UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION OF PENNSYLVANIA,	:	CIVIL ACTION NO. 03-1577
Plaintiff,	:	(JUDGE PRATTER)
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,	:	[ELECTRONICALLY FILED]
Defendant.	:	

SEPTA'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S REMAINING CLAIMS AND IN OPPOSITION TO DIA'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This Court must decide whether the Americans With Disabilities Act ("ADA") and the Rehabilitation Act of 1973 required SEPTA: (1) to install an elevator at the northwest corner of 15th Street and Market Street when SEPTA replaced a street-level stairway leading to the Suburban Station and Penn Center Concourse (collectively, "Suburban Station concourse"), and (2) to install an elevator in the southeast corner of the courtyard at Philadelphia City Hall when SEPTA replaced an escalator that serves as an exit from the concourse level to the street-level courtyard. Plaintiff, Disabled in Action ("DIA"), contends in its motion for summary judgment that SEPTA should have installed elevators so that wheelchair-bound individuals could travel between the street and concourse levels. DIA wants the Court to order SEPTA to install

the elevators. SEPTA files this response to DIA's motion and cross-moves for summary judgment because SEPTA complied with federal law and DIA is not entitled to any relief. [1]

SEPTA replaced the stairs at the northwest corner of 15th and Market ("the 15th Street Courtyard") as part of renovations to Suburban Station, which SEPTA was required to make accessible pursuant to a consent decree entered into on June 28, 1989 in connection with the case captioned *Eastern Paralyzed Veterans Association of Pennsylvania ("EPVA") v. SEPTA*, Civil Action No. 86-6797 (E.D. Pa.).[2] SEPTA's 13 Regional Rail Lines pass through Suburban Station. The commuter rail passenger station known as Suburban Station consists of two levels – the platform level where passengers board and disembark from trains, and the concourse level, the level between the platform level and the street.

SEPTA acknowledges that the ADA required it to install at least one elevator at Suburban Station to make the station accessible to the disabled. Consistent with its legal obligation, SEPTA installed not one, but two street-level elevators – on 16th Street between Market Street and JFK Boulevard, and on JFK Boulevard between 16th and 17th Streets. People in wheelchairs may use either elevator to reach Suburban Station concourse, including the concourse level at the bottom of the stairs at the 15th Street Courtyard.[3] In 2005, the Federal Transit Administration ("FTA") signaled its approval that SEPTA's Suburban Station renovations complied with the ADA.

DIA contends that the stairway at the 15th Street Courtyard is not part of Suburban Station but instead is an entrance to the 15th Street Station of the Market-Frankford

---

1 Through the course of this litigation, DIA has abandoned many of its arguments against SEPTA, including its arguments related to the "key station" issue. This brief addresses the two remaining issues in this case as described herein.

2 The regulations issued by the United States Department of Transportation to implement the ADA incorporated the consent decrees in the "key stations" provisions of the ADA. *See* 49 CFR §37.53.

3 There also are elevators leading from the concourse level to the platform level at Suburban Station, which allow the disabled access to SEPTA's Regional Rail lines.

Subway-Elevated Line, the east-west subway line. It further contends that SEPTA should have installed an elevator at that location so that people in wheelchairs could travel from street level to the concourse level. DIA's argument ignores the fact that Suburban Station's concourses run from 15th to 18th Streets and from Market to Cuthbert Streets. There are a number of ways to access the 15th Street Station. As an example, one may access the 15th Street Station through the Suburban Station concourse, the stairway on the southwestern corner of 15th Street and Market Streets (under the Clothespin statue), and the Broad Street concourse. Even if SEPTA had installed an elevator in the 15th Street Courtyard, a person in a wheelchair still would not be able to access the 15th Street Station, a point conceded by DIA. Even assuming, *arguendo*, that the 15th Street Courtyard is an entrance to the 15th Street Station, the replacement of stairs did not constitute an "alteration" that obligated SEPTA to install an elevator.

DIA's contention that federal law required SEPTA to install an elevator at the City Hall Courtyard also fails. The ADA does not require installation of an elevator absent "alterations" to a facility. SEPTA did not make any alterations – rather, as part of its Escalator Replacement Program, SEPTA merely replaced an escalator that no longer was operable. Further, the escalator is neither an entrance to nor exit from the City Hall Station of the Broad Street Line, the north-south subway line. Accordingly, the ADA's "vertical accessibility" requirement was not triggered in any event. The escalator merely provides access to the street level from the concourse level (not the subway platform).

II. RELEVANT STATUTORY AND REGULATORY LAW

Subchapter II of the ADA and Section 504 of the Rehabilitation Act of 1973 ("Section 504") require public transportation systems to provide service and other program benefits to individuals with disabilities. 42 U.S.C. §§ 12131(1), (2), § 12132; 29 U.S.C. § 794. Both statutes charge the Architectural and Transportation Barriers Compliance Board ("Access

Board") with establishing and maintaining minimum guidelines and requirements for accessibility. 29 U.S.C. § 792(b)(1), (2), (3); 42 U.S.C. § 12204(a), (b). Under the ADA, the U.S. Department of Transportation ("DOT") must issue regulations covering public transportation systems that are consistent with the Access Board's minimum guidelines and with the regulations issued under Section 504 of the Rehabilitation Act. 42 U.S.C. §§ 12134, 12149, 12163, 12164. Thus, the ADA and Section 504 are interpreted consistently. 42 U.S.C. §§ 12146, 12147, 12148, and 12162.

DOT regulations governing public transit systems may be found at 49 CFR Part 37. In Appendix A to 49 CFR Part 37, the DOT has adopted the Access Board's Americans With Disabilities Act Accessibility Guidelines ("ADAAG" or "Guidelines"), which are codified at 36 CFR Part 1191, Appendices B and D.[4] The Guidelines were first published in July 1991 and amended through September 2002 ("1991 Guidelines"). Modified Guidelines were published in July 2004. The 1991 Guidelines are applicable in this case. 49 CFR §37.9(c).[5]

The ADA imposes three obligations on public transportation systems to make stations accessible to the disabled, including individuals who use wheelchairs. First, a public transportation system is required to designate "key stations" – stations generally that have heavy passenger traffic; are transfer stations, end stations, or major interchange points with other transportation modes; and serve major commerce centers – and make them accessible to the disabled. 42 U.S.C. §§ 12147(b) and 12162(e)(2)(A)(ii) and (iii); 49 CFR §37.51. When Congress enacted the ADA in 1990, it recognized that rail systems in older urban areas such as Philadelphia would face extraordinary costs to meet the key station requirements and thus

---

4 The Guidelines also are available on the Access Board's website, www.access-board.gov. The website contains both the 1991 Guidelines, which apply in this case, and modified guidelines published in July 2004.

5 None of the modifications to the 1991 Guidelines is potentially applicable here in any event.

extended the three-year time line for compliance to 30 years for subway lines (*i.e.*, until 2020) and to 20 years for commuter rail lines (*i.e.*, until 2010). 42 U.S.C. §§ 12147(b)(2)(A), (B) and 12162(e)(2)(A)(ii)(II) and (iii).[6]

SEPTA has continued to work diligently to provide accessibility to its ridership, and to date 33 of its 35 Key Stations, including those on both transit and commuter rails, are accessible to the disabled. SEPTA's Statement of Undisputed Facts ("SUF") 58. Only minor work remains at the two other Key Stations – both on property not owned by SEPTA -- but completion of those projects has been delayed because of litigation involving parties other than SEPTA. SUF 59. Aside from the 33 Key Stations, 54 additional SEPTA stations are accessible to the disabled. SUF 60. As of the date of the filing of this brief, construction is under way at nine additional non-Key Stations that will be accessible to the disabled. SUF 61.

