IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 09-3964

DISABLED IN ACTION OF PENNSYLVANIA,

APPELLEE,

V.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ("SEPTA"),

APPELLANT.

APPEAL FROM THE MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED SEPTEMBER 11, 2009 IN CIVIL ACTION NO. 03-CV-1577

BRIEF FOR APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee, Disabled in Action of Pennsylvania, states that it does not have any parent corporation, that it issues no stock, and that there is no publicly held corporation that is not a party to this proceeding which has any financial interest in the outcome of the proceeding.

Dated: June 2, 2010

By: /s/ Stephen F. Gold
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STATEMENT OF ISSUES

1. Did the District Court correctly conclude that the massive renovations to the 15th Street Courtyard Entrance and the City Hall Station Exit constitute "alterations," which, under the express mandate of the Americans with Disabilities Act and Rehabilitation Act, must be made in a manner that is readily accessible to and usable by individuals with mobility disabilities?

2. Did the District Court correctly conclude that the ADA and RA required SEPTA to make the alterations to the 15th Street Courtyard Entrance in a manner accessible to individuals with mobility disabilities regardless of the subsequent installation of elevators at Suburban Station?

3. Is the City of Philadelphia an indispensable party with respect to DIA's City Hall Exit claim when SEPTA never raised that defense in the District Court and when the City will not be prejudiced by the District Court's Order granting relief to DIA?

STATEMENT OF THE CASE

Plaintiff-Appellee, Disabled in Action of Pennsylvania (DIA or Plaintiff), filed this lawsuit against Defendant-Appellant, Southeastern Pennsylvania Transportation Authority (SEPTA or Defendant), in March 2003. (Docket # 1). In its Complaint, DIA asserted that SEPTA violated the accessibility standards of Title II of the ADA, 42 U.S.C. §§ 12131-12165, and Section 504 of the RA, 29 U.S.C. § 794, by, *inter alia,* failing to make alterations to its facilities at 15th and

Market Streets and City Hall in a manner that made them readily accessible to and usable by individuals with disabilities. Fourth Am. Compl. ¶ 60 (J.A. at 105).

By Memorandum and Order dated November 17, 2006, the District Court granted summary judgment for SEPTA on both of DIA's claims. (Docket # 141). The Court held that federal regulations precluded DIA's key station claim and that the statute of limitations barred its inaccessible alterations claim.[1] Mem. at 24-40 (Docket # 141).

On DIA's appeal of that ruling, this Court reversed, holding that DIA had timely filed its inaccessible alteration claim and remanding the case for further proceedings on the merits. *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transp. Auth.*, 539 F.3d 199 (3d Cir. 2008). Although the Court did not address the merits of the case, it appeared skeptical of two of SEPTA's arguments. First, the Court concluded that "the 15th Street Courtyard indisputably provides access to the Market-Frankford Station." *Id.* at 202 n.1. Second, the Court labeled as "hyper-technical" SEPTA's assertion that it had no obligation to make the City Hall Station Exit alterations in an accessible manner because it was not an "exit." *Id.* at 205 n.8.

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[1] DIA asserted that SEPTA violated the ADA by failing to treat the 15th Street Station and City Hall Station as "key stations" for purposes of accessibility. Fourth Am. Compl. ¶¶ 61-62 (J.A. at 105-06). DIA did not appeal the grant of summary judgment to SEPTA on that claim. *See* Mem. at 40-72 (Docket # 141).

On remand, the parties renewed their cross-motions for summary judgment on DIA's inaccessible alterations claim. (Docket ## 155, 163). Following oral argument (J.A. at 1070), the Court granted DIA's motion for summary judgment and denied SEPTA's motion for summary judgment. The Court held that: (1) the renovations to the 15th Street and City Hall Stations were "alterations" that, under the ADA, were required to be made in a manner that was readily accessible to and usable by individuals with mobility disabilities; (2) the altered facilities are not "readily accessible"; and (3) SEPTA failed to establish it was not feasible to make those facilities accessible. Mem. at 9-27 (J.A. at 13-31). SEPTA has now appealed that ruling. (J.A. at 1).

STATEMENT OF FACTS

A. The Parties

DIA is a non-profit corporation that advocates for the civil rights of persons with disabilities, including the elimination of disability discrimination in transportation and other aspects of community life so that people with disabilities can achieve equality with their non-disabled peers. Pl.'s Statement of Undisputed Facts (SUF) & Def.'s Resp. ## 1, 3 (J.A. at 988, 1017). DIA's members include people with multiple disabilities, including wheelchair users who travel on SEPTA. *Id.* # 2 (J.A. at 988, 1017).

SEPTA is an agency and instrumentality of the Commonwealth of Pennsylvania and a recipient of federal financial assistance, which makes it subject to the requirements of Title II of the ADA and Section 504 of the RA. Pl.'s SUF & Def.'s Resp. ## 8, 11 (J.A. at 989, 1018). SEPTA provides public transportation in southeastern Pennsylvania, including a network of fixed-route services, such as bus, light rail, rapid rail, and commuter rail services. *Id.* # 9 (J.A. at 989, 1018).

B. SEPTA's Alterations to the 15th Street Courtyard Entrance

The 15th Street Station is a station on the Market-Frankford Elevated Line, a rapid rail line that operates from northeast Philadelphia through Center City and west Philadelphia to Delaware County. Pl.'s SUF & Def.'s Resp. ## 12, 13, 14, 18 (J.A. at 990, 1019). The 15th Street Station is located underground in the vicinity of 15th and Market Streets in the heart of Center City Philadelphia. *See id.* # 15 (J.A. at 990, 1019). The 15th Street Station serves as a major transfer point and interchange with other SEPTA lines, including the Broad Street Subway, the Subway-Surface Trolleys, and the Regional Rail Lines. *See* Pl.'s Exh. 8 (J.A. at 550, 551). The 15th Street Station is by far the busiest on the Market-Frankford Line, serving almost 30,000 passengers daily -- nearly double the second busiest station. *See* Pl.'s Exh. 13 at COP-2464 (Docket # 131).

There are two entrances adjacent to the 15th Street Station. One is located at the southwest corner of 15th and Market Streets at Claes Oldenburg's *Clothespin*

statue. *See* Def.'s Resp. to Pl.'s SUF # 20 (J.A. at 1020); Pl.'s Exh. 20 at 66-68 (J.A. at 635-36); Def.'s Exh. 58 (J.A. at 445). The other entrance is located in the courtyard on the northwest corner of 15th and Market Streets across from City Hall and Dilworth Plaza. *See* Pl.'s Exh. at 20 at 66-68 (J.A. at 635-36); Def.'s Exh. 58 (J.A. at 445). The second entrance is the "15th Street Courtyard Entrance" that is at issue in this litigation. Once a person descends the stairs at the 15th Street Courtyard Entrance, it is a short distance to the cashier booths to access the Market-Frankford Elevated Line. Tr. at 20, 32 (J.A. at 1089, 1101); *see also* Pl.'s Exh. 20 at 66 (J.A. at 635).[2]

From the 15th Street Courtyard Entrance, a person can walk to the City Hall Station, the Walnut-Locust Station on the Broad Street Subway Station, the Subway Surface Lines, and the PATCO Station at 16th and Locust Streets to the south. *See* Pl.'s Exh. 15 (J.A. at 552); Pl.'s Exh. 8 (J.A. at 550-51). An individual can also walk from the 15th Street Courtyard Entrance to Suburban Station to the west. *See* Pls.' Exh. 15 (J.A. at 552). Suburban Station is a "key station" in

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[2] SEPTA contends that the distance from the 15th Street Courtyard Entrance to the turnstile to enter the 15th Street Station is 150 feet. SEPTA Br. at 14-15. Although one SEPTA employee guessed that it was "probably 150 feet approximately," Pls.' Exh. 24 at 34 (J.A. at 679), this appears inconsistent with the architectural rendering commissioned by SEPTA, which indicates a distance of approximately 20 meters (about 65 feet). Def.'s Exh. 58 (J.A. at 445).

SEPTA's Regional Rail system, a commuter rail line. *See* Def.'s SUF # 1 (J.A. at 1003); Pl.'s SUF & Def.'s Resp. # 18 (J.A. at 991, 1020).

