

Appeal No. 09-3964

**United States Court of Appeals  
for the Third Circuit**

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Disabled in Action of Pennsylvania,  
Plaintiff-Appellee,

v.

Southeastern Pennsylvania Transportation Authority,  
Defendant-Appellant.

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Appeal from Order of the United States District Court  
for the Eastern District of Pennsylvania  
Case No. 2:03-cv-01577  
Judge Gene E.K. Pratter

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**BRIEF OF APPELLANT,  
SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY**

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**STEVENS & LEE**

By s/ Jo Bennett

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Michael G. Tierce  
mgt@stevenslee.com  
Jo Bennett  
jb@stevenslee.com  
1818 Market Street, 29th Floor  
Philadelphia, PA 19103-1702  
(215) 751-2883

Dated: May 5, 2010

*Attorneys for Appellant*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to F.R.A.P. 26 and Third Circuit LAR 26.1, Appellant, Southeastern Pennsylvania Transportation Authority (“SEPTA”), is a “body corporate and politic [that exercises the] public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof.” 74 Pa.C.S. § 1711(a). Therefore, no corporate disclosure statement is required.

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## **GLOSSARY**

“15th Street Stairwell” means the well located at the northwestern corner of the intersection of 15th and Market Streets in the City of Philadelphia. Within the well are a stair and two escalators that allow pedestrians to connect street-level and Penn Center Concourse. At the base of the well is a courtyard.

“15th Street Stair” means the stair located within the 15th Street Stairwell that allows pedestrians to connect street-level and Penn Center Concourse.

“Penn Center Concourse” is the collective name for the corridors for pedestrian circulation that are one level below the area bounded by 15th Street, 18th Street, Market Street, and JFK Boulevard.

“Suburban Station” is the bi-level subterranean commuter railroad passenger station, the upper level of which is within part of Penn Center Concourse and the lower level of which contains railroad tracks and pedestrian platforms.

“15th Street Subway Station” is a subterranean passenger station that serves the Market-Frankford Subway-Elevated Line and is located under the intersection of 15th Street and Market Street.

“City Hall Courtyard” is the open space that is located in the center of Philadelphia City Hall.

“City Hall Subway Station” is the subterranean passenger station that serves the Broad Street Subway Line and is located under the western foundation wall of City Hall and Dilworth Plaza.

“City Hall Subway Station Concourse” is collective name for the subterranean corridors that allow pedestrians to connect City Hall Subway Station, 15th Street Subway Station and street-level.

“Dilworth Plaza” is the open bi-level public space that is located between the western wall of Philadelphia City Hall and the eastern edge of 15th Street and affords pedestrians the ability to connect street-level to Penn Center Concourse and City Hall Subway Station Concourse.

## **I. JURISDICTIONAL STATEMENT**

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, because Appellee, Disabled in Action of Pennsylvania (“DIA”), asserted federal statutory claims against SEPTA under Section 227 of the Americans With Disabilities Act (“ADA”), 42 U.S.C. § 12147(a), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). *See* Joint Appendix at JA 5 (hereinafter, the Joint Appendix is cited as “JA at \_\_\_\_”).

This Court has jurisdiction under 28 U.S.C. § 1291, because the District Court issued a final order granting judgment in favor of DIA and against SEPTA<sup>1</sup> (JA at 4).

## **II. STATEMENT OF ISSUES PRESENTED**

- 1. Whether the District Court erred when it failed to follow U.S. Department of Transportation regulations entitled to deference under the *Chevron* doctrine?**

**[Suggested Answer: Yes.]**

- 2. Whether the District Court abused its discretion by ordering SEPTA to install an elevator on City-owned land**

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<sup>1</sup> In its Order, the District Court directed SEPTA to file a proposed schedule of compliance within 30 days (JA at 4). This directive does not impact the finality of the District Court’s Order. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962) (district court order that required appellant to submit plan to effectuate the order was a final order); *Frederick L. v. Thomas*, 557 F.2d 373, 379-81(3d Cir. 1977) (remedial order that required school district to submit plan to identify all learning disabled students was appealable injunctive order).