The ADA's second and third requirements regarding stations concern new construction and "alterations" to existing facilities. A public transportation system must make newly built stations accessible to the disabled, including disabled individuals who use wheelchairs. 42 U.S.C. §§ 12146 and 12162(e)(1). When a public transit system makes "alterations" to an existing station, it must make the alterations in such a way that, to the maximum extent feasible, the altered portions are readily accessible to disabled individuals, including individuals who use wheelchairs. 42 U.S.C. §§ 12147(a) and 12162(e)(2)(B).[7]

---

[6] In 1989, a year before Congress passed the ADA, the City of Philadelphia and SEPTA entered into the settlement agreement with EPVA in which the parties identified stations that would be made accessible to the disabled. The Department of Transportation, through regulation, has determined that the designations made under the settlement satisfy SEPTA's obligation to identify key stations under the ADA. *See* 49 CFR § 37.53.

[7] Subpart I of Part B, Subchapter II of the ADA covers subway systems [42 U.S.C. § 12141(2)], and Subpart II of Part B, Subchapter II of the ADA covers commuter rail systems. 42 U.S.C. § 12161(1) and (2). Thus, Subpart I applies to SEPTA's subway lines, and Subpart II applies to SEPTA's Regional Rail system. Generally, however, the requirements under the two Subparts are similar.

III. ARGUMENT

On a motion for summary judgment, the court must decide whether there is an issue of material fact and, if not, whether the moving party is entitled to judgment at a matter of law. *Medical Protective Co. v. Watkins,* 198 F.3d 100, 103 (3d Cir. 1999). The non-moving party must, through affidavits, admissions, depositions, or other evidence, demonstrate that a material factual issue exists for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). To avoid summary judgment, the non-moving party must do more than show there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (3d Cir. 1986). If the non-moving party fails to create "sufficient disagreement to require submission [of the evidence] to a jury," the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

A. THE ADA DID NOT REQUIRE SEPTA TO INSTALL AN ELEVATOR AT THE 15th STREET COURTYARD.

1. Stair Replacement at the 15th Street Courtyard Was Part of SEPTA's Suburban Station Renovation Project, Which Included Installation of Two Elevators Near the 15th Street Courtyard.

SEPTA's Suburban Station is a "key station" under the 1989 consent decree and 42 U.S.C. § 12162(e)(2)(A)(ii) and (iii). *See* SUF 1; 49 C.F.R. § 37.53. For more than 50 years, Suburban Station, which serves SEPTA's 13 Regional Rail lines, has been a mixed-use transit complex combining retail, office, and commuter rail operations in an integrated facility that spans from 15th Street to 18th Street and from Market to Cuthbert Streets. SUF 2, 32. The mixed-use nature of Suburban Station has remained consistent throughout this 50-year period. SUF 32.

In February 1995, SEPTA and the City of Philadelphia reached a general agreement concerning the framework for the renovation of Suburban Station, its retail spaces and

its concourses (the "Project"). SUF 3. One objective was to have SEPTA, the City and private ownership enter into cooperative agreements to carry out the renovations without regard to property ownership.[8] SUF 4. In its Request For Proposal ("RFP"), SEPTA outlined design requirements for renovations to below-ground concourses, courtyards, station and train operations, corridors, retail spaces, and entrances. SEPTA included ADA accessibility requirements because of Suburban Station's designation as a key station. SUF 5.

In 1997, SEPTA awarded the architectural firm Bower, Lewis & Thrower ("BLT") the design contract. SUF 5. From inception, the 15th Street Courtyard was within the scope of the Project. SUF 5-7. Suburban Station has clearly demarcated boundaries -- extending from 15th Street to 18th Street and from Cuthbert Street to Market Street, including the 15th Street Courtyard. SUF 2 & 13.[9] The property lines that defined the scope of the Project and its site are shown on the Zoning Plan and on BLT's schematic drawing of the Suburban Station concourse. *See* SUF 13 & 15. The Zoning Plan identifies, *inter alia*, in bold red lines, the Project's perimeter boundary lines and main phase work that SEPTA would undertake on SEPTA, City, and privately owned property within these boundaries. *See* SUF 13.[10] BLT's architectural schematic drawing shows a concourse-level view of the boundary lines of the Project highlighted in red, which included the 15th Street Courtyard. *See* SUF 15.[11]

---

8 This is consistent with 49 C.F.R. § 37.51 which identifies the "responsible parties" and their legal obligations in making key stations in commuter rail systems accessible. SUF 3.

9 The ADAAG defines "Facility," without any regard to ownership, as "all or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site." 1991 Guidelines, § 3.5. A "Site," in turn, is defined as "[a] parcel of land bounded by a property line or a designated portion of a public right-of-way." *Id.*, § 3.5; SUF 8. Clearly, Suburban Station is a facility on more than one site.

10 Ownership within a transit facility is not relevant to the definition of the facility or the scope of a particular renovation project. SUF 8.

11 The property lines defining the scope of the Project are the same as those established for Suburban Station and the Penn Center Complex (as it was then named) by the Pennsylvania Railroad in 1950. SUF 31.

Because the City owns the 15th Street Courtyard, SEPTA sought the City's cooperation and authorization to obtain a permit to complete that work without an elevator, which involved an appeal to the City Department of Licenses and Inspections for a variance from the Philadelphia Building and Occupancy Code. SUF 25. On October 17, 2000, the City's Department of Licenses & Inspections gave SEPTA permission to perform the work at the 15th Street Courtyard. SUF 26.[12] During the course of the work, SEPTA and the City learned that federal grant money was available for the 15th Street Courtyard portion of the Project. SUF 20. SEPTA and the City obtained a $750,000 grant, which required that the work at the 15th Street Courtyard be accelerated. SUF 21. Work at the 15th Street Courtyard began in February 2001 and included replacement of an unsafe stairway, renovations to the escalator headhouse, and replacement of planters. SUF 22. The stairway replacement did not require any major structural modifications. SUF 23. Work at the 15th Street Courtyard concluded in August, 2002.

As part of the renovations at Suburban Station, SEPTA installed an elevator at street level on the east side of 16th Street between Market Street and JFK Boulevard that provides access to the concourse level. SUF 16. The elevator is 340 feet from the 15th Street Courtyard. SUF 18. SEPTA installed signs at street level at the 15th Street Courtyard to direct people who use wheelchairs to the elevator on 16th Street. SUF 19. SEPTA also installed a second elevator at street level near the southeast corner of 17th Street and JFK Boulevard. SUF 16. The 17th Street elevator provides access to Suburban Station concourse and to one

---

[12] The City, a co-defendant in this case, settled with DIA. (Docket No. 49).

train platform. *Id.*[13] The total cost of the Suburban Station Renovation Project was approximately $63 million. SUF 62.