Prior to 2001, the 15th Street Courtyard Entrance consisted of a set of stairs and two escalators enclosed within a head house. Pl.'s SUF & Def.'s Resp. # 45 (J.A. at 995, 1026). In 2001, SEPTA began a project to alter the 15th Street Courtyard Entrance. *See* Pl.'s Exh. 23 (J.A. at 645). As part of this project, SEPTA demolished the existing staircase, which had been located in the middle of the Courtyard, constructed an entirely new staircase *at a different location* in the 15th Street Courtyard (adjacent to the southeastern wall), and replaced the head house over the escalators at that entrance. *See* Pl.'s SUF & Def.'s Resp. ## 47, 53 (J.A. at 996, 997, 1026-27, 1029); Pl.'s Exh. 20 at 60-61 (J.A. at 634); Pl.'s Exh. 24 at 14-15 (J.A. at 659-60); Pl.'s Exh. 26 (J.A. at 777). SEPTA admits that the staircase at the 15th Street Courtyard Entrance had to be demolished and completely replaced with a new staircase because deterioration of the concrete rendered the existing staircase unsafe and beyond repair. *See* Pl.'s SUF & Def.'s Resp. # 53 (J.A. at 997, 1029); Pl.'s Exh. 25 at 13 (J.A. at 762). SEPTA's photographs of the construction project depict the massive scope of the alterations. *See* Pl.'s Exh. 27 (J.A. at 778-861).

SEPTA completed the renovation of the 15th Street Courtyard in August 2002. Pl.'s SUF & Def.'s Resp. # 58 (J.A. at 998, 1030). SEPTA did not install an

elevator at that Entrance, although it is undisputed that it would have been structurally feasible to do so. *See id.* # 59 (J.A. at 998, 1031); Pl.'s Exh. 24 at 54 (J.A. at 699); Def.'s Exh. 23 ¶¶ 1-3, 8 (J.A. at 244-45). As a result, the newly renovated 15th Street Courtyard Entrance is inaccessible to individuals with mobility disabilities. Since neither the Courtyard Entrance nor the *Clothespin* entrance is accessible, the 15th Street Station has no entrance that is accessible to people with mobility disabilities. *See* Pl.'s Exh. 8 (SEPTA transit map showing that 15th Street Station is not designated as handicap accessible) (J.A. at 551).

In 2005, three years after completion of the 15th Street Courtyard Entrance alterations, SEPTA completed the installation of two elevators from street level to the Suburban Station concourse. Def.'s Exh. 29 ¶¶ 43, 44 (J.A. at 255). One elevator is located at 17th Street and John F. Kennedy Boulevard, and the second is on 16th Street between Market Street and John F. Kennedy Boulevard. *See id.*

Although individuals can use the 16th Street elevator to access the Suburban Station concourse and then travel through that concourse to reach the 15th Street Courtyard Entrance, this is a distance of approximately 340 feet. *See* Def.'s SUF # 18 (J.A. at 1007). Individuals with mobility disabilities at 15th and Market Streets -- including those who use manual or motorized wheelchairs, walkers, canes, or who are otherwise substantially limited in their ability to walk due to arthritis or other impairments -- have to travel 680 feet (340 feet each way) to reach the same

area that they could have reached directly if SEPTA had made the alterations to the 15th Street Courtyard Entrance in an accessible manner.

C. SEPTA's Alterations to the City Hall Station Exit

The City Hall Station is a station on the Broad Street Subway Line, which runs from north Philadelphia to south Philadelphia. Pl.'s SUF & Def.'s Resp. # 62 (J.A. at 998, 1032). The City Hall Station, as its name denotes, is located in and around the area underneath Philadelphia's City Hall, which sits at Broad and Market Streets in Center City Philadelphia. *See id.* # 64 (J.A. at 998, 1032). The City Hall Station is the busiest station on the Broad Street Subway Line, serving approximately 57,000 passengers daily. Pl.'s Exh. 3 at SEPTA 8503 (Docket # 131).

The City Hall Station has several access points for entry or exit, including an escalator from the lower south concourse level (sometimes called the mezzanine) to the southeast courtyard of City Hall. *See* Pl.'s SUF & Def.'s Resp. # 73 (J.A. at 1000, 1033-34); Def.'s SUF ## 48, 51 (J.A. at 1013); Pl.'s Exh. 7 (J.A. at 548). From the concourse level at the City Hall Station Exit, pedestrians can travel -- without using stairs -- to the eastbound platforms of the 11th and 13th Street Stations of the Market Frankford Line, the Walnut-Locust Station concourse of the Broad Street Subway Line, the Regional Rail Lines in Suburban Station, and the

15th and Locust Street Station of the PATCO transportation system. *See* Pl.'s SUF & Def.'s Resp. ## 68-70, (J.A. at 999-1000, 1033).

In August 2003, SEPTA completed the total replacement of the escalator at the City Hall Station Exit. *See* Pl.'s SUF & Def.'s Resp. # 71 (J.A. at 1000, 1033); Def.'s SUF # 50 (J.A. at 1013). SEPTA replaced the escalator because it had deteriorated to the point where it was completely inoperable. Pl.'s SUF & Def.'s Resp. # 72 (J.A. at 1000, 1033). The vertical clearance provided by the existing elevator proved inadequate to install the new escalator, requiring SEPTA to extend the existing wellway at the top and bottom and to relocate the truss (*i.e.*, the structural component that physically supports the escalator along its length) in the wellway. *Id.* ## 75, 76 (J.A. at 1001, 1034-35). Photographs depict the extensive scope of the renovations. Pl.'s Exh. 44 (J.A. at 910-63).

In undertaking these alterations, SEPTA provided no elevator access to make the Exit accessible to individuals with mobility disabilities, including those who use wheelchairs. *See* Pl.'s SUF # & Def.'s Resp. 79 (J.A. at 1001, 1036). Since no other exits are accessible, City Hall Station is not an accessible facility. *See* Pl.'s Exh. 8 (J.A. at 549-51). It is beyond dispute that it is technically feasible for SEPTA to install an elevator at the City Hall Station Exit to provide access from the street level to the concourse level. Pl.'s SUF & Def.'s Resp. # 80 (J.A. at

1002, 1037); Pl.'s Exh. 34 at 95 (J.A. at 888); Pl.'s Exh. 43 ¶¶ 1, 36 (J.A. at 905, 909); Def.'s SUF # 56 (J.A. at 1014).

RELATED CASES AND PROCEEDINGS

SEPTA's recitation of the related cases and proceedings in this matter is accurate. SEPTA's Br. at 2.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act and the Rehabilitation Act explicitly make it unlawful for SEPTA to fail to make "alterations" to any part of a transportation facility that affects or could affect usability so that the altered portions of the facility are "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of the alterations." 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)(i). By assuring that alterations are made in an accessible manner, Congress sought to assure that over time there would be ever-increasing access for people with mobility disabilities. The ADA's accessible alterations mandate does not excuse a transit provider from compliance based on costs; only structural infeasibility -- which is not an issue in this case -- can excuse compliance with the accessibility mandate.

As the District Court correctly found, the massive reconstruction and renovations at both the 15th Street Courtyard Entrance and the City Hall Station Exit constituted "alterations" that affected the "usability" of the altered portions so

as to trigger the ADA's accessibility mandate. Mem. at 14-15 (J.A. at 18-19). Federal regulations define "alteration" to include "remodeling, renovation, rehabilitation, [and] reconstruction." 49 C.F.R. § 37.3. Giving these words their ordinary meaning, SEPTA's complete and total replacement of the dangerous staircase and the inoperable escalator constituted "alterations" required by the ADA to be made in a manner that was accessible to individuals with mobility disabilities.

SEPTA's contention that an "alteration" is limited to structural changes that involve movement of load-bearing walls is devoid of any legal support. This tortured construction is at odds with DOT's regulatory definition as well as this Court's prior interpretation of the term "alterations" in the ADA and RA. Ignoring these dispositive interpretations, SEPTA cites to inapposite regulatory materials to support its untenable interpretation. The District Court did not err in failing to give deference to SEPTA's interpretation of these materials.

SEPTA cannot excuse its failure to comply with the ADA's accessible alterations mandate when it altered the 15th Street Courtyard Entrance by relying on the existence of elevators in Suburban Station. The 15th Street Courtyard Entrance is not part of Suburban Station, which serves the Regional Rail Lines. The Courtyard is an independent facility or part of the 15th Street Station of the Market-Frankford Line. Since there are no accessible entrances to the 15th Street Station, SEPTA was required to make the Entrance accessible.