**and not requiring the City of Philadelphia to be joined as a party?**

**[Suggested Answer: Yes.]**

### **III. STATEMENT OF RELATED CASES**

There have been two earlier appeals from the underlying action, Appeal Nos. 04-4530 and 06-5109. In Appeal No. 04-4530, SEPTA sought issuance of a writ of mandamus and contended that, *inter alia*, the District Court had abused its discretion by ordering SEPTA to produce discovery on a “key station” claim in DIA’s Third Amended Complaint that had no legal basis under U.S. Department of Transportation (“DOT”) regulations and that SEPTA had moved to dismiss months earlier. This Court denied SEPTA’s petition and declined to stay the District Court’s discovery order.

In Appeal No. 06-5109, this Court reversed the District Court’s decision that DIA’s claims against SEPTA asserted in DIA’s Fourth Amended Complaint were barred by the statute of limitations. *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority*, 539 F.3d 199 (3d Cir. 2008). As a result, this Court remanded for further proceedings, during which both parties moved for summary judgment on the merits. The District Court ruled in favor of DIA, leading to the present appeal.

#### **IV. STANDARD OF REVIEW**

This Court's review of the District Court's summary judgment ruling is plenary. *American Society for Testing v. Corrpro Cos., Inc.*, 478 F.3d 557, 566 (3d Cir. 2007); *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002). Similarly, this Court has plenary review "over a district court's choice and interpretation of legal precepts." *American Society for Testing*, 478 F.3d at 566 (quoting *Blasband v. Rales*, 971 F.2d 1034, 1040 (3d Cir. 1992)).

#### **V. STATEMENT OF THE CASE**

DIA initiated this lawsuit against SEPTA on March 14, 2003 and alleged that SEPTA had violated the ADA and the Rehabilitation Act when it failed to install an elevator at the 15th Street Stairwell, located at the northwest corner of 15th and Market Streets in Philadelphia (JA at 54). DIA contended that SEPTA had "altered" the 15th Street Subway Station of the Market-Frankford Subway-Elevated Line by "building a new stairway and improving the escalator" in the 15th Street Stairwell (JA at 53). In support of its allegations, DIA cited to this Court's decision in *Disabled in Action of Pennsylvania v. Sykes*, 833 F.2d 1113 (3d Cir. 1987), a pre-ADA case. The Complaint requested that the District Court order SEPTA to install an elevator.

DIA filed an Amended Complaint on June 12, 2003 to add the City of Philadelphia as an additional defendant (JA at 57-58). The City owns the 15th

Street Stairwell, and SEPTA contended that the City must be joined in order for DIA to obtain the relief sought in the lawsuit (JA at 56). The Amended Complaint repeated the allegations of the original Complaint (JA at 57-60).

Four months later, on October 10, 2003, DIA filed a Second Amended Complaint and raised new factual allegations (JA at 62-73). DIA alleged that during construction at the 15th Street Stairwell, it had met with representatives from SEPTA and from the City about installation of an elevator at that location (JA at 66). According to DIA, SEPTA and the City proposed instead to build an elevator at Dilworth Plaza, about 225 feet from the 15th Street Stairwell, as a “substitute” for the 15th Street Stairwell elevator, and agreed to build additional elevators at Dilworth Plaza to make City Hall Subway Station on the Broad Street Subway Line wheelchair-accessible (JA at 66). DIA alleged that SEPTA had subsequently reneged on the agreement by delaying funding for the latter projects (JA at 67). DIA sought alternative relief: either an order directing SEPTA to install an elevator at the 15th Street Stairwell, or an order directing SEPTA to install the elevators at Dilworth Plaza (JA at 69).

On January 4, 2004, DIA filed its Third Amended Complaint against SEPTA and the City of Philadelphia (JA at 74-87). The Third Amended Complaint relied on the same underlying facts, but DIA added a “key station” claim. DIA alleged that City Hall Subway Station was a key station under

42 U.S.C. § 12147(b) and that SEPTA therefore was obligated to make City Hall Subway Station fully accessible to the disabled, including people who use wheelchairs (JA at 74-87). In its Third Amended Complaint, DIA sought an order compelling installation of the elevator at the 15th Street Stairwell and installation of the elevators at Dilworth Plaza (JA at 81).