2. The Federal Transit Administration Determined That the Suburban Station Renovations Comply with the ADA.

In November 2005, inspectors retained by the FTA determined that the renovations at Suburban Station, including the stairway at the 15th Street Courtyard, substantially complied with the ADA. SUF 41. The FTA inspectors concluded that SEPTA had complied fully with the 1991 Guidelines by providing for the two disabled accessible routes through Suburban Station by virtue of the 16th Street and JFK Boulevard elevators. SUF 42. The FTA inspectors specifically observed that a station's ADA compliance was determined by assessing the station facility and its elements under the regulations (Part 37) and the Guidelines. SUF 41-42. The FTA's compliance review found subtle areas of non-compliance – a sign in an elevator was mounted too high from the elevator floor, and a call button on an elevator did not light fully. *Id.* Critically, the FTA's inspectors nowhere indicated that SEPTA should place an elevator at the 15th Street Courtyard. *Id.*[14]

3. SEPTA's Suburban Station Renovations Meet ADA Standards.

The Guidelines require only *one* accessible entrance in order for a transit facility to be comply with the ADA. The 1991 Guidelines, § 10.3.2(1) (Existing Facilities: Key Stations), state: "Rapid, light, and commuter rail key stations ... and existing intercity rail stations shall provide at least one accessible route from an accessible entrance to those areas

---

[13] Wheelchair accessibility is available to all aspects of the Suburban Station concourse and that, from either street level elevator, a disabled person can access, barrier-free: (1) all train platforms using four additional concourse level elevators; (2) all transportation functions; and (3) all retail spaces, courtyards and public places. SUF 17. The 15th Street Courtyard is accessible from the 17th Street elevator and from the 16th Street elevator. SUF 18. The distance from the 16th Street elevator to the 15th Street Courtyard at concourse level is approximately *340 feet.* SUF 18. Accordingly all of the ADA's applicable accessibility requirements have been met. 1991 Guidelines, § 4.1.6(1), (2) (Accessible Buildings: Alterations); SUF 7.

[14] As a result of the inspection, SEPTA prepared a time line for completion of the minor issues cited in the ADA Key Assessment and subsequently corrected the deficiencies. SUF 43.

necessary for use of the transportation system." Similarly, when alterations are made to a building, the Guidelines require only one accessible entrance so long as signage is appropriate. *Id.* at § Section 4.1.6.(1)(h) (Accessible Buildings: Alterations). While SEPTA does not concede that the 15th Street Courtyard entrance was "altered" within the meaning of the ADA and its regulations, Section 4.1.6(1)(h) of the Guidelines provides that an entrance being altered need not meet ADAAG's requirements for accessibility so long as there is one accessible entrance. *Id.* at Section 4.1.6(1)(f) and (h)(Accessible Buildings: Alterations). At Suburban Station, there are two entrances accessible to the disabled.

Multiple federal jurisdictions have concurred that the Guidelines require only one accessible entrance. In *Kasten v. Port Authority of New York & New Jersey*, 2002 WL 31102689 (E.D.N.Y. 2002), the court noted that both DOT regulations and the Guidelines required only one elevator entrance to an airport terminal to meet the requirements of the ADA. *Id.* at *3. Similarly, in *Durante v. County of Belknap*, 2005 WL 361540 (D.N.H. 2005), a case dealing with access to a courthouse, the court held that "the existence of one ADA-compliant entrance necessarily renders the courthouse's services, programs, and activities 'readily accessible' to individuals with disabilities." *Id. at* *3. *See also Disabled in Action of Pennsylvania v. Sykes*, 833 F.2d 1113, 1119-21 (3d Cir. 1987), a pre-ADA case, in which the Third Circuit interpreted a regulation under the Rehabilitation Act (49 CFR § 27.67(d) – which is substantially similar to the Guidelines) -- and noted that only one accessible entrance was required; *Long v. Coast Resorts, Inc.*, 32 F. Supp. 2d 1203, 1212 (D.Nev. 1999), ("the ADA does not require every element of a place of public accommodation to be accessible" and *"[e]very entrance or exit is not required to be wheelchair accessible."*), *aff'd in part, rev'd in part on other grounds*, 267 F.3d 918 (9th Cir. 2001) (emphasis added).

The ADA required SEPTA to make only one entrance to Suburban Station accessible to the disabled. Because the ADA does not require identical access, and the 16th Street elevator is only 340 feet from the 15th Street Courtyard creating an accessible, unobstructed path from the 16th Street elevator to the 15th Street Courtyard, there was no legal requirement that SEPTA install an elevator at the 15th Street Courtyard. *See, generally, Hassan v. Slater*, 41 F.Supp. 2d 343, 350 (1999) (disabled person required to travel an additional *four and a half miles* to reach an accessible train station failed to state a claim of discrimination); *Civic Association of the Deaf v. Giuliani*, 970 F.Supp. 352, 362 (S.D.N.Y. 1997) (reduction in number of street alarm boxes in pilot areas did not prevent system of reporting street emergencies from being "readily accessible" to hearing impaired people as required by ADA absent proof that walking an additional block or two to locate alarm box so difficult as to render system practically inaccessible).

4. The 15th Street Courtyard Is Not An "Entrance" To the 15th Street Station of the Market-Frankford Subway-Elevated Line.

Suburban Station and the 15th Street Station of the Market-Frankford Subway-Elevated Line are two separate and distinct transit facilities that are demarcated by clear property lines and serve two distinct, unconnected rail lines. SUF 13, 15, 30 & 31.[15] A review of the history of the Suburban Station makes this abundantly clear. The Old Broad Street Station, constructed by the Pennsylvania Railroad Company and opened in December 1881, stretched from Market to Filbert Street (now JFK Boulevard) and from 15th to 18th Street. SUF 33. A

[15] DIA relies upon the Third Circuit's decision in *DIA v. SEPTA*, 539 F.3d 199, 202 n.1 (3d Cir. 2008) for the proposition that the 15th Street Courtyard is an "entrance" to the Market-Frankford Subway-Elevated Line. In the decision, the Court stated, in a footnote, that "at this stage of the litigation, we accept DIA's characterization of the 15th Street Courtyard as an "entrance" to the Market-Frankford Station . . . The District Court may take up this nuance and determine its relevance to § 12147(a) liability on remand." Accordingly, this issue is ripe for decision.

series of elevated viaducts – commonly known as the "Chinese Wall" -- carried the tracks into the station from the west. SUF 34.

After a fire in 1923 damaged the Broad Street Station, the City of Philadelphia and the Pennsylvania Railroad reached agreement on construction of a new station. Suburban Station, built on adjacent land owned by the railroad, opened in 1930. SUF 34. The newly constructed Suburban Station and its 22-story office building occupied the block bounded by 16th and 17th Streets and Cuthbert and Filbert Streets, and offered retail shops at street and concourse levels. SUF 35.

Although the Pennsylvania Railroad intended to demolish the Broad Street Station once Suburban Station opened, the intervention of the Great Depression, World War II, and the lack of money and materials delayed the project until the early 1950s. SUF 36. During demolition, the City and the Pennsylvania Railroad began discussions and Penn Center was "conceived, designed and built as a group of integrated business office buildings placed so as to have direct access to the underground transit facilities of Suburban Station all tied together by a below-street-level concourse area containing shopping, dining, recreation and business services." SUF 37. The Suburban Station facility includes the area from 15th Street on the east to 18th Street on the west, and Cuthbert Street on the north and Market Street on the south. SUF 38. The boundaries of Suburban Station include the 15th Street Courtyard -- the site of the old Broad Street Station -- and have always included this area. SUF 38.