Even if the 15th Street Courtyard Entrance is part of Suburban Station, the ADA required SEPTA to make the alterations to that Entrance in an accessible manner. SEPTA's subsequent installation of elevators in Suburban Station cannot excuse its prior failure to make the Courtyard Entrance accessible. Moreover, DOT's regulations explicitly provide that SEPTA had an obligation to comply with the ADA's accessible alterations mandate regardless of whether it had satisfied the accessibility standards for existing key stations. 49 C.F.R. §§ 37.9(a), 37.47(a), 37.51(a).

Finally, SEPTA's argument that the City is a necessary party for relief on the City Hall Exit claim is flawed procedurally and substantively. Given that SEPTA asserts this defense for the first time on appeal, it should be rejected as untimely. Substantively, the argument lacks merit. The District Court was able to afford appropriate relief to DIA on its claims without participation by the City. Moreover, the City was not prejudiced by the disposition of the City Hall Exit claim without its involvement. The City knew about the lawsuit and did not choose to participate, apparently recognizing that existing permit and oversight processes that have been used in the past when SEPTA undertakes construction on City property are sufficient to protect its interests.

ARGUMENT

I. Standard of Review

This Court's review of the entry of summary judgment is plenary. *Torretti v. Main Line Hospitals, Inc.*, 580 F.3d 168, 172 (3d Cir. 2009). Summary judgment is appropriate when there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; *accord* Fed. R. Civ. P. 56(c). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts," but, rather, only by the existence of a genuine dispute of a material fact. *American Eagle Outfitters v. Lyle & Scott, Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009) (citation omitted). In assessing whether a factual dispute is genuine, "the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* This Court can affirm the District Court's judgment on any grounds supported by the record. *Torretti*, 580 F.3d at 172.

II. SEPTA VIOLATED THE ADA'S AND RA'S ACCESSIBLE ALTERATIONS MANDATE.

A. Congress Intended that Public Transportation Providers Assure that Alterations Are Accessible.

In enacting the ADA, Congress found that isolation, segregation, and discrimination against individuals with disabilities persist in the "critical area[] of ... transportation." 42 U.S.C. § 12101(a)(3). Congress also recognized that "[t]ransportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society." S. Rep. No. 101-116, at 13 (1989). Accordingly, Title II of the ADA includes detailed standards that define what constitutes unlawful discrimination by public transportation providers, such as SEPTA.

The ADA did not require public transportation providers to immediately -- and very expensively -- retrofit all of its facilities to make them accessible. Rather, Congress adopted an incremental approach that requires transportation providers to make facilities accessible in the following three circumstances:

- *"New" facilities* must be fully accessible, 42 U.S.C. §§ 12146, 12162(e)(1), 49 C.F.R. § 37.41(a);
- *Designated "key stations"* had to meet certain minimal accessibility criteria by removing some architectural barriers by July 26, 1993, although that time frame can be extended for up to 20-30 years, 42

U.S.C. §§ 12147(b), 12162(e)(2)(A)(i), 49 C.F.R. §§ 37.47, 37.51; and

- *"Alterations" which a transportation provider decides to make* to any portion of an existing facility undertaken after the ADA's effective date must be made so that the altered portion is accessible, 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)(i), 49 C.F.R. § 37.43(a)(1).[3]

In other words, with the exception of "key stations," the ADA did not require public transportation providers to make its existing facilities accessible, *see* 42 U.S.C. §§ 12147(b), 12148(a)(2), 49 C.F.R. § 37.61(b), but it did require them to make any new construction and alterations to existing facilities accessible to and usable by individuals with disabilities.

The dichotomy between accessibility standards for new construction and alterations, on the one hand, and existing facilities, on the other hand, is one of the bedrocks of the ADA. *See Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). This distinction reflects Congress's "recognition that modification of such [existing] facilities [when no modification is otherwise planned] may impose extraordinary costs. New construction and

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[3] Each of these provisions define the prohibited acts as "discrimination" that violates both Title II of the ADA, 42 U.S.C. § 12132, and Section 504 of the RA, 29 U.S.C. § 794. 42 U.S.C. §§ 12146-12148, 12162. Thus, although SEPTA's failure to make the alterations in an accessible manner violates both the ADA and RA, DIA will use the shorthand "ADA" to refer to both statutes.

alterations, however, present an immediate opportunity to provide full accessibility." *Id.* at 1074. Not only do new construction and alterations present an opportunity to make facilities accessible in a more cost-effective way than retrofitting, but it is "discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded." *Id.* at 1073.[4] As the Third Circuit noted more than two decades ago, "the relevant question is to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons." *Disabled in Action v. Sykes*, 833 F.2d 1113, 1120 (3d Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *accord Kinney*, 9 F.3d at 1074.

Congress's goal was that "over time, access will be the rule, rather than the exception." H.R. Rep. No. 101-485, pt. 3, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 486. Accordingly, by requiring that new construction and alterations are made in an accessible manner, the ADA assures that persons with mobility disabilities are afforded increasing -- and increasingly equal -- access to

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[4] Title II's accessibility requirement for "key stations" appears to be a recognition that, due to the nature and costs of structural changes to public transportation facilities, it could be years before public transportation providers built new facilities or altered existing facilities, resulting in long delays in achieving increased accessibility. Thus, Congress took specific steps to impose time lines to assure that key stations are made accessible even absent new construction or alterations.

facilities, with the goal that, eventually, all facilities will be accessible to all people regardless of disability.

B. SEPTA's Demolition and Reconstruction of the Staircase at the 15th Street Courtyard Entrance and Its Replacement of the Inoperable Escalator at the City Hall Station Exit Constitute "Alterations" that Triggered the ADA's Accessibility Mandate.

1. The Total Renovation of the Stairway and Replacement of the Escalator Constitute "Alterations" Under the ADA.

To achieve its goal of assuring gradual, yet ever-expanding access for people with mobility disabilities in the essential realm of public transit, Congress required transportation providers to assure that alterations that "affect or could affect the usability" of a facility or part of a facility, must be made "in such a manner that, to the maximum extent feasible, the altered portions ... are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations." 42 U.S.C. §§ 12147(a) (rapid rail), 12162(e)(2)(B)(i) (commuter rail). The failure to make alterations in an accessible manner constitutes discrimination in violation of the ADA and RA. *Id.*

Congress did not define the term "alterations" in the ADA. Congress, though, directed the United States Department of Transportation (DOT) to promulgate regulations to implement the ADA's transportation provisions. 42 U.S.C. §§ 12149(a), 12164. In its regulations, DOT defined the term "alteration" as follows:

> [A] change to an existing facility, including, but not limited to *remodeling, renovation, rehabilitation, reconstruction*, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical or electrical systems are not alterations *unless* they affect the usability of the building or facility.

49 C.F.R. § 37.3 (emphases added).

It is undisputed that SEPTA demolished the existing stairway at the 15th Street Courtyard Entrance because it had deteriorated to the point where it was unsafe for use and replaced it with a new stairway in a new location in the Courtyard. *See* discussion, *supra*, at 6. It is also undisputed that SEPTA removed the existing escalator at the City Hall Station Exit because it had deteriorated to the point where it was inoperable and replaced it with a new escalator, including extending the wellway and relocating the truss. *See* discussion, *supra*, at 9. The photographs of these construction projects (J.A. at 778-861, 910-963) demonstrate the extraordinary extent of the alterations -- far beyond anything that could be described as routine maintenance.

As the District Court correctly concluded, "it is difficult to imagine how what was done by SEPTA would *not* be described by at least one of the four words highlighted by DIA in quoting 49 C.F.R. § 37.3, to wit, *remodeling, renovation, rehabilitation*, or *reconstruction*." Mem. at 15 (J.A. at 19) (emphases in original).