In August 2004, DIA and the City reached a settlement. Under the terms of the settlement, the City agreed that, if a court ordered SEPTA to install an elevator at the 15th Street Stairwell or to install the elevators at Dilworth Plaza, it would give SEPTA permission to use the City's property for that purpose (JA at 89-94). The City stated in the agreement that it had issued the permit to SEPTA for the 15th Street Stairwell project without the requirement for elevator installation only because the City believed that SEPTA had agreed to install the elevators at Dilworth Plaza in lieu of the elevator at the 15th Street Stairwell (JA at 91). The District Court dismissed the City as a party to the action (JA at 40, Dkt. #68).

SEPTA vigorously disputed DIA's allegation that it had agreed to build elevators at Dilworth Plaza as alleged in DIA's Third Amended Complaint. SEPTA had moved to dismiss the Third Amended Complaint and to strike the allegations regarding the purported agreement about elevator installation at Dilworth Plaza (JA at 37, Dkt. #32). The parties eventually reached a stipulation

on this point, and by Order dated December 23, 2004, the District Court ordered the allegations relating to the purported agreement stricken from the Third Amended Complaint (JA at 95-96). The District Court further ordered DIA to file a Fourth Amended Complaint without the stricken allegations (JA at 95-96).

When it filed its Fourth Amended Complaint on February 15, 2005, DIA not only restated its “alteration” claim regarding the 15th Street Stairwell and the key station claim involving City Hall Subway Station, but it also added two new claims. DIA alleged for the first time that: (1) 15th Street Subway Station was a key station, and (2) SEPTA had altered City Hall Subway Station in 2003 when SEPTA replaced an inoperative escalator from concourse level to street level at the “southeast entrance located in the City Hall Courtyard”<sup>2</sup> (JA at 97-105). The Fourth Amended Complaint sought alternative relief: installation of elevators at the 15th Street Stairwell and in City Hall Courtyard, or installation of three elevators at Dilworth Plaza that would make City Hall Subway Station and 15th Street Subway Station fully accessible as key stations (JA at 106).

On April 5, 2006, the parties cross-moved for summary judgment. By Order and Opinion dated November 17, 2006, the District Court granted summary

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<sup>2</sup> DIA also alleged that SEPTA intended to replace an escalator in the northwest corner of City Hall Courtyard (JA at 101). No escalator was installed at that location. Thus, there was no issue before the District Court.

judgment in favor of SEPTA and against DIA. The District Court held that:

(1) DIA's "alterations" claims regarding work performed at the 15th Street Stairwell and in City Hall Courtyard were time-barred, and (2) DIA did not have a private right of action to enforce DOT regulations concerning SEPTA's determination of which stations should be key stations<sup>3</sup> (JA at 46, Dkt. #141).

On appeal, DIA challenged only the District Court's ruling on the statute of limitations. This Court reversed the District's Court decision that DIA's alterations claims were time-barred and remanded for further proceedings in light of its decision. 539 F. 3d at 218.

After remand, the parties resubmitted their motions for summary judgment to address the merits of DIA's remaining claims. By Order dated September 11, 2009, the District Court granted summary judgment in favor of DIA and against SEPTA. The District Court concluded that the ADA required SEPTA to build the elevators. The District Court found that: (1) the work that SEPTA performed at each location constituted an "alteration" under 42 U.S.C. § 12147(a);

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<sup>3</sup> In adopting its key station regulations, DOT created an exception for Philadelphia. Under that exception, DOT allowed SEPTA to satisfy its ADA key station obligation by renovating those stations identified as key stations pursuant to a settlement that SEPTA had reached with Eastern Paralyzed Veterans Association of Pennsylvania, Inc. 49 C.F.R. § 37.53. City Hall Subway Station and 15th Street Subway Station are not among the 42 key stations identified in the settlement; however, Suburban Station is one of the 42 key stations (JA at 109-126).

(2) after SEPTA made the alterations, the facilities were not “readily accessible to” disabled individuals, including people who use wheelchairs, and (3) there were no technical reasons preventing SEPTA from installing the elevators (JA at 5-31).