One of the ways[16] to reach the 15th Street Station of the Market Frankford Subway-Elevated Line is through the Suburban Station concourse. An individual who enters the Suburban Station concourse at the 15th Street Courtyard must travel south in the 15th Street

[16] There are a number of ways to reach the 15th Station. The actual entrance to the 15th Street Station of the Market-Frankford Subway-Elevated Line is the stairway at the southwest corner of 15th and Market Streets (under the Clothespin statue). SUF 30.

corridor, exit Suburban Station, and travel over the "hump." Below the hump are underground transit lines for the Subway Surface Trolley Lines and the Market-Frankford Subway-Elevated Line. SUF 30. The scope of the renovations to the corridor adjacent to the 15th Street Courtyard did not extend beyond the Project's boundaries or the property line of the Suburban Station concourse. SUF 27. SEPTA did not perform any renovations to the underground connection from Suburban Station to the 15th Street Station. SUF 28. Indeed, as a "key station," renovation of Suburban Station did not require that the underground connections between these two stations be made accessible. *See* 1991 Guidelines, § 10.3.2(2) (Existing Facilities: Key Stations) (accessible route requirements between facilities contained in § 10.3.1(3), which incorporates Section 4.3, is not applicable to key stations). SUF 18.

While SEPTA acknowledges that the 15th Street Courtyard is owned by the City, ownership is not relevant to defining the facility or the scope of a particular renovation project. SUF 8. Nor is ownership relevant to the ADAAG definitions of "accessible," "facility," "site," "entrance," or "accessible route." 1991 Guidelines, § 3.5. In February 1995, SEPTA and the City reached a general agreement concerning the framework for the Project. SUF 3. One of the objectives was to have SEPTA, the City and private ownership enter into cooperative agreements to implement the renovations without regard to property ownership. SUF 3-4. Accordingly, property ownership is irrelevant to this inquiry both as a matter of law and as a matter of fact.

The 15th Street Courtyard and Suburban Station concourse are well within the property line boundary of Suburban Station. SUF 7 & 15. The architectural schematic of Suburban Station as well as an exhaustive review of the history of Suburban Station demonstrate that the 15th Street Courtyard and Suburban Station's 15th Street corridor are within the Suburban Station concourse property line. SUF 15, 33-38. Indeed, the boundary between

Suburban Station concourse and the 15th Street Market-Frankford Subway-Elevated Station is shown to begin at the seventh step leading out of the Suburban Station corridor to the 15th Street Station. SUF 15, 31, 38. In light of this undisputed evidence, the 15th Street Courtyard is an "entrance" to Suburban Station.

(a) DIA's Position That The 15th Street Courtyard Is An Entrance To The Market-Frankford Subway-Elevated Line Is Unsupported By Law And Fact.

DIA has argued that the 15th Street Courtyard is an "entrance" to the 15th Street Station and not Suburban Station. In support of this argument, DIA claims that: (1) "diagrams of the concourse depict the close proximity of the 15th Street Entrance to the 15th Street Station ...."; (2) the City recognizes the 15th Street Entrance as an entrance to the 15th Street Station; and (3) SEPTA itself "recognizes the reality that the 15th Street Entrance as an entrance to the 15th Street Station." These arguments have no merit.

(i) "Close Proximity" Is Irrelevant In Determining Whether A Facility Must Be Vertically Accessible.

DIA argues the "close proximity" of the 15th Street Courtyard to the 15th Street Market-Frankford Subway-Elevated Station and implies that proximity makes the 15th Street Courtyard *a part of* the 15th Street Market-Frankford Subway-Elevated Station. DIA Memorandum at 22.[17] DIA cites no legal authority to support this contention, nor can it. DIA Memorandum at 23. The Guidelines nowhere employ the amorphous notion of proximity to trigger a "vertical accessibility" requirement. The notion of "proximity" is wholly antithetical to ADAAG's boundary-driven definitions of "accessible," "facility," "entrance," "site," and "accessible route." 1991 Guidelines, §§ 3.5, 4.3. Under ADAAG, each of these controlling

[17] DIA's factually baseless reference to the 15th Street Courtyard as the "15th Street Entrance" will not make the 15th Street Courtyard a part of the 15th Street Market-Frankford Station no matter how often that label is invoked.

definitions depends upon the applications of particular boundaries. Surely a subjective concept like proximity has no place among ADAAG's architectural guidelines, especially where, as here, vertical accessibility may mean the provision of an elevator at significant cost.

Just as undefined notions of "proximity" cannot re-draw property lines or change the scope of a project, neither the ADA nor the Guidelines provides that renovation of one facility triggers a requirement that another facility in "close proximity" be made accessible. The Key Station provisions exemplify the precision and inherent limits that are clear throughout ADAAG. As a "Key Station," renovation of the Suburban Station transit facility did *not* require that the underground connection between Suburban Station and 15th Street Market-Frankford Subway-Elevated Station be made accessible. 1991 Guidelines, § 10.3.2(2). *See* SUF 8. Even in *new construction* a route connecting two facilities need not be made accessible if the facility potentially to be connected to new construction is not accessible. 1991 Guidelines, § 10.3.2(2). Because Suburban Station is fully accessible (with two elevators), there was no requirement that SEPTA install a third elevator at the 15th Street Courtyard.

(ii) DIA's Argument that the City Recognizes 15th Street As An Entrance to the Market-Frankford Subway-Elevated Line Is Without Merit.

Similarly, DIA's contention that the City recognizes the 15th Street Courtyard as an entrance to the 15th Street Station of the Market-Frankford Subway-Elevated Line is unavailing. DIA Memorandum at 22-23. DIA's reliance upon the testimony of City employee Christopher Zearfoss is misplaced and does not make the 15th Street Courtyard *a part of* the 15th Street Market-Frankford Subway-Elevated Station. *See* DIA Memorandum at 23. Zearfoss did not testify that one can "directly access" the 15th Street Market-Frankford Subway-Elevated Station from the 15th Street Courtyard. Rather, Zearfoss testified that when one walks down into the 15th Street Courtyard, an individual has entered Suburban Station at one of a number of

entrances to the Suburban Station 15th Street concourse. *See* Zearfoss Deposition, 8/13/04, DIA Memorandum at Exhibit "18" at 81. Zearfoss' testimony makes clear that the 15th Street Courtyard is not an entrance to the 15th Street Market-Frankford Subway-Elevated Station.

Zearfoss acknowledged that Suburban Station and the 15th Street Market-Frankford Subway-Elevated Station are at different elevations at both concourse and track levels. Zearfoss' testimony confirms that the 15th Street Courtyard provides an entrance to Suburban Station at its 15th Street corridor and that in order to arrive at the 15th Street Market-Frankford Subway-Elevated Station from the 15th Street Courtyard, one needs to traverse an underground connection and ascend the hump to the 15th Street Market-Frankford Subway-Elevated Station and enter its bounds. *See id.* at 81. *See* SUF 30.[18] This testimony does not support the contention that the City recognized the 15th Street Courtyard as an "entrance" to the 15th Street Station.

(iii) DIA's Argument that SEPTA Recognizes 15th Street As An Entrance to the Market-Frankford Subway-Elevated Line Is Without Merit.