It is a basic tenet of statutory and regulatory construction that words must be interpreted as having their ordinary and literal meaning. *See Lin-Zheng v. Attorney General*, 557 F.3d 147, 156 (3d Cir. 2009) (relying on dictionary definition); *Alcoa, Inc. v. United States*, 509 F.3d 173, 181 (3d Cir. 2007) (same). "Reconstruct," for example, means "to establish or assemble again"; "renovate" means "to restore to a former better state"; and "rehabilitate" means "to restore to a former state." *See Merriam-Webster Online Dictionary*, *available at* http://www.merriam-webster.com/dictionary. SEPTA's complete and total replacements of an existing stairway and existing escalator are the very essence of renovation, rehabilitation, and, certainly, reconstruction.[5]

[5] SEPTA apparently has abandoned on appeal its argument in the District Court that the renovations at issue in this case were not "alterations," but were simply the "final act of maintenance" in the normal life of those structures -- an argument correctly described by the District Court as "euphemistic word-smithing." Mem. at 13 (J.A. at 17). Moreover, even "maintenance" is an "alteration" that triggers the ADA's accessibility mandate if it affects the "usability" of the facility, 49 C.F.R. § 37.3, as the complete replacement of the staircase and escalator certainly did.

2. This Court's Rulings in *DIA v. Sykes* and *Kinney v. Yerusalim* Establish that the Renovations in this Case Are "Alterations" Under the ADA.

The District Court's conclusion is fully supported by this Court's rulings in two prior decisions. In *Disabled in Action v. Sykes*, the Court held that SEPTA violated the Rehabilitation Act when it demolished an existing stairway, constructed a new stairway, and installed an escalator at the northbound Columbia Avenue Station on the Broad Street Subway. 833 F.2d at 1120-21. Applying a regulation under the Rehabilitation Act that, like the subsequently-enacted ADA, required alterations to be made in a manner accessible to individuals with mobility disabilities, the court determined that SEPTA's actions constituted "alterations" so that its failure to install an elevator to make the facility accessible to individuals with disabilities violated the Rehabilitation Act. *Id*. The Court emphasized:

> It is unimportant to define whether the altered portion of a facility is itself an "entrance," "a stairway," or both. Instead, the relevant question is to what extent *any* alterations to a facility provide an opportunity to make the facility more accessible.

Id. at 1120-21 (emphasis added). *Disabled in Action v. Sykes* is virtually indistinguishable from the present case.[6]

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[6] The plaintiff in *Disabled in Action v. Sykes* also challenged SEPTA's failure to install an elevator at the southbound Columbia Avenue Station when it demolished and reconstructed the stairs. The Court declined to rule on whether those renovations constituted alterations under the RA so as to require the

Kinney similarly requires the Court to affirm the District Court's conclusion that the reconstruction of the 15th Street Courtyard Entrance and replacement of the escalator at the City Hall Exit constitute "alterations" that were required to be made in an accessible manner. The plaintiffs in *Kinney* asserted that the City of Philadelphia violated Title II of the ADA by failing to install curb ramps at intersections when it resurfaced streets. *Kinney*, 9 F.3d at 1069. The ADA required public entities to install curb ramps on "[n]ewly constructed or altered" streets. 28 C.F.R. § 35.151(e)(1). Resurfacing can entail simply placing a new layer of asphalt over the existing one, the use of machinery to remove some of the existing asphalt, or complete removal and replacement of both the asphalt and concrete layers of the street. *Id.* at 1070. The City asserted that the mere resurfacing of streets was not an "alteration" that triggered the ADA's requirement to install curb cuts. This Court disagreed. *Id.* at 1073-74.

The *Kinney* Court determined that the crucial issue in assessing whether a change is an "alteration" is whether it "affects the usability of the facility involved." *Kinney*, 9 F.3d at 1072 (citing 28 C.F.R. § 35.151(b) and ADAAG § 3.5). In other words, "[i]f a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory

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installation of an elevator and remanded the case to the district court to consider that issue. *Disabled in Action v. Sykes*, 833 F.2d at 1121.

disabilities" by installing curb cuts. *Id.* at 1073. Since "[r]esurfacing makes driving on and crossing streets easier and safer[,] ... helps to prevent damage to vehicles and injury to people, and generally promotes commerce and travel, ... the street becomes more usable in a fundamental way." *Id.* at 1073-74. Accordingly, even the minimum street resurfacing project -- the laying of a new asphalt bed on a city block -- is an "alteration" that requires the City to install curb cuts. *Id.*; *cf. Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 812-13 (2d Cir. 1996) (holding that the installation of ticket machines physically modifies transit station and, as such, is an alteration that required those machines to be readily accessible).

The complete removal and replacement of a staircase and escalator entails far greater construction that the minimal repaving of city streets that this Court declared to be an "alteration" under the ADA. Moreover, since the work at issue here, like the street repaving in *Kinney*, made the altered features more usable and safer for the general public, those benefits must be provided to persons with mobility disabilities.

In sum, this Court's rulings in *Disabled in Action v. Sykes* and *Kinney* establish beyond dispute that the work undertaken by SEPTA at the 15th Street Courtyard Entrance and the City Hall Exit constituted "alterations" under the ADA. As such, SEPTA had an obligation to make those alterations in a manner

accessible to individuals with mobility disabilities. 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)((i).

3. SEPTA's Narrow Interpretation of the Term "Alterations" to Mean Only Structural Modifications that Impact Load-Bearing Walls Is Contrary to DOT's Regulations and This Court's Rulings.

SEPTA's primary argument is that the only type of "alteration" that triggers the ADA's accessibility mandate is a "structural modification" and that a "structural modification" is only one that involves removal or alterations to load-bearing walls. SEPTA's Br. at 26-29. SEPTA's position is wrong.

SEPTA's argument ignores the express definition of "alteration" in DOT's regulations, 49 C.F.R. § 37.3. DOT's definition of alteration identifies "changes or rearrangement in structural parts or elements" and "changes or rearrangement in the plan or configuration of the walls and full-height partitions" as *examples* of the types of changes that will constitute "alterations" that trigger compliance with the accessibility mandate. *Id.* In addition to those examples, DOT's regulations also identify "remodeling, renovations, rehabilitation, and reconstruction" as acts that constitute "alterations" under the ADA. *Id.*; *see* discussion, *supra*, at 18-19. Thus, SEPTA's attempt to limit an "alteration" to structural modifications to load-bearing walls is completely contrary to DOT's definition of that term.

SEPTA's argument further disregards this Court's interpretation of the term "alteration" in *Disabled in Action v. Sykes* and *Kinney*. Both of those cases

involved alterations that triggered the accessibility mandates of the ADA and RA when structural changes to load-bearing walls were not involved.

Ignoring DOT's definition of alteration and this Court's rulings, SEPTA cites DOT's interpretation of the "maximum extent feasible" exception to the accessible alterations mandate to support its assertion that "alterations" are *only* those that involve structural modifications to load bearing walls. SEPTA's Br. at 26-27. DOT's regulatory interpretation does not support SEPTA's argument. In explaining the feasibility exception to the ADA's accessible alterations mandate, DOT wrote that a transit agency is not required to make alterations in an accessible manner when doing so requires "removing or altering a load-bearing structural member" *unless* the alteration involves a change to the load-bearing structural member in which case the alteration does have to be made in an accessible manner. 49 C.F.R. Pt. 37, App. D, § 37.43. Accordingly, contrary to SEPTA's argument, DOT's position is not that *only* structural changes to load-bearing walls trigger the accessible alterations mandate. Rather, consistent with its definition of "alteration," 49 C.F.R. § 37.3, DOT stated that changes to structural components are one example of when the accessible alterations mandate is triggered. Conversely, if an agency undertakes other types of alterations that do not involve structural changes to a facility, it will be excused from making those alterations in an accessible manner only to the extent that compliance with the accessibility man-

date would force the agency to make structural changes it did not otherwise plan to make.

SEPTA's argument flips the DOT regulation on its head by focusing only on the "unless" provision and then misapplying it. In the present case, there were no structural changes involving load-bearing walls, but installing elevators at the Courtyard Entrance and City Hall Exit would not require SEPTA to make any structural changes to load-bearing walls. This means that SEPTA has no infeasibility defense; it does not mean that SEPTA had no obligation to make the alterations to those facilities in an accessible manner.

