standards developed to ensure access, and the only evidence on which Defendant proposes to rely to justify these violations will do nothing whatsoever to achieve its professed goals. Taco Bell's evidence is methodologically weak, factually unsupported and -- in one case -- simply invented out of whole cloth by Taco Bell itself. Even if Taco Bell's arguments were not completely legally unsupported, the flaws in its proposed factual approach would require that they be rejected.

Defendant proposes to rely on anthropometric evidence prepared by Bruce Bradtmiller, Ph.D., to excuse its violations of the Standards. (See Def.'s Opp. at 6 n.6.) Dr. Bradtmiller's work in this case relies on both data and methods that he himself has criticized as unreliable. (See Pls' Opp. at 9-12.) Several of the examples -- mirrors, grab bars, sinks -- in Defendant's brief show how this process is susceptible to error and distortion. Ultimately, this lawsuit is about more than just mirrors, grab bars and sinks, as Defendant proposes to analyze each element at issue in this case using Dr. Bradtmiller's method.[8] And Plaintiffs are not suggesting that Dr. Bradtmiller is unique in the inadequacy of his data and methods, or that Defendant should hire someone with better data or methods. Instead, the flaws in Defendant's examples reveal flaws that are endemic to any attempt to tailor anthropometric analysis to the needs of one party to a specific litigation. There is no ad hoc analysis that would be superior to the DOJ and California Standards.

---

[8] See Defendant's Opening Brief at 9 ("Whether an element as-built provides substantially equivalent access for the disabled is a question of fact to be determined on an element-by-element basis.")

A. Defendant Makes Assertions for Which it Invents the Data.

Taco Bell's analysis of mirror height requires it to invent numbers that Dr. Bradtmiller did not provide. Taco Bell claims that:

> the mirror in the men's restroom in Store No. 2755 was mounted at 40½ inches above the floor, ½ inch above the 40 inch DOJ Standard. The ½ inch discrepancy is de minimis because there is no material effect on accessibility. Whether hung at 40 inches above the floor or 40½ inches above the floor, approximately 50% of those confined [sic] to wheelchairs would be able to fully use the mirror. See Bradtmiller Decl. Ex. C at 2.

(Def.'s Opp. at 10.)[9]

Nothing in Dr. Bradtmiller's declaration supports this assertion. Specifically, he does not address either the height of the mirror in the men's restroom in store 2755, or the number of people accommodated by a mirror at 40½ inches. (See Bradtmiller Decl. Ex. C at 1-4, and Decl. of Amy F. Robertson in Supp. of Pls.' Revised Mot. for Partial Summ. J. ("Robertson Decl.") ¶¶ 2-10.) Thus there is no basis in Dr. Bradtmiller's data for Taco Bell's assertion that "whether hung at 40 inches . . . or 40½ inches . . . approximately 50%" of people who use wheelchairs would be able to use the mirror.

In fact, several of Dr. Bradtmiller's estimates make it highly unlikely that Taco Bell's assertion is even close to accurate. Dr. Bradtmiller opines that a mirror hung at:

- 40 inches "accommodates" 51.9%;[10]
- 41 inches "accommodates" 28.4%;[11] and
- 41½ inches "accommodates" 0.04%.[12]

---

[9] This deviation may be within "conventional building industry tolerances for field conditions" see DOJ Stds. § 3.2; Cal. Stds. § 1101B.4, and thus may not require adjustment.

[10] Bradtmiller Decl. Ex. C at 2, 4.

[11] See Robertson Decl. ¶¶ 3 & 9 and Exs. 1 & 7, and Bradtmiller Decl. Ex. C at 4 (stores 112 and 15914).

[12] See Robertson Decl. ¶ 7 and Ex. 5 and Bradtmiller Decl. Ex. C at 4 (store 3579).

Given the steep decline in accommodation as mirror height moves from 40 to 41 to 41½ inches -- from 51.9% to 0.04% -- it would seem unlikely that "approximately 50%" would be accommodated at 40½ inches. Here, Taco Bell is not arguing for using flawed anthropometric data to second-guess the Standards; it is pulling numbers out of thin air to excuse its violations.

B. Dr. Bradtmiller Makes Assertions for Which He Admits He Has No Data.

Another example on which Defendant relies is knee clearance under a lavatory, that is, a sink. (See Def.'s Opp. at 3.) Both DOJ and California Standards regulate knee clearance under a sink eight inches back from the front edge.[13] This ensures that the slope of the bowl does not obstruct the ability of a person in a wheelchair to roll under the sink to use it. Dr. Bradtmiller admits that

> [l]avatory knee clearance at 8" from rim has no anthropometric data. Instead, the regular knee height is taken, which means that the percentage of subjects who roll the full 8" under the sink is unknown. It is impossible to estimate this percentage, since the amount of roll is dependent on stomach depth, arm length, arm mobility and trunk mobility.