DIA further asserts that "[e]ven SEPTA itself recognizes the "reality" that the 15th Street Entrance is an entrance to the 15th Street Market-Frankford Subway-Elevated Station." DIA Memorandum at 23. This assertion is incorrect. DIA relies upon a one-page unidentified and unauthenticated document that, in addition to providing hours and fare information, identified 15th Street Market-Frankford Subway-Elevated Station as being on the "Market-Frankford Line" with an "address" at "15th & Market Street." DIA Memorandum at

---

[18] *See* SUF 31 at Exhibit "1" at 3 (noting that "Where is a distinct difference in elevation between the Market-Frankford Line and the Suburban Station concourse level," "when standing at the bottom of the Suburban Station concourse level steps a six feet tall person is looking at the ankles of people on the Market-Frankford 15th Street Station mezzanine," and "[t]his property line running between the Suburban Station concourse level and the Market-Frankford mezzanine level is the boundary between the Market-Frankford Line and the Suburban Station Complex.").

¶ 23; DIA Exhibit 6. As DIA is fully aware, both the 15th Street Market-Frankford Subway-Elevated Station and the Market-Frankford tracks are located directly *under* Market Street and are not within the boundaries of the 15th Street Courtyard or the boundaries of Suburban Station. *See* SUF 15 & 30.

Paragraph 26 of DIA's Motion also claims that SEPTA's directional signage in the 15th Street corridor of Suburban Station (at the bottom of the 15th Street Courtyard escalator) identifies the 15th Street Courtyard as an entrance to the 15th Street Market-Frankford Subway-Elevated Station. *See* DIA Motion at Exhibits 15, 16. DIA relies on directional signage located at the base of the 15th Street Courtyard escalator, *in* Suburban Station. *See* SUF 30 & 31. This sign simply directs persons entering Suburban Station from the 15th Street Courtyard to various transit lines and Suburban Station's ticketing and platforms. Under the ADAAG, directional signage is of no import in determining what is constitutes an "entrance," "facility," "accessible route," or "site." 1991 Guidelines, § 3.5.[19] DIA cites no legal authority under the ADA, its Part 37 regulations or ADAAG for the proposition that the existence or non-existence of directional signage is at all relevant to a determination of the entrances or boundaries of a facility or a site. This is because none exists and it would be an incorrect interpretation of Part 37 and ADAAG.

Finally, DIA relies upon the deposition testimony of Gerald Maier, SEPTA's Director of Real Estate, when he testified that pedestrians "can reach" the 15th Street Market-Frankford Station by utilizing the 15th Street Courtyard. DIA Memorandum at 23; DIA Motion at ¶ 27. Maier testified that he considered 15th Street Courtyard to be an entrance to

---

[19] ADAAG does require that, when "alterations" to a building are performed, only one accessible entrance is required as long as signage is appropriate at entrances that are not accessible. 1991 Guidelines, § 4.1.6(1)(h). SEPTA has provided ADA-compliant signage at the street level of the 15th Street Courtyard that directs disabled individuals to the elevator at 16th Street. SUF 16, 18.

Suburban Station -- not an entrance to the 15th Street Market-Frankford Subway-Elevated Station -- and that to travel from the bottom of the 15th Street Courtyard to the 15th Street Market-Frankford Subway-Elevated Station requires travel through Suburban Station's 15th Street corridor, and up the steps that lead to the Market-Frankford Station. Maier Deposition, 9/1/05, DIA Memorandum at Exhibit "20" at 66, 67, and 69. Whether an individual "can reach" a particular station -- like "proximity" -- is not a defined ADAAG term and is of no particular relevance in determining what constitutes a "facility," "accessible route," "site" or compliance with Key Station accessibility obligations. 1991 Guidelines, §§ 3.5, 10.3.2. Obviously, DIA's reliance is misplaced.

(iv) DIA's Additional Arguments Are Meritless.

DIA next asserts that the definition of "facility" under Part 37 suggests that the 15th Street Courtyard is a part of the 15th Street Market-Frankford Subway-Elevated Station. (DIA Memorandum at p. 23, 29-31). This too is incorrect. ADAAG clarifies that a facility must be "located on a site" and that a "site" is a parcel of land "bounded by a property line or a designated portion of a public right of way." 1991 Guidelines, § 3.5. All of Suburban Station, including its 15th Street Courtyard, is a facility located on a site. Similarly, the 15th Street Market-Frankford Subway-Elevated Station is also a facility, located on its own "site" bounded by property lines -- a site that is wholly separate and apart from Suburban Station.[20]

---

[20] DIA directs this Court's attention to the definition of a "facility" found in the DOT Part 37 regulations. This definition is phrased differently than the ADAAG definition, but is of equal impact: a "facility" is defined as "all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, structure, or equipment is located." DIA Memorandum at 23, citing 49 C.F.R. § 37.3. DIA contends that this is a "very broad" definition that supports its claim that the 15th Street Courtyard is a part of the 15th Street Market-Frankford Station. DIA Memorandum at 23. However, this definition also requires that an entrance be part of the "facility" and on the "site," where the "building, facility structure or equipment is located." Simply put, where there is no "site" there can be no "entrance."

ADAAG's Key Station provisions further illustrate that an entrance must be on the same site as the facility or building. Under the Guidelines, a Key Station such as Suburban Station is only required to have "... one accessible route from an accessible entrance to those areas necessary for use of the transportation system." 1991 Guidelines, § 10.3.2(1); by definition, an accessible route is defined to be within a facility (which in turn must be located on a site). It is, therefore, undeniable that the entrance to which the accessible route must connect is an entrance that is located on the same site as the facility or building.[21] The ADAAG compels the conclusion that an entrance to a facility must be located on and be part of the facility -- in this case Suburban Station -- to which the 15th Street Courtyard is an entrance.[22]

The applicable ADAAG provisions undermine any contention that the 15th Street Courtyard is an entrance to the 15th Street Market-Frankford Subway-Elevated Station. There simply is no doubt that the Suburban Station transit facility, is its own distinct "facility" on its own distinct "site" with its own distinct "entrances" -- and the 15th Street Courtyard is part of both Suburban Station and within the scope of the Project. Likewise, the 15th Street Market-Frankford Subway-Elevated Station is its own distinct "facility" on its own distinct "site" with its own distinct "entrances." The 15th Street Courtyard is not a part of that facility.

---

21 *See* 1991 Guidelines, § 10.3.2(1) ("Rapid, light and commuter rail key stations: An existing intercity rail station shall provide at least one accessible route from an accessible entrance to those areas necessary for use of the transportation system"). *See also* 1991 Guidelines, § 4.3.2, Accessible Route (location) ... "one accessible route within the boundary of the site"; § 4.3.2 ... "accessible route shall connect ... buildings, facilities and elements that are on the same site."

22 *See* 1991 Guidelines, § 3.5 ("Entrance" defined in part as "[airy access point to a building or portion of a building or facility used for the purpose of entering."). DIA's argument of "equal access" boils down to arguing that there must be an elevator at every stairwell. Even new construction does not mandate this under ADAAG. *See, e.g.*, 49 C.F.R. § 37, Appendix A, § 4.13(8) (requiring only 50% of public entrances to be accessible). Equal access does not mean that an elevator is required for every stairway or that multiple means of vertical access must be provided to access the same facility. Equal access means, in the context of a Key Station, that *one* accessible route be provided to the primary function areas of the Key Station. 49 C.F.R. § 37, Appendix A, § 10.3.2(1). The accessible route provides the disabled with complete and equal access to the primary function areas of Key Stations.