SEPTA also cites Section 4.1.6(1)(f) of the ADA Accessibility Guidelines (ADAAG)[7] in support of its erroneous construction of the word "alterations" to mean only structural modifications to load-bearing walls. SEPTA's Br. at 27-28. This guideline states: "If an escalator or stair is planned or installed where none existed previously and major structural modifications are necessary, then a means

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[7] In accordance with Congress's direction that DOT's accessibility standards should be consistent with the "minimum guidelines" established by the Architectural and Transportation Barriers Compliance Board (Access Board), 42 U.S.C. §§ 12149(b), 12163, DOT adopted the Access Board's guidelines. 49 C.F.R. § 37.9. Since the alterations in this case were completed prior to November 29, 2006, the relevant Access Board regulations are the 1991 ADAAG standards rather than the revised standards promulgated by the Access Board in 2004. 49 C.F.R. § 37.9(c)(1). DIA's references to ADAAG in this Brief are to the 1991 standards codified at 49 C.F.R. Pt. 37, App. A (2006).

of accessible vertical access shall be provided." ADAAG § 4.1.6(1)(f). As the District Court correctly noted, this guideline simply identifies one specific situation in which an elevator must be installed; it cannot be read, as SEPTA insists, to mean that no elevator is required when alterations to existing stairs and escalators are undertaken that do not involve changes to load-bearing walls. Mem. at 11-12 (J.A. at 15-16). In any event, as DOT has explained, compliance with the minimum guidelines of ADAAG is not enough to meet the ADA's accessibility standards. Rather, "a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of this part *and* the requirements set forth in [ADAAG]." 49 C.F.R. § 37.9(a) (emphasis added).

SEPTA's lengthy argument that the District Court somehow failed to afford deference to DOT's regulations, as required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984), and its progeny, SEPTA's Br. at 30-34, is misguided at best, sophistry at worst. The District Court considered, applied, interpreted, and deferred to all *relevant* DOT regulations as required by *Chevron*. SEPTA's argument is nothing more than a complaint that the District Court failed to give deference to *SEPTA's* interpretation of the DOT and ADAAG provisions at issue in this case, which, of course, is not required by *Chevron*. The DOT and ADAAG provisions SEPTA cites do not require the results SEPTA wants. Indeed, it is SEPTA that ignores relevant DOT regulations -

- including DOT's explicit definition of "alteration" -- in favor of twisting inapt regulatory materials to support its strained arguments.[8]

SEPTA's interpretation contravenes the explicit statutory and regulatory requirements that when a transportation provider alters all or part of any facility, it must make those alterations in an accessible manner -- not merely when it installs a completely new stairway or escalator with changes in load-bearing walls. 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)(i); 49 C.F.R. § 37.43(a)(1). Since both the statute and DOT's regulations expressly require alterations -- including renovations, rehabilitation, and reconstruction of existing facilities without any changes in load-bearing walls -- to be made in an accessible manner, ADAAG's provisions cannot be interpreted to excuse SEPTA from doing so in this case.

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[8] In contrast to the present case, the plaintiffs in *George v. Bay Area Rapid Transit*, 577 F.3d 1005 (9th Cir. 2009), agreed that the transit agency complied with DOT's accessibility regulations, but argued that those federal regulations were arbitrary and capricious. *See id.* at 1008-09. The appellate court held that DOT's regulations were not arbitrary and capricious. *Id.* at 1009-11. DIA is not asking the court, as the *George* plaintiffs did, to hold that a transit agency can be held to violate the ADA even when it complies with the regulatory accessibility standards. Rather, DIA contends that SEPTA did not comply with the ADA's accessibility standards set forth in the statute and applicable regulations.

4. The ADA's Accessible Alterations Mandate Does Not Balance Accessibility Against Costs.

SEPTA suggests that the accessible alterations mandate can be excused based on the costs of alterations, asserting that the ADA requires a "balancing approach between accessibility and costs." SEPTA's Br. at 24. In support of this contention, SEPTA cites the statutory language that alterations must be made in an accessible manner only "to the maximum extent feasible." 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)(i). SEPTA's interpretation of the feasibility exception is contrary to regulatory and judicial interpretations, which limit the exception to situations involving structural feasibility without respect to the cost of compliance.[9]

DOT regulations explicitly state: "As used in this section [relating to alterations], the phrase to the maximum extent feasible applies to the occasional case where the *nature of an existing facility* makes it impossible to comply fully with applicable accessible standards through a planned alteration." 49 C.F.R. § 37.43(b) (emphasis added). In its preamble to the regulation, DOT explained:

> [T]he term "maximum extent feasible" means that *all changes that are possible must be made*. The requirement to make changes to the maximum extent feasible derives from clear legislative history. The Senate Report states--

[9] Despite SEPTA's legal argument that costs must be considered, it provides no information about the actual costs of the accessibility alterations in this case, let alone any argument as to why those costs would outweigh the need for and congressional policy in favor of accessibility.

> "The phrase "to the maximum extent feasible" has been included to allow for the occasional case in which the nature of an existing facility is such as to make it virtually impossible to renovate the building in a manner that results in its being entirely accessible to and usable by individuals with disabilities. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible."

49 C.F.R. Pt. 37, App. D, § 37.43 (quoting S. Rpt. 101-116, at 68 (1989)) (emphasis added).

DOT's interpretation is consistent with the ADA, which recognizes that new construction and alterations provide the opportunity to assure accessibility in a cost-effective manner at the time the transportation provider decides to make those changes, instead of requiring the transportation provider to undertake costlier retrofitting of facilities when it had not otherwise planned any construction or alterations. As such, undue cost burden is not a defense when a public entity decides to undertake alterations. *See Kinney*, 9 F.3d at 1075. When deciding whether, how, and when to make alterations, transportation providers have the opportunity to plan and budget for those alterations so that the accessibility-related costs are taken into consideration.

DOT's interpretation has been expressly embraced by the Second Circuit. In a case involving the accessible alterations mandate of Title III of the ADA, 42 U.S.C. § 12183(a), which uses language almost identical to the alterations

provision at issue in this case, 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)(i), the court explained:

> Section 12183's "maximum extent feasible" requirement does not ask the court to make a judgment involving costs and benefits. Instead, it requires accessibility except where providing it would be "virtually impossible" in light of the "nature of the existing facility." ... The statute and regulations require that such facilities be made accessible even if the cost of doing so -- financial or otherwise -- is high.

Roberts v. Royal Atlantic Corp., 542 F.3d 363, 371 (2d Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 1581 (2009).

Accordingly, DOT's interpretation -- which, as SEPTA recognizes, is entitled to deference under *Chevron*, SEPTA's Br. at 30-34 -- and the courts' rulings demonstrate that the "maximum extent feasible" exception to the ADA's accessible alterations mandate is not an invitation for courts to balance costs with accessibility. Rather, it is an extremely narrow exception that excuses an entity from make alterations to a facility in an accessible manner only if it is "virtually impossible" due to the facility's structure, which is not the case here. As the District Court found, and SEPTA does not dispute, it is structurally feasible to install elevators at both the Courtyard Entrance and City Hall Exit. *See* discussion, *supra*, at 7, 9; Mem. at 25, 26 n.16 (J.A. at 29, 30).

III. The ADA Required the Alterations to the 15th Street Courtyard Entrance to Be Made in an Accessible Manner Even Though There Now Are Elevators In Suburban Station.

SEPTA essentially argues that it had no obligation to install an elevator at the 15th Street Courtyard Entrance when it completely demolished and reconstructed the stairway because it is part of Suburban Station.[10] SEPTA contends that Suburban Station, a key station, complies with ADAAG's requirements because it has two elevators. *See* ADAAG § 10.3.2(1) (there must be "*at least one* accessible route from an accessible entrance" in existing key stations, like Suburban Station) (emphasis added). The distance of those elevators from the 15th Street Courtyard, SEPTA asserts, is irrelevant since there is no "distance test" for accessible entrances in transit stations. SEPTA's Br. at 34-39.

SEPTA's argument cannot withstand analysis. The 15th Street Courtyard Entrance is not part of Suburban Station and, thus, the existence of elevators in Suburban Station is irrelevant. Either considered as its own distinct facility or as part of the 15th Street Station to the Market-Frankford Elevated Line, the alterations to the 15th Street Courtyard Entrance were required to be made in an

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[10] SEPTA on appeal confusingly refers to Suburban Station as the "Penn Center Concourse." The Penn Center Concourse is not a transit facility, though it encompasses several transit facilities, including Suburban Station, the 15th Street Station of the Market-Frankford Elevated Line, and the City Hall Station of the Broad Street Subway Line, as well as numerous retail shops and commercial buildings.

accessible manner since there was no other accessible entrance. Alternatively, even if the 15th Street Courtyard Entrance is part of Suburban Station, SEPTA had an obligation to make that Entrance accessible when it reconstructed the stairway since the elevators at 16th and 17th Streets did not exist at the time SEPTA made the alterations to the Entrance. *See* Mem. at 16-21 (J.A. at 20-25).