Bradtmiller Decl. ¶ 16(c). Despite the fact that there are "no anthropometric data" and it is "impossible to estimate" the percentage who can roll the full eight inches under the sink, Dr. Bradtmiller provides his opinion on the percentage "accommodated" by certain knee clearances at eight inches. See id. Ex. C at 2, 4. He is, by his own admission, offering an opinion for which he has no data.

C. Dr. Bradtmiller's Analysis Is Fundamentally Flawed By The Lack of Defined Terms.

In its Opposition Brief, Defendant repeats the grab bar example from its Opening Brief; Plaintiffs have already addressed the merits of this example in their Opposition Brief. (See Pls.' Opp. at 11-12.) Dr. Bradtmiller's analysis of grab bars illustrates a problem that pervades his work for Defendant and renders it useless to Defendant's arguments and completely inappropriate as a substitute for the regulatory process.

---

[13] DOJ Stds. § 4.19.2 & Fig. 31; Cal. Stds. 1115B.2.1.2.1 & Fig. 11B-1D (2001).

Dr. Bradtmiller purports to analyze how many people are "accommodated" by compliant and noncompliant features. (See Bradtmiller Decl. ¶¶ 6, 9, 10, 12-16, 20, Ex. C at 1-5.) Yet neither Dr. Bradtmiller nor Taco Bell ever defines the term "accommodate." It is, perhaps, easy to imagine what the term might mean with respect to a dimension like door width: if you get through, you are accommodated; if not, not. Ideally, even used in this context, the term should have greater specificity concerning, for example, individuals who can get through a door, but only with scraped knuckles.

With other dimensions, Dr. Bradtmiller's meaning is even less clear. With respect to grab bar height, for example, it is unclear whether "accommodate" means or includes "useable at all," "useable but with difficulty," "useable comfortably," and/or "preferred." In Dr. Bradtmiller's analysis of grab bar height, this is a crucial distinction. Grab bars are metal bars installed to the sides and/or rear of a toilet that a person with a disability can use for leverage in transferring to the toilet. The study on which Dr. Bradtmiller relied asked subjects to "select[ ] bar heights with which they felt comfortable."[14] Fifty-nine percent felt comfortable at 36 inches; 32% at 33 inches, 2% at 30 inches and 7% at 27 inches.[15] From this data, Dr. Bradtmiller draws the conclusion that Taco Bell's noncompliant 37-inch-high grab bars "accommodate" 96.7% of people who use wheelchairs.[16] This compares apples to oranges: Even if Dr. Bradtmiller's analytical method were acceptable, it cannot be applied to data measuring one thing (comfort) to yield a conclusion purporting to measure something else entirely (accommodation).

---

[14] Steinfeld, Edward, et al., Accessible Buildings for People with Walking and Reaching Limitations at 57 (U.S. Dep't of Housing and Urban Dev., Office of Policy Dev. and Research 1979) ("Steinfeld (1979)"); see Bradtmiller Decl. ¶ 16(c) (stating that in analyzing grab bar heights, "Steinfeld's preference data were used.").

[15] Id. at 64-65 and Robertson Decl. ¶ 12.

[16] As Plaintiffs pointed out in their Opposition Brief, Dr. Bradtmiller has no empirical data concerning grab bars at 37 inches. To the extent he is using the statistical method described in his declaration to estimate this number, it has several flaws that he himself has recognized elsewhere. Pls.' Opp. at 11-12.

In the case of grab bar height -- and specifically grab bars that are higher than permitted by Standards, such as those in Defendant's example -- this method can yield incoherent results. This is because taller people may "feel comfortable" with higher grab bars, but still be able to use lower ones, while shorter people may "feel comfortable" with lower grab bars, but be unable to use higher ones. Ultimately, we don't know, for the simple reason that the study on which Dr. Bradtmiller relies did not test the factor for which he cites it.

This flaw contaminates all of Dr. Bradtmiller's work, and renders his conclusions meaningless. These meaningless and flawed conclusions cannot be used to supplant decades of fully-researched, publicly-developed and legally-mandated accessibility standards.

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,

FOX & ROBERTSON, P.C.

By: /s/ Amy F. Robertson

Amy F. Robertson, pro hac vice
Timothy P. Fox, Cal. Bar No. 157750
910 - 16th Street
Suite 610
Denver, Colorado 80202
Tel: (303) 595-9700
Fax: (303) 595-9705

Dated: April 29, 2005

Attorneys for Plaintiffs