Accordingly, all of the arguments asserted by DIA in support of its contention that the 15th Street Courtyard is an "entrance" to the Market-Frankford Subway-Elevated line are without merit.

5. Even Assuming that the 15th Street Courtyard is an Entrance to the Market-Frankford Subway-Elevated Line, the Replacement of a Stairway in the 15th Street Courtyard Does Not Qualify as an "Alteration" Under the ADA.

Even if the 15th Street Courtyard is considered an entrance to the Market-Frankford Subway-Elevated line (which SEPTA denies), the replacement of the stairway did not constitute an alteration within the meaning of the ADA and ADAAG and, therefore, did not obligate SEPTA to install an elevator. Work on the 15th Street Courtyard began in February 2001 as an accelerated phase of the Suburban Station Renovation Project and included installing a concrete stairway that was unsafe and in disrepair, renovating the headhouse at 15th Street, and replacing planters. SUF 22. No major structural modifications were necessary to install the replacement stairs. *Id.* The new stairway at the 15th Street Courtyard brings an ambulatory person from street level to the same point within the Suburban Station as the former stairway. SUF 23. The replacement of the stairway did not change the access from the street level to the Suburban Station concourse in any way. SUF 24.

Even the FTA has recognized, specifically with respect to SEPTA, that the replacement of elevators, escalators, and other accessibility features such as stairs simply constitutes normal maintenance. In a June 10, 1999 letter to then-SEPTA General Manager John K. Leary, FTA Regional Administrator Sheldon A. Kinbar pointed out that "under the Americans with Disabilities Act (ADA), where elevators, escalators and other accessibility features exist they must be maintained." SUF 44. Kinbar equated repair or replacement with maintenance. To that end, Kinbar requested, *inter alia*, "[a]n updated schedule for *repair or*

replacement of these elevators and escalators, along with expected sources of funding for this purpose and expected completion date." *Id.*

Tellingly absent from the FTA Regional Administrator's letter is any indication that the replacement of an escalator would carry a concomitant obligation to provide vertical accessibility corresponding with the escalator site. *Id.* As the FTA plainly recognized in Kinbar's letter, the Guidelines do not mandate that SEPTA provide an elevator where it has replaced an existing stair or escalator, no major structural modifications were undertaken to install the stair or escalator, and duration of inoperability is irrelevant. *See id.*

The Third Circuit's decision in *Sykes, supra,* is consistent with ADAAG's provisions that an elevator need not be provided where existing stairs are replaced. In *Sykes*, the Court held that *only* the reconstruction of the northeast entrance to Columbia Station on the Broad Street Line effected an "alteration" "in a manner that affects or could affect the accessibility of the facility." *Sykes*, 833 F.2d at 1121. The reconstruction of the northeast entrance consisted of the construction of two entirely *new* stairs and a *new* escalator. *Id.* at 1120. Notably, the reconstruction of two existing stairs on the southbound side of Columbia Station in *Sykes* was insufficient to trigger a vertical accessibility requirement. In *Sykes*, the reconstructed southbound stairs lead "from the street to the southbound terminal at the Columbia Avenue Station." *See Sykes*, 833 F.2d at 1120. The Court pointedly declined to hold that reconstruction of two existing stairways on the southbound side of Columbia Station constituted "alterations." *Id.* at 1120, 1121. *See also* SUF 36 & 37.

Sykes is instructive as the Third Circuit: (1) ordered installation of an elevator only where *new* stairs and a *new* escalator were constructed, which is not the case here, and (2) did not order vertical accessibility where reconstruction of two *existing* stairways took place,

which is twice the number of *existing* stairways at issue in this case. Standing on its own, the application of *Sykes* to the instant case compels the conclusion that no elevator is required in the 15th Street Courtyard.

DIA argues that the replacement of the stairs at the 15th Street Courtyard was other than normal maintenance. The evidence does not support this conclusion. In addition to ADAAG's general definition of alterations, ADAAG specifically addresses existing escalators and stairs. Section 4.1.6(1)(f) of the Guidelines provide that vertical access is required only when "an escalator or stair is planned or installed *where none existed previously and major structural modifications are necessary for such installation*." (Emphasis added). In this case, the stairs in the 15th Street Courtyard indisputably existed previously and the project did not rise beyond the level of "normal maintenance." No major *structural* modifications, such as moving the Courtyard walls - which function as the "stairwell" of the 15th Street Courtyard, were required to put in the replacement stair and the replacement did not change access at the 15th Street Courtyard. SUF 24.

To escape the fundamental fact that the new stair at the 15th Street Courtyard was replacement work constituting normal maintenance, DIA repeatedly invokes either the words "demolished" or "demolition." DIA Memorandum at pp. 26-28. Replacement, of course, is the final act of maintenance that comes at the end of the useful life of any object. SUF 45. Simply put, at the end of an object's useful life, it is replaced without usability being affected. *Id.* Replacement is simply one point on the continuum of normal maintenance. *Id.* Even DIA's counsel acknowledges that "demolition" is simply one point on the continuum of normal maintenance. *Id.*[23]

---

[23] DIA's effort to equate the phrase "maximum extent feasible" with the concept "make all possible changes" is flawed. DIA Memorandum at 29-30. As DIA is fully aware by virtue of its citation to 49 C.F.R. § 37.43(b),

Performing normal maintenance or changing the mechanical or electrical systems are not alterations that trigger a requirement to provide an elevator. *See* 49 C.F.R. § 47.3. *See also Sykes, supra,* 833 F.2d at 1121. In *Sykes*, the Court recognized that normal maintenance of existing stairs does not trigger a vertical accessibility requirement. *Id.* at 1121, n.9. That normal maintenance does not trigger accessibility is firmly embedded in both the ADA and ADAAG. *See, e.g.*, 42 U.S.C.A. § 12147(a); 49 C.F.R. § 37.43 (transportation facility need not be made accessible in absence of alterations that affect usability); 1991 Guidelines, § 4.1.6(1)(i) (alteration work that is limited to electrical, mechanical, plumbing, hazardous material abatement, or automatic sprinkler retrofitting does not trigger accessibility requirement).

In sum, DIA cannot demonstrate that the replacement of the stairs at the 15th Street Courtyard constituted anything other than maintenance of those stairs. The removal of a deteriorated set of stairs and replacement with another set of stairs without the performance of major structural modifications does not trigger ADA accessibility requirements. SUF 44-45. A replacement stairway is considered maintenance if the existing stairway is beyond repair and does not alter an entrance. *Id.* Section 4.6(1)(f) of the Guidelines is controlling and installation of an elevator is not required. Put simply, usability and accessibility are not affected in the absence of major structural modifications. Therefore, no "alteration" took place.

6. The Cases Cited by DIA Are Distinguishable.

DIA places almost exclusive reliance upon the Third Circuit case of *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994), to support its contention that SEPTA's replacement of the 15th Street Courtyard stairs constituted an

---

the phrase "maximum extent feasible" applies (1) where a party seeking accessibility has carried its burden of demonstrating that a planned alteration has triggered a duty to provide accessibility that is technically feasible and (2) providing accessibility is impossible given the idiosyncratic nature of the facility being altered. *See* 49 C.F.R. § 37.43(b).