A. The 15th Street Courtyard Entrance Is an Independent Facility or Part of the 15th Street Station and, As Such, The Alterations Had To Be Made In An Accessible Manner.

The ADA expressly requires that alterations to a "facility" or any "portion of a facility" be made in an accessible manner. SEPTA's argument that elevators in Suburban Station excuses it from making the 15th Street Courtyard Entrance alterations in an accessible manner rests on the mistaken assumption that the Courtyard Entrance is part of the Suburban Station facility. It is not.

DOT has specifically defined the term "facility" for purposes of the public transportation requirements of the ADA:

> Facility means 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 any building, property, structure or equipment is located.

49 C.F.R. § 37.3 (emphasis added). ADAAG defines "facility" somewhat differently:

> All *or any portion* of buildings, structures, site improvements, complexes, equipment, roads, walks, passage-

> ways, parking lots, or other real or personal property located on a site.

ADAAG § 3.5 (emphasis added). The 15th Street Courtyard Entrance can be viewed as an independent facility because, at minimum, it is a structure -- a staircase and head house -- located on a separate site and owned by the City of Philadelphia. Pl.'s SUF & Def.'s Resp. # 38 (J.A. at 994, 1025); Def.'s Exh. 48 (J.A. at 395).

Alternatively, the Courtyard Entrance can be considered part of the 15th Street Station of the Market-Frankford Line, which has no accessible entrances. As this Court has previously acknowledged, "the 15th Street Courtyard indisputably provides access to the Market-Frankford Station." *Disabled in Action of Pennsylvania.*, 539 F.3d at 202 n.1.

The facts support the conclusion that functionally the 15th Street Courtyard is one of the two entrances and paths of travel to the 15th Street Station of the Market-Frankford Elevated Line,[11] and that SEPTA considers it to be so.

- It is a short distance from the bottom of the 15th Street Courtyard Entrance in the concourse to the cashier booths to enter the 15th Street Station platforms. *See* discussion, *supra*, at 5 n.2.

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[11] The *Clothespin* entrance on the southwest corner of 15th and Market Streets across Market Street from the Courtyard Entrance is the second entrance to the 15th Street Station.

- The directional signage installed by SEPTA at the head house at the 15th Street Courtyard also identifies it as the entrance to the 15th Street Station of the Market-Frankford Elevated Line as well as a means to access the Broad Street Subway, Subway-Surface Lines, and Regional Rail Lines. Pl.'s Exh. 16 (J.A. Addendum at 552).

- SEPTA's public information identifies the address of the 15th Street Station as 15th and Market Streets -- the location of the 15th Street Courtyard Entrance. Pl.'s Exh. 6 (J.A. at 547).

- Historically, the 15th Street Courtyard Entrance has been identified as an entrance to the 15th Street Station. *See* Pls.' Exh. 19 at COP-2450-2451 (J.A. at 615-16); Pls.' Reply Exh. 1 (J.A. at 1069).

- Passengers use the 15th Street Courtyard Entrance to access the 15th Street Station. *See* Pl.'s Exh. 20 at 67 (J.A. at 635); Pl.'s Exh. 18 at 81-82 (J.A. at 573-74).

In light of this functional reality, the only reasonable and sensible conclusion is that the 15th Street Courtyard Entrance is part of the 15th Street Station of the Market-Frankford Line, and since there is no accessible entrance to that Station, it is beyond dispute SEPTA was required to make the alterations to the Courtyard Entrance in an accessible manner.

1. Property Lines Are Not Definitive In Determining Whether the 15th Street Courtyard Entrance Is Part of the 15th Street Station or Suburban Station.

In the District Court, SEPTA argued that the 15th Street Courtyard Entrance could not be considered part of the 15th Street Station because it falls within the property lines of Suburban Station. *See* SEPTA's Br. in Support of Its Motion for Summary Judgment and in Opposition to DIA's Motion for Summary Judgment at 11-20 (Docket # 163, Att. 3). In other words, SEPTA contended that property lines defined the contours of a "facility."

The definitions of facility in the DOT regulations and ADAAG make no reference at all to property lines. *See* discussion, *supra*, at 32-33 (quoting 49 C.F.R. § 37.3 and ADAAG § 3.5). The only such reference is in ADAAG's definition of "site" as "[a] parcel of land bounded by a property line or a designated portion of a public right of way." ADAAG § 3.5. A "site," however, is not the only type of "facility" under either DOT's regulations or ADAAG's definition. To the contrary, DOT's regulations define "site" as one of several distinct types of covered facilities, along with "building," "structures," and "complexes." 49 C.F.R. § 37.3. ADAAG similarly does not limit facilities to those on specific "sites"; rather, the term "site" is used only as a modifier for the catch-all phrase "other real or personal property located on a site." ADAAG § 3.5. ADAAG does not link other types of covered facilities -- including structures and complexes -- to sites or

property lines. There is no reason why a "complex" cannot be an array of buildings or structures that cross property lines.[12] Thus, the Court must look at the totality of facts, not simply property lines, in assessing whether the 15th Street Courtyard Entrance is part of the 15th Street Station facility or, instead, is only a part of the Suburban Station facility. Looking at these facts, described *supra*, at 33-34, the 15th Street Courtyard Entrance is plainly part of the 15th Street Station facility.[13]

2. The Property Lines of Suburban Station Are Too Muddled to Be Dispositive of the Designation of the 15th Street Courtyard Entrance As Solely Part of Suburban Station.

Whatever relevance property lines could have in marking the contours of a "facility" for purposes of the ADA, the property lines relating to Suburban Station and the 15th Street Station are so muddled as to have little, if any, value in identifying the facility where the 15th Street Courtyard Entrance is located.

First, SEPTA claims that Suburban Station's property lines extend from 15th Street to 18th Street and from Market Street to John F. Kennedy Boulevard. Def.'s

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[12] A "complex" means a whole made of interrelated parts or a building or group of buildings housing related units. *Merriam-Webster Online Dictionary*, available at http://www.merriam-webster.com/dictionary.

[13] Looking solely at property lines, the Court would have to conclude that the 15th Street Courtyard Entrance is a distinct and independent facility -- not part of Suburban Station or the 15th Street Station -- since it is owned by the City of Philadelphia, not SEPTA. Pl.'s SUF & Def.'s Resp. # 38 (J.A. at 994, 1025); Def.'s Exh. 48 (J.A. at 395).

Br. at 11. Yet, it also acknowledges that within those perimeters there are multiple, discrete property lines owned by other entities that result in "islands of exclusion." *See* Pl.'s SUF & Def.'s Resp. ## 34, 40 (J.A. at 993-94, 995, 1024, 1025); Def.'s Exh. 48 (identifying separate property lines for buildings, such as Two Penn Center and Three Penn Center) (J.A. at 395).

Second, it is undisputed that the City of Philadelphia owns the 15th Street Courtyard and that the Courtyard has its own discrete property line. Pl.'s SUF & Def.'s Resp. # 38 (J.A. at 994, 1025); Def.'s Exh. 48 (J.A. at 395). It is not part of the property of Suburban Station that is owned by SEPTA.

Third, the underground property line demarcation between 15th Street Station and Suburban Station, according to SEPTA, falls literally midway on the steps to the cashier booth area of 15th Street Station. Def.'s Exh. 58 (showing property line between Courtyard Entrance and cashier area) (J.A. at 445). If this property line is considered dispositive of the determination of "facility," then no alterations to 15th Street Station will ever trigger the accessibility requirement. If, for example, SEPTA decides to reconstruct the cashier area at 15th Street Station, it will claim that it need not be accessible because half of it is, according to these property lines, in Suburban Station.

Finally, and perhaps most importantly, SEPTA has described Suburban Station (as opposed to the technical property lines) as "occup[ying] the block

bounded by 16th and 17th Streets and Cuthbert and Filbert Streets ...." Def.'s SUF # 35 (J.A. at 1010). SEPTA's description is accurate, as its Property Line Concourse Plan shows a distinct area for "Suburban Station," including the ticket offices and waiting areas in the concourse level and the train platforms at the platform level. *See* Def.'s Exhs. 48 & 49 (J.A. at 395, 396) (BLT Property Line Concourse Plan showing distinct areas for Suburban Station separate areas for City-owned courtyard and Penn Center buildings).