## **VI. STATEMENT OF FACTS**

### **A. SEPTA Has a Strong Commitment to ADA Compliance.**

SEPTA, an agency and instrumentality of the Commonwealth of Pennsylvania, is the nation’s fifth-largest public transportation system and serves 3.9 million customers across a 2,200-square-mile region (JA at 241, ¶ 3; JA at 465); 74 Pa.C.S.A. §1711(a). More than one-half million customers daily and 301 million passengers annually use SEPTA’s network of bus, subway/elevated, trackless trolley, light rail, and commuter rail services (JA at 465). In addition, SEPTA coordinates paratransit services for seniors and disabled individuals throughout the five-county region in which SEPTA operates (JA at 241, ¶ 3; JA at 465).

Since the passage of the ADA in 1990, SEPTA has committed more than one billion dollars to an ongoing, intensive, system-wide initiative to make its services, vehicles and facilities accessible to all customers (JA at 1042-43, ¶ 19). Two years after Congress passed the ADA, SEPTA submitted an ADA Key Station Plan and Schedule (“the Plan”) to the DOT (JA at 129-156). The Plan’s purpose was to ensure that SEPTA’s station upgrades complied with DOT regulations

implementing the ADA (JA at 130). The Plan provided a schedule for making SEPTA's key stations fully accessible to people who use wheelchairs, and it provided cost estimates for providing accessibility at each key station (JA at 137-140, 142-44).

Since submitting the Plan, SEPTA has made substantial progress toward making all of its stations accessible. To date, 33 of 35 key stations are fully accessible to the disabled (JA at 1039, ¶ 5). Only minor work remains at the two key stations that are not yet accessible, and completion of those projects has been delayed because of litigation involving parties other than SEPTA (JA at 1039, ¶ 5). Aside from SEPTA's key stations, SEPTA has reconstructed 54 additional stations to make them fully accessible to the disabled (JA at 1040, ¶ 8). Since this litigation began, 13th Street Subway Station on the Market-Frankford Subway-Elevated Line, Walnut-Locust Subway Station on the Broad Street Subway Line, and Suburban Station -- all key stations -- have been made fully accessible with elevator access from street level to platform level (JA at 1040, ¶ 6).

SEPTA has worked in collaboration with the regional disability community in designing and carrying out many of its projects. The SEPTA Advisory Committee for Accessible Transportation ("SAC") assists SEPTA in

maintaining compliance with the ADA<sup>4</sup> (JA at 1040, ¶ 9). SAC also acts on behalf of the regional disability community and offers its views when SEPTA undertakes a project that may affect the interests of disabled individuals (JA at 1040, ¶ 9).

One such project included SEPTA's \$63 million renovation of Suburban Station/Penn Center Concourse in Center City Philadelphia (JA at 1042-43, ¶ 19).

**B. SEPTA Upgrades Suburban Station and Penn Center Concourse as Part of SEPTA's ADA Key Station Compliance Plan.**

**1. Suburban Station and Penn Center Combine Retail, Office and Transportation Operations.**

Suburban Station, which serves SEPTA's 13 commuter rail lines, historically has been a mixed-use complex combining retail, office and transit operations (JA at 250, ¶ 12; JA at 281). The Pennsylvania Railroad and the City built Suburban Station in 1929 on land adjacent to the old Broad Street Station (JA at 280-81). When it opened a year later, Suburban Station included a 22-story office building (Suburban Station Building) with retail shops at street level, an underground concourse (part of today's Penn Center Concourse) with retail shops and offices, and, below the concourse level, train platforms extending toward 15th Street to the east and 18th Street to the west (JA at 281).

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<sup>4</sup> Information regarding SAC is located on SEPTA's website at [www.septa.org](http://www.septa.org) under the heading "SEPTA Partners."

In the early 1950s, the railroad demolished Broad Street Station and the “Chinese Wall,” the elevated viaducts that carried trains into downtown Philadelphia from the west (JA at 279, 282). City planners and railroad officials were eager to develop the 22 acres that stretched from 15th Street to 18th Street and from Market Street to Filbert Street (now JFK Boulevard) (JA at 284, 286). When completed in 1959, Penn Center combined office buildings and hotels at street level with an underground concourse level containing restaurants, shops, and rail and bus transportation (JA at 287-288).