"alteration" under the ADA. *Kinney* is easily distinguishable from this case. As a threshold matter, *Kinney* is a case that arises under 49 CFR Part 35, which is not applicable here.[24] *Kinney* addressed whether altered streets must contain curb ramps or sloped areas when a city resurfaces a street; and not with the replacement of existing stairs or escalator under Part 37. *Kinney*, 9 F.3d at 1069.

Other factors distinguish *Kinney*. The Court decided *Kinney* within the context of a Department of Justice regulatory mandate that compelled public entities to fashion a transition plan for providing curb cuts by January 26, 1995. *Id.* at 1071, 1072, *citing* 28 C.F.R. § 35.150(c) and (d)(2). No such mandatory transition plan exists with respect to the replacement of existing stairs and escalators that are at issue in this matter. DIA contends that the Third Circuit "[f]ocused with precision on the concept of usability that is expressed in the statutory language for alterations." However, the Third Circuit utilized ADA Title III criteria with respect to private entities that is wholly inapplicable to public entities providing mass transportation, which is controlled by Title II. Federal, state, and local governments are not covered by Title III. *See* S.Rept. No. 101-116, 101st Cong., 1st Sess.

To apply *Kinney* to this case would violate the basic principles of statutory construction as it would elevate *Kinney's* general analysis of "usability" in the context of curb cuts above the application of specific DOT regulations and specific ADAAG provisions applicable to this Title II matter. General language of a statute will not apply or prevail over matter specifically addressed in another part of the same enactment. *See In Re: Davidson*, 120

---

[24] Part 35 thus does not apply to the provisions of Part B of Title II that govern public mass transit. The DOJ regulations promulgated with respect to Part A of Title II of the ADA are found at Part 35 of Title 28 of the U.S.C.A. That Part's purpose is to effectuate subtitle A of title II of the ADA, 28 C.F.R. § 35.101. The DOJ regulations specifically provide that, "[t]o the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of Title II of the ADA (42 U.S.C. 12141), *they are not subject to the requirements of this part.*" 28 C.F.R. § 35.102(b) (emphasis added).

B.R. 777, 787 (D.N.J. 1951). A specific statutory provision will prevail over a general provision. *Abramson v. Georgetown Consultants Group, Inc.*, 765 F. Supp. 255, 262 (D.V.I. 1991), *judgment aff'd*, 952 F.3d 1391 (3d Cir. 1999). Statutes and regulations are subject to the same rules of construction. *See Sekula v. Federal Deposit Ins. Corp.*, 39 F.3d 448, 454 (3d Cir. 1994).

Applying *Kinney's* analysis would undermine: (1) the ADAAG guideline that requires vertical access at an escalator or stair only where none previously existed and major structural modifications are required for the installation, (2) the ADAAG guideline for entrances to a building that requires only one accessible entrance to a building so long as signage is appropriate, and (3) the ADAAG provision for key stations requiring only one accessible route from an accessible entrance. 49 C.F.R. § 37 Appendix A, § 4.1.6(1)(f) and (h); 49 C.F.R. § 37 Appendix A, § 10.3.2(1). *Kinney* is simply not applicable here.

DIA's reliance upon *Civic Association of the Deaf v. Giuliani*, *supra* is also misplaced. *Giuliani* is distinguishable first as a Part 35 case that is inapplicable to the instant Part 37 matter. *Giuliani* did not involve stairs or escalators or regulatory provisions and controlling guidelines that specifically address stairs or escalators. The Court in *Giuliani,* which dealt with the replacement of two-button emergency boxes with one-button emergency buttons, found an ADA violation based upon a determination of a change to the physical *and functional* structure of the equipment. *Guiliani, supra.* at 359. In the instant matter, as is set forth above, there has been no change in the functionality of either the stairs in the 15th Street Courtyard; the replacement stair provides the same access as before. SUF 24.

DIA's reliance upon *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 811-812 (2d Cir. 1996) is similarly misplaced. *Molloy* did not involve stairs or escalators or regulatory provisions and guidelines that specifically addressed stairs or escalators. Rather, *Molloy*

addressed, *inter alia*, a claim that the installation of ticket vending machines in railroad stations constituted "alterations" under the ADA. The *Molloy* Court, unlike this Court, did not have the benefit of or the requirement to apply specific ADAAG provisions governing key stations, stairs, normal maintenance, and escalators.

Finally, DIA's reliance upon *DIA v. Sykes, supra,* is equally as unavailing. DIA claims that *Sykes* dealt with "alterations" substantially identical to those in this case. DIA Memorandum at 34. This is not true. In fact, *Sykes* confronted a situation where the City constructed two new stairways and a new escalator on the northbound side of Columbia station on the Broad Street Line *where none existed before*. *DIA v. Sykes*, 833 F.2d at 1120. On the southbound side, the City had either partially or entirely reconstructed two stairways. *Id.* at 1120. The Court, applying the Rehabilitation Act, found a vertical access requirement on the northbound side, where the completely new stairs and escalator were placed. *Id.* at 1121. However, on the southbound side, the partial or total reconstruction of two sets of stairs *still* was not enough for the Court to conclude that the work was beyond normal maintenance. *Id.* at 1121. In sum, none of the case law cited by DIA supports its motion for summary judgment.

B. SEPTA'S REPLACEMENT OF AN ESCALATOR FROM THE CONCOURSE LEVEL TO THE COURTYARD IN CITY HALL WAS IN FULL COMPLIANCE WITH THE ADA.

SEPTA initiated an Escalator Replacement Program in 1999 to replace escalators that were not already being repaired or replaced as part of other projects. SUF 46. The southeast City Hall Courtyard escalator was replaced as part of Phase II of this city-wide program. SUF 47.

1. The Escalator Is Not An "Exit" from the City Hall Station.

As a threshold matter, the southeast escalator is not an "exit" from the City Hall Station.[25] Replacement of the escalator at City Hall leading from the mezzanine, or concourse, level, did not trigger a requirement to install an elevator to subway platforms. The escalator at issue is located within the concourse level at City Hall and provides an exit from the concourse that is not located within City Hall Station. SUF 51-53. There is no dispute that this escalator exited only from the mezzanine and not from subway platforms. SUF 53-54.

DIA argues that the escalator in the southeast area of the City Hall Courtyard descends to the Broad Street Subway at City Hall Station. This is not accurate. Rather, the southeast escalator operates as an exit only leading from the mezzanine level below the City Hall Courtyard to the Courtyard level. SUF 51-53. There is no descending escalator or stairs at this location in the City Hall Courtyard. SUF 51. A person disembarking from the Broad Street subway onto the platform at City Hall Station cannot access the escalator without walking up the set of stairs and traveling through the mezzanine to the base of the escalator. SUF 53-54. Accordingly, the southeast escalator is not an "exit" from the City Hall Station.