B. Assuming *Arguendo* that the 15th Street Courtyard Is Part of Suburban Station, the ADA Required SEPTA to Make the 15th Street Courtyard Entrance Alterations Accessible.

1. The ADA Requires Alterations to Key Stations to Be Made in an Accessible Manner Regardless of Whether There Are Other Accessible Entrances to the Station.

SEPTA argues that its installation of elevators at 16th and 17th Street as part of its Suburban Station key station excused it from complying with the ADA's statutory mandate to make the alterations to the 15th Street Courtyard in an accessible manner. SEPTA relies on Section 10.3.2(1) of ADAAG, which provides that existing key stations, such as Suburban Station, must have at least one accessible route from an accessible entrance. SEPTA's Br. at 37. This argument ignores the statutory and regulatory framework, which the District Court correctly construed to show that "even if SEPTA is in compliance with the

[ADAAG] Key Stations guidelines, that does not excuse it from complying with the general alterations guidelines and regulations." Mem. at 16-17 (J.A. at 20-21).

The ADA's statutory mandate that alterations be made in an accessible manner, 42 U.S.C. §§ 12147(a), 12162(e)(2)(B)(i), does not exempt alterations made to key stations that, absent any alterations, would be in compliance with the ADA's accessibility standards because they have another accessible entrance. Any doubt that the ADA's accessible alterations mandate supplements the ADA's key station accessibility requirements in ADAAG is laid to rest by the DOT regulations. First, DOT's regulations -- which SEPTA recognizes are entitled to deference -- explicitly state that the requirement that key stations must be readily accessible to and usable by individuals with disabilities "is separate and apart from *and in addition to* requirements" that alterations must be accessible to such individuals. 49 C.F.R. §§ 37.47(a), 37.51(a) (emphasis added). Second, DOT's regulations further instruct that "a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirement of this part *and* the requirements set forth in [ADAAG]." 49 C.F.R. § 37.9(a) (emphasis added).

Since the ADA's statutory provisions and DOT's regulations explicitly require that *all* alterations to SEPTA's transit facilities, including Suburban Station, must be made so as to be accessible to people with mobility disabilities regardless

of whether they meet minimum ADAAG key station standards, SEPTA cannot rely on compliance with the ADAAG's key station standards alone to excuse its failure to install an elevator when it altered the 15th Street Courtyard Entrance.[14]

By requiring that transit providers make all alterations to key stations in a manner accessible to individuals with mobility disabilities regardless of whether they complied with the minimum barrier removal standards in ADAAG for existing key stations, DOT assured that the ADA's goal of expanding accessibility and achieving equality over time is met. DOT's requirements that transit providers comply with both ADAAG and the statutory and regulatory accessible alterations mandate guarantee that as existing key stations are altered, transit providers will take advantage of the opportunities to expand their accessibility to provide equal access to individuals with mobility disabilities.

SEPTA reliance on the ADAAG's "new construction" requirements to excuse its failure to make the 15th Street Courtyard Entrance alterations in an accessible manner is misplaced. SEPTA asserts that ADAAG provides that newly

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[14] For this reason, SEPTA's reliance on the FTA's review of its overall Suburban Station Renovation Project, SEPTA's Br. at 38 n.20, is unavailing. This review simply assessed whether the renovations satisfied the ADA's key station requirements and did not address whether SEPTA had complied with the ADA's alteration requirements when it altered the 15th Street Courtyard Entrance. *See* Mem. at 17 n.13 (J.A. at 21). Thus, the District Court's opinion did not render the FTA opinion meaningless, but, rather, correctly recognized its limited scope.

constructed stations -- which Suburban Station is not -- need have only one accessible entrance and that the general provisions of ADAAG state that there is no requirement for greater accessibility for alterations than for new construction. SEPTA Br. at 36-37 & n.18 (citing ADAAG §§ 4.1.6(1)(d), 10.3.1(2)). SEPTA's reliance on ADAAG's provisions relating to new stations fails for several reasons.

First, ADAAG's provisions for newly constructed transit stations, if applied to Suburban Station, would have required SEPTA to assure that the 15th Street Courtyard Entrance was accessible. Section 10.3.1(2) of ADAAG provides that newly constructed transit stations that serve different transportation fixed routes or groups of fixed routes must provide accessible entrances to each group or route. Assuming *arguendo* that the 15th Street Courtyard Entrance is part of Suburban Station, it plainly serves a different fixed route -- the Market-Frankford Elevated Line -- from the rest of Suburban Station, which serves the Regional Rail Lines. Thus, SEPTA would have to install an accessible entrance to the Market-Frankford Elevated Line.

Second, DOT's regulations, to which this Court must defer, explicitly state that key stations must meet *both* the ADAAG key station requirements and the accessible alterations mandate. 49 C.F.R. §§ 37.47(a), 37.51(a). Accordingly, ADAAG's general statement that alterations need not exceed the accessibility requirements of new construction, ADAAG § 4.1.6(d), simply cannot be read to

apply to the specific accessibility provisions for existing key stations. DOT's regulations and the Access Board's ADAAG standards must be read so as to give meaning to all of them and avoid rendering any provisions superfluous. *See Disabled in Action*, 539 F.3d at 210; *United States v. Cooper*, 396 F.3d 308, 312 (3d Cir. 2005). Adoption of SEPTA's argument that a key station need have only one accessible entrance -- regardless of future alterations to other entrances -- would render superfluous DOT's explicit rules that require key stations to meet both the ADAAG requirements and Congress's accessible alterations mandate in the text of the ADA. It would also undermine the ADA's goal of incremental achievement of equal access.

SEPTA also suggests that it had no obligation to install an elevator when it altered the 15th Street Courtyard Entrance because there currently is no wheelchair access from the Concourse level to the 15th Street Station platform. SEPTA's Br. at 38-39. This argument fundamentally misunderstands the ADA, which, as discussed above, adopted a gradualist approach to accessibility of existing facilities. *See* discussion, *supra*, at 14-17. Congress required even "portions" of a facility to be made accessible when those portions are altered, understanding that eventually other portions of the facility will be altered and, if all the portions are altered in an accessible manner, the entire facility will eventually be accessible. Accordingly, when in the future SEPTA alters the platforms at the 15th Street

Station so as to make them accessible, an accessible entrance at the nearby 15th Street Courtyard will give patrons with mobility disabilities a nearly direct entrance to that Station.[15]

Finally, SEPTA's argument that the District Court inappropriately imposed a "distance requirement" to justify its decision, SEPTA's Br. at 34-36, is a red herring based on a misinterpretation of the ruling. The District Court did not hold that SEPTA was required to install an elevator at the 15th Street Courtyard Entrance because it was a 680-foot round-trip from the 16th Street Elevator. Rather, the District Court held that SEPTA was required to install an elevator at that location because it had undertaken alterations to the 15th Street Courtyard Entrance when it completely demolished and reconstructed the stairway. The District Court discussed the distance between the 16th Street elevator and the Courtyard Entrance to refute SEPTA's argument that the Courtyard Entrance alterations need not be made accessible because the Courtyard Entrance already was accessible to individuals with mobility disabilities given the allegedly

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[15] An accessible entrance at the 15th Street Courtyard would afford immediately improved access to the 15th Street Station of the Market-Frankford Elevated Line for individuals who use canes, crutches, or walkers due to mobility disabilities. An elevator at the Courtyard Entrance would significantly reduce the number of stairs that they must use to travel from the ground level to the platform at the 15th Street Station.

negligible distance to the 16th Street elevator. Thus, the District Court correctly rejected SEPTA's distance argument. Mem. at 20-21 (J.A. at 24-25).

2. The Installation of Elevators at 16th and 17th Streets in Suburban Station *After* the Inaccessible Alterations to the 15th Street Courtyard Defeats SEPTA's Reliance on the Alleged "One Accessible Entrance" Standard.