The Penn Center Concourse opened into the concourse at Suburban Station (JA at 287-88). Thus, at concourse level, Penn Center spans east to west from 15th Street to 18th Street and from Market Street north JFK Boulevard (JA at 249, ¶ 5; JA at 451). Penn Center Concourse connects to the concourse level of Dilworth Plaza underneath 15th Street (JA at 726-27). This connection includes a ramp to allow a person in a wheelchair to travel between the two sites (JA at 726-27). There are seven public stairways the connect the streets and Penn Center Concourse: four on the south side of JFK Boulevard at 15th, 16th, 17th and 18th Streets; two on 16th Street (one at the northeast corner of 16th and Market, and one on 16th Street midway between Market Street and JFK Boulevard); and the 15th Street Stairwell entrance (JA at 394, 686-87).

## **2. SEPTA, City Cooperate on Suburban Station/Penn Center Project.**

In 1995, SEPTA and the City of Philadelphia reached agreement on improvements at Suburban Station/Penn Center Concourse in order to meet SEPTA's ADA key station requirements (JA at 301-04). SEPTA issued a request for proposals and, in 1997, awarded the design contract to the architectural and design firm Bower, Lewis & Thrower (JA at 252, ¶ 21; JA at 305-45). The project boundaries ran from 15th Street to 18th Street and from Market Street north to Cuthbert Street<sup>5</sup> (JA at 395, 664). SEPTA, the City, and private parties own the various parcels within Penn Center Concourse's boundaries (JA at 627-29).

The work proceeded in four phases: chilled water system improvements, asbestos abatement, platform ventilation, and the main renovation phase. (JA at 0252, ¶ 23). The main phase included the construction/renovation of elevators, modifications at concourse level, and modifications at street level entrances, including the entrance at the 15th Street Stairwell. (JA at 0253, ¶¶ 28-30).

After completing the work at platform level (the first three phases), workers moved to the concourse level. They installed new ceilings; replaced,

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<sup>5</sup> Cuthbert Street is the northernmost boundary of the concourse below the Suburban Station Building (JA at 395, 664).

cleaned and polished the marble on concourse walls and columns; repaired, cleaned and polished floors; replaced railings and handrails; and built structures, including a ticket purchase office, a passenger services office, and ticket vending areas (JA at 690). Workers renovated the corridor leading from the stairway at 18th Street and JFK Boulevard to the passenger waiting area in Suburban Station (JA at 691). Workers also cleaned and polished all signage in the concourse, and, in the 15th Street corridor of Penn Center Concourse, workers made improvements to the electrical system, replaced the ceiling, and patched the terrazzo floor (JA at 0253, ¶ 31; JA at 690-91). At the four stairway entrances on JFK Boulevard at 15th, 16th, 17th and 18th Streets, workers repaired the treads, repaired the railings, and cleaned, polished and repaired the balustrades (JA at 691).

### **3. The Suburban Station/Penn Center Project Includes Two Wheelchair-Accessible Entrances.**

Although only one elevator was necessary under ADA's key station provision, SEPTA installed two elevators at street level to make Suburban Station fully accessible (JA at 255, ¶¶ 44; JA at 394, 1123). The elevators were put into public service in February and June of 2005, and they provide a barrier-free path throughout Penn Center Concourse and, therefore, the concourse level of Suburban Station (JA at 255-56, ¶¶ 43-44).

The elevator on JFK Boulevard near 17th Street is the elevator that provides the most direct route to Suburban Station's train platforms (JA at 255, ¶

44). That elevator descends from street level, to concourse level, then down to the platform level at Track 0 (JA at 255, ¶ 44; JA at 975). People who use wheelchairs may access the platforms for Tracks 1-2 and Tracks 3-4 by exiting the JFK Boulevard elevator at concourse level and transferring to the appropriate elevator that connects to the platform below (JA at 255, 396, 410-11, 975). The elevator on JFK Boulevard is next to the stairway entrance at the southeast corner of JFK Boulevard and 17th Street (JA at 255, ¶ 44; JA at 396, 410).