2. The Southeast City Hall Courtyard Escalator Renovations Do Not Constitute "Alterations" Under the ADA.

Even assuming that the escalator in the southeast area of the City Hall Courtyard was an "exit" from City Hall Station (which SEPTA denies), the replacement of the escalator was simply the replacement of out-of-service equipment as part of an ongoing maintenance program. Performing normal maintenance or changing the mechanical or electrical systems are

---

[25] DIA relies in its brief on the footnote included in the Third Circuit's opinion regarding the status of the escalator as an "exit" to City Hall Station. This reliance is misplaced. In its decision, the Third Circuit merely stated in a footnote that "[a]t this stage of the proceedings, we reject SEPTA's hyper-technical definition of 'exit' . . . The District Court may consider the relevance, if any, of this dispute on remand." 539 F.2d at 202 n.8. Accordingly, this issue is ripe for decision by this Court.

not alterations that trigger a requirement to install an elevator. *See* 49 C.F.R. § 47.3. *See also Sykes*, 833 F.2d at 1121. In *Sykes*, the Court recognized that normal maintenance of existing stairs does not trigger a vertical accessibility requirement. The Court specifically quoted from the preamble to the DOT "alterations" regulation, 49 C.F.R. § 27.67(b), enacted pursuant to the Rehabilitation Act, which governed the resolution of *Sykes*:

> In the preamble to the final rule, the DOT explained:
>
> > [49 C.F.R. § 37.67(b)] is based on the belief that alterations present opportunities to design and construct the altered portion or item in an accessible fashion ... The basic requirement in [49 C.F.R. § 27.67(b)] is simply to take the opportunities afforded by the alterations and, to the maximum extent feasible, use the alteration to make the facility accessible. Thus, *normal maintenance may take place in practically all cases without generating an accessibility requirement.* 44 Fed. Reg. 31442, 31449.

Id. at 1121, n.9 (emphasis added). The straightforward concept that normal maintenance does not trigger an accessibility requirement is firmly embedded in both the ADA and in the ADAAG. *See*, e.g., 42 U.S.C.A. § 12147(a) (Alterations of existing facilities), 49 C.F.R. § 37.43 (Alteration of transportation facilities by public entities) (transportation facility need not be made accessible in absence of alterations that affect usability); 1991 Guidelines, § 4.1.6(1)(i) (Accessible Buildings: Alterations) (alteration work that is limited to electrical, mechanical, plumbing, hazardous material abatement, or automatic sprinkler retrofitting does not trigger accessibility requirement).

There is no disputed issue of material fact that the existing unsafe escalator in the City Hall Courtyard was replaced with another escalator providing the identical service. SUF 52. The existing escalator was removed from the wellway and a new escalator was installed in the same wellway. SUF 48. Although the wellway was extended at the top and bottom to

accommodate the new ADA-compliant escalator (two additional steps at top and bottom), no major structural modifications were made. *Id.* at 113-114; SUF 48-50.

Moreover, the usability of City Hall Station was not affected as the previous escalator ascended from the mezzanine, not City Hall Station. The replacement escalator also ascends from the mezzanine. *Id.* at 101-102; SUF 52. There was no change in access. Even if an elevator were placed in the location of the escalator, it physically could not descend to City Hall Station. *Id.* at 114-116, 133; SUF 57. Therefore, the usability of the station was not affected by the escalator replacement and there was no opportunity to provide greater access.

Under Section § 4.1.6(f) of the Guidelines, installation of an elevator is required only when "an escalator ... is planned or installed *where none existed previously and major structural modifications are necessary for such installations*." (Emphasis added). Where an existing escalator is replaced and no structural modifications occur, as here, there is no vertical access requirement under the ADA.

DIA argues that the replacement of the Southeast City Hall Courtyard escalator constituted other than normal maintenance and affected the usability of City Hall Station.[26] This is simply not the case. Rather SEPTA replaced one escalator with another escalator that was ADA-compliant and provided the *identical* service to the *identical* location. The existing escalator was removed from the wellway and a new escalator was installed in the same wellway. SUF 50.

---

[26] DIA, in a one paragraph argument, contends that "[t]he undisputed documentary evidence identifies the Southeast City Hall Courtyard escalator as part of the City Hall Broad Street Subway Station" and that "[t]here is absolutely no question that the Southeast City Hall Courtyard escalator is part of the Broad Street Subway City Hall Station." DIA Memorandum at 24. Between these two conclusory sentences, DIA points to construction photographs of the Southeast City Hall Courtyard escalator. DIA Memorandum at 24. While certain of the photographs define the location as "City Hall Station," such description does not make it so. The Southeast City Hall Courtyard escalator is, in fact, located within the concourse level at City Hall and provides an exit from the concourse, but is not located within City Hall Station. SUF 51-54. Regardless of how one characterizes the replacement escalator, it is normal and needed maintenance.

Although the wellway was extended at the top and bottom to accommodate the replaced escalator, no major *structural* modifications, such as moving the walls of the wellway, were undertaken. The new escalator, like the old escalator, is in the same wellway. *Id.* The usability of City Hall Station was not affected because as the previous escalator ascended from the mezzanine, (not City Hall Station), the replacement escalator also ascends from the mezzanine. *Id.* Of course, even if an elevator were placed in the location of the Southeast City Hall Courtyard escalator, it physically could not descend to City Hall Station. *Id.*, SUF 53-54, 57.

The concepts of replacement, useful life, and normal maintenance discussed with respect to the stairs in the 15th Street Courtyard apply with equal force to the replacement of the Southeast City Hall Courtyard escalator. SUF 50-52; 49 C.F.R. § 47.3; *Disabled In Action v. Sykes*, 833 F.2d at 1121; 42 U.S.C.A. § 12147(a); 49 C.F.R. § 37.43; 1991 Guidelines, § 4.1.6(1)(i). Plainly, the June 10, 1999 letter from Kinbar to Leary specifically addresses the Southeast City Hall Courtyard escalator and did not require vertical accessibility as part of the Escalator Replacement Program. SUF 44. At transit properties throughout the country elevators and escalators are replaced as a matter of course as part of ordinary maintenance. SUF 44. According to the FTA, replacement of an escalator does not trigger ADA accessibility requirements no matter how long an escalator has been out of service. *Id.*

DIA cannot demonstrate that the replacement of the Southeast City Hall Courtyard escalator constituted anything other than normal maintenance that did not involve major structural modifications to replace the escalator. Accordingly, the work at the southeast City Hall Courtyard escalator did not trigger an ADA obligation to install an elevator to the

mezzanine or to City Hall Station. *See* 1991 Guidelines § 4.6(1)(f).[27] SEPTA is entitled to summary judgment on this claim as well.

IV. CONCLUSION

For all the foregoing reasons, SEPTA respectfully requests that the Court grant its Motion for Summary Judgment and deny DIA's Motion for Summary Judgment.

Dated: January 16, 2009

STEVENS & LEE

By: /s/ Jo Bennett

Michael G. Tierce
Pa. ID No. 49896
mgt@stevenslee.com
Jo Bennett
Pa. ID No. 78333
jb@stevenslee.com
1818 Market Street, 29th Floor
Philadelphia, Pa 19103
(215) 751-2883

Attorneys for SEPTA

[27] It is physically impossible to provide vertical access to the subway platforms from the location of the escalator. SUF 53-54, 57.

CERTIFICATE OF SERVICE

I, Jo Bennett, certify that on this 16th day of January, 2009, SEPTA's Motion for Summary Judgment on Plaintiff's Remaining Claims, Memorandum of Law in support of SEPTA's Motion and in Opposition to DIA's Motion for Summary Judgment, and proposed Orders were filed electronically and are available for viewing and downloading from the ECF system. I further certify that Plaintiff's counsel were served via the Court's ECF system

Dated: January 16, 2009

By: /s/ Jo Bennett
Jo Bennett