SEPTA's suggestion that the existence of elevators at 16th and 17th Street excused it from installing an elevator when it altered the 15th Street Courtyard ignores the fact that those elevators were not installed until 2005 -- three years after SEPTA completed alterations of the 15th Street Courtyard Entrance in 2002. Thus, at the time SEPTA made the alterations to the 15th Street Courtyard Entrance, there were *no* accessible entrances to Suburban Station, and thus SEPTA was not in compliance with the ADAAG accessibility standards that required existing key stations, such as Suburban Station, to have at least one accessible entrance. ADAAG § 10.3.2(1). Accordingly, assuming *arguendo* that the ADA exempts a transit provider from installing an elevator when it makes alterations to a key station entrance that has another accessible entrance, SEPTA cannot benefit from that exemption since it did not have an accessible entrance to Suburban Station when it altered the 15th Street Courtyard Entrance.

IV. SEPTA's Untimely Assertion that the City of Philadelphia Is A Necessary Party Is Meritless.

A. SEPTA's Assertion of This Defense Is Untimely.

SEPTA contends that the City of Philadelphia is a necessary party to this action pursuant to Federal Rule of Civil Procedure 19 because the City owns the City Hall Courtyard, where the District Court required SEPTA to install an elevator at the City Hall Exit. SEPTA's Br. at 39-43.[16] Failure to join a party under Rule 19 is a defense that must be asserted in a party's pleadings, in a motion to dismiss or for judgment on the pleadings, or at trial. Fed. R. Civ. P. 12(b)(7), 12(h)(2). SEPTA did not assert that the City was a necessary party in its Answer, *see* SEPTA's Answer at 17-20 (Docket # 83) or in a proper motion or, indeed, at any time in the District Court. [17]

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[16] SEPTA's argument that the City is a necessary party relates only to DIA's claim involving the City Hall Exit -- not the 15th Street Courtyard Entrance. As discussed, *infra*, at 49, the 15th Street Courtyard Entrance is the subject of an agreement between DIA and the City in which the City has indicated that it would permit SEPTA to install an elevator in the Courtyard if the District Court so ordered.

[17] SEPTA states that it raised the argument in a letter brief. SEPTA's Br. at 42 n.22. In fact, this letter -- submitted after oral argument on the cross-motions for summary judgment -- argued only that the lack of explicit approval from the City for installation of an elevator at the City Hall Station was a "feasibility issue" -- not that the City was a necessary party under Rule 19. Letter dated June 26, 2009 (J.A. at 1160).

SEPTA raises this assertion for the first time on appeal. A party's "failure to present the issue [of the necessity of joinder under Rule 19] to the district court militates that the equities lie on the side of" the non-movant. *Judwin Properties, Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 434 (5th Cir. 1992). This is particularly true in this case, where it is beyond dispute that SEPTA was aware that the City owned the City Hall Courtyard and that the City had participated in this action with respect to the 15th Street Courtyard Entrance. Yet, SEPTA never asked the District Court to join the City as a necessary party with respect to the City Hall Exit claim. SEPTA's inaction in light of its knowledge forecloses it from now seeking to join the City as a necessary party. *See Arnold v. Blast Intermediate Unit 17*, 843 F.2d 122, 125 n.6 (3d Cir. 1988) (defendant's belated Rule 19 motion to join a necessary party was barred by laches when it failed to do so despite ample opportunity). Plainly, the only reason SEPTA now raises this issue is to further delay this already long-lived case. The Court should refuse to indulge SEPTA's defensive, dilatory tactics. *See, e.g., Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperatives*, 103 F.3d 888, 896 (9th Cir. 1996); *Ilan-Gat Engineers, Ltd. v. Antigua International Bank*, 659 F.2d 234, 242 (D.C. Cir. 1981);

B. The City Is Not a Necessary Party.

A person is a "necessary" party who must be joined in a litigation if either: (1) the court cannot afford complete relief among existing parties in the person's absence; or (2) the absent person claims an interest relating to the subject matter of the action so that disposing of the action in his absence would (a) as a practical matter, impair or impede his ability to protect his interest, or (b) leave an existing party subject to substantial risk of incurring inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1); *accord General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007). The moving party has the burden of showing why an absent party should be joined under Rule 19. *Pittsburgh Logistics Systems, Inc. v. C.R. England, Inc.*, 669 F. Supp. 2d 613, 618 (W.D. Pa. 2009). SEPTA has failed to meet its burden in this case.

SEPTA does not and could not argue that the City is a required party pursuant to Rule 19(a)(1)(A) because the district court could not afford complete relief to DIA. This provision requires a court to determine only whether it "can grant complete relief to persons *already named* as parties to the action; what effect it may have on absent parties is immaterial." *General Refractories*, 500 F.3d at 313 (emphasis in original). In affording relief to DIA in the absence of the City, the District Court implicitly determined that it could grant complete relief to the parties in the action on the basis that the "settlement agreement strongly suggests

that the City would not oppose such a plan." Mem. at 26 (J.A. at 30). This determination was correct. The Court ordered SEPTA to develop a plan to come into compliance with its finding of liability. Order (J.A. at 4). SEPTA's submission to the District Court, although far from a plan, indicates that it began discussions with the City with regard to compliance. SEPTA's Statement Regarding Proposed Schedule of Compliance ¶¶ 7-8 (J.A. at 1163). Although SEPTA stated that it had not reached agreement with the City on a "definitive plan," *id.* ¶ 8, there is no indication in SEPTA's Statement that the City would preclude SEPTA from complying with the Court's ruling that it provide access to individuals with mobility disabilities at the City Hall Exit. Thus, SEPTA cannot meet its burden of showing that full relief cannot be accorded to DIA in the absence of participation in the litigation by the City.[18]

SEPTA primarily contends that the City is a necessary party because disposition of the claims in this case will "as a practical matter impair or impede the [City's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). SEPTA's Br. at 41. Notably, the City -- which has long been aware of this litigation, including the claims involving the City Hall Exit and the District Court's entry of

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[18] Of course, SEPTA would be able to assert a defense of impossibility to an effort by DIA to enforce the Court's ruling if the City barred it from making the City Hall Exit accessible after SEPTA took reasonable steps to comply with the Order. *See United States v. Rylander*, 460 U.S .752, 757 (1983); *Harris v. City of Philadelphia*, 47 F.3d 1311, 1324 (3d Cir. 1995).

judgment against SEPTA -- has never claimed any interest in it or sought to intervene, which is the best evidence that the City's absence would not impair or impede its ability to protect its interests. *See United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994).

Moreover, the City's interests are protected through the use of routine procedures -- including the permit process, plan reviews, and construction oversight -- described in its Settlement Agreement with DIA relating to the 15th Street Entrance. *See* Settlement Agreement § 3 (J.A. at 90-91). These procedures have been used in the past when SEPTA has had to engage in construction on City-owned property and are more than adequate to protect the City's interests in assuring the health, safety, and welfare of the public and enforcing its laws. There is nothing in the Court's Order that would undermine or jeopardize the City's legal interests in any manner.[19] Accordingly, the City will not be prejudiced if it is not made a party to this litigation.

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[19] *Steel Valley Authority v. Union Switch and Signal Div.*, 809 F.2d 1006 (3d Cir. 1006), cited by SEPTA, is inapposite. The party in that case was necessary to the litigation because the plaintiff sought an injunction that would prevent that party from demolishing or altering its property or using it for any other purpose. *Id.* at 1012, 1014. Unlike the party's property interest in *Steel Valley Authority*, which formed the crux of the case, the City's property interests in this case are peripheral at best and can be addressed through the processes that have long been used -- without judicial involvement -- when SEPTA has had to construct on City property.

CONCLUSION

For all the reasons set forth above, DIA respectfully requests that this Court affirm the District Court's September 11, 2009 Memorandum and Order that granted DIA's Motion for Summary Judgment and denied SEPTA's Motion for Summary Judgment and remand this matter to the District Court.

Respectfully submitted,

Dated: June 2, 2010

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COMBINED CERTIFICATIONS

I, Rocco J. Iacullo, certify as follows:

1. I am a member in good standing of the Bar of this Court.

2. This Brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 11,914 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. J.A. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2003 in Times New Roman 14-point font.

3. The text of the electronic brief is identical to the paper copies. A virus detection program (Symantec Anti-Virus Corporate Edition v. 10.1.800) was run on the file using the current virus definitions and no virus was detected.

4. On June 2, 2010, the Brief for Appellee was filed with the Court's ECF system on June 2, 2010 and is available for viewing and downloading by the following counsel who consented to electronic service and a true and correct copy was served by first class mail, postage prepaid on the following counsel:

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