The second elevator is on 16th Street midway between Market Street and JFK Boulevard. At this entrance, SEPTA's contractors also built a new stair to the concourse next to the elevator (JA at 396). The elevator descends to concourse level and allows a person in a wheelchair to navigate the entire Suburban Station/Penn Center Concourse, including an accessible path through the 15th Street corridor to the bottom of the stair at the 15th Street Stairwell (JA at 256, ¶¶ 50-51; JA at 373, 396, 402).

DIA contended before the District Court that the 15th Street Stairwell is an entrance to the 15th Street Subway Station, which is not wheelchair-accessible (JA at 100). An ambulatory person may enter Penn Center Concourse from the 15th Street Stairwell, turn left and walk about 150 feet and up a set of

stairs to reach 15th Street Subway Station's ticket area<sup>6</sup> (JA at 445, 635, 679).

Underneath the stairs is the Subway/Surface Trolley Line (JA at 642). The property line for 15th Street Subway Station is at approximately the middle of those stairs (JA at 395-96, 445, 694). SEPTA did not perform any work inside the property line of 15th Street Subway Station (JA at 253, ¶ 32; JA at 395, 0396).

#### **4. SEPTA, City Receive Grant To Defray the Cost of 15th Street Stairwell Improvements That Were Included in Suburban Station/Penn Center Project.**

During the Suburban Station renovation project, SEPTA and the City, which owns the 15th Street Stairwell, learned about possible grant money to defray the costs of the Suburban Station/Penn Center project (JA at 419-27). SEPTA and the City applied for, and received, a \$750,000 grant. (JA at 428-30). The grant, however, required that the work begin within 18 months, forcing SEPTA to accelerate work at the 15th Street Stairwell (JA at 431, 440, 658-59).

SEPTA immediately sought a permit from the City (JA at 442-43). DIA, however, opposed the permit on the ground that SEPTA and the City did not plan to install an elevator at the 15th Street Stairwell. DIA's counsel, Stephen F.

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<sup>6</sup> The stair referenced here is not the 15th Street Stair. Rather, the stair referred to here is located within 15<sup>th</sup> Street Subway Station of the Market-Frankford Subway-Elevated Line.

Gold, Esq., wrote to Edward McLaughlin, Commissioner of the City Licenses and Inspections Department:

Despite the fact that SEPTA has provided access for people with disabilities to Suburban Station at two other locations, the City of Philadelphia still has a responsibility to ensure that renovations to its own facilities are done in accordance with the ADA Accessibility Guidelines (ADAAG) to the maximum extent feasible. This courtyard is not only an access point to Suburban Station, but also to many shops, businesses and public offices in the immediate area.<sup>7</sup>

(JA at 246). The City initially denied the permit on the ground that the project did not satisfy the requirements of Section B-1110.2.2(9) of the City Code, which states: “Where building entrances are altered, or when plans are presented to relocate and provide a new primary entrance, the entrance shall be made accessible” (JA at 442).

The City subsequently reversed its position. At an appeal hearing before the City of Philadelphia Accessibility Advisory Board, a technical advisor to the Board testified that SEPTA’s proposal complied with the City Code because

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<sup>7</sup> In his correspondence, Mr. Gold appears to argue that the ADA requires the 15<sup>th</sup> Street Stairwell to be accessible because the City of Philadelphia owns it. That is not a proper reading of the ADA. A large building may occupy multiple parcels that have various owners who lease the parcels to the building’s owner. As to accessibility, the ADA requires consideration of a building or facility (such as Suburban Station) as a whole, not the ownership of the parcels that the building or facility occupies. 49 C.F.R. §§ 37.49, 37.57.

SEPTA's broader renovation project included installation of elevators at 16th Street and on JFK Boulevard near 17th Street, thus making the Concourse accessible (JA at 443). The technical advisor also testified that, under the City Code, installation of an elevator was not required, because the cost exceeded 20 percent of the \$1.5 million budget for the 15th Street Stairwell phase of the Suburban Station/Penn Center project<sup>8</sup> (JA at 443). As a result, the City reversed its decision, and in February 2001 issued a permit allowing SEPTA to proceed with the improvements at the 15th Stairwell without installation of an elevator (JA at 443).

Work began immediately. Workers reconstructed the escalator headhouse, demolished and rebuilt the stairway, made minor repairs, and replaced lighting, handrails and tile in the below-ground courtyard situated at the base of the 15th Street Stairwell (JA at 394, 660). The entrance at the 15th Street Stairwell reopened on August 8, 2002 (JA at 735). There is a sign at the street-level entrance directing people who use wheelchairs to the 16th Street elevator entrance, which is 340 feet across Penn Center Plaza (JA at 250, ¶ 10; JA at 411, 965-66).

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<sup>8</sup> The SEPTA engineer who oversaw the Suburban Station/Penn Center renovation testified that the cost to install an elevator would exceed \$800,000 (JA at 443).

Although workers demolished and rebuilt the 15th Street Stair, none of the work in the 15th Street Stairwell involved any structural modifications.

Terry G. Heiser, who has been a licensed professional engineer for 30 years, managed the Suburban Station/Penn Center project for SEPTA (JA at 244, ¶¶ 1, 3). Heiser, a Senior Project Manager assigned to SEPTA's Capital Design and Construction Department, reviewed all documents submitted by Bower, Lewis & Thrower, SEPTA's architect on the project, relating to the technical aspects of the project, such as plans, designs and architectural studies (JA at 244, ¶¶ 1-3). At his deposition, Mr. Heiser testified that the work performed at the 15th Street Stairwell was limited to the replacement of the stair and head house, and the improvement of some architectural finishes. (JA at 660). Based on the scope of the work, Mr. Heiser testified that –

[SEPTA's contractor] did not make any structural modifications or remove any load bearing walls in performing the work on the stairs in the courtyard. ...  
[and] [n]o structural changes were made to the walls of the 15th Street Courtyard.

(JA at 257, ¶ 58). Experts retained by SEPTA for this case likewise confirmed the limited scope of the work (JA at 386, 401, 968-69, ¶ 10).

Photographs of the project, which are included in the Appendix, provide documentary proof that the project involved no major structural modifications (JA at 778-861). At the base of the 15th Street Stairwell is a

courtyard enclosed on three sides by concrete walls, with the remaining side a glass wall and entryway to the 15th Street corridor of Penn Center Concourse (JA at 778-861). The photographs demonstrate that no work was performed on the support structures or walls surrounding the courtyard (JA at 778-861). Instead, all work, including the demolition and reconstruction of the stairs, occurred in the open space in the middle of the courtyard and did not require any modifications to the Stairwell's supporting structures (JA at 778-861).

**5. The FTA Determines That the Upgrades at Suburban Station/Penn Center Concourse Complied with the ADA's Vertical Access Requirements.**

Upon completion of the Suburban Station/Penn Center renovation, the Federal Transit Administration ("FTA"), an administrative division in the DOT, issued an "ADA Key Station Assessment" of the Suburban Station/Penn Center Concourse project (JA at 972-986). The FTA assessment, conducted by the FTA's Office of Civil Rights, viewed the scope of the project as encompassing the entire area within the boundaries of the Penn Center Concourse, including the 15th Street Stairwell (JA at 975-76). Using regulations and guidelines issued by the DOT and the Architectural and Transportation Barriers Compliance Board ("Access Board"), the FTA determined that SEPTA's station renovation complied with the ADA's

vertical access requirements for people who use wheelchairs<sup>9</sup> (JA at 973, 1042, ¶ 17).

### **C. SEPTA Replaces an Inoperative Escalator in City Hall Courtyard.**

In 1999, a passenger injury prompted SEPTA to replace escalators at a number of stations (JA at 868, 970). In June 2001, during the second phase of the escalator replacement project, SEPTA replaced an inoperative escalator leading from City Hall Subway Station Concourse to ground level in the southeast corner of Philadelphia City Hall Courtyard, which is owned by the City (JA at 868-69). The escalator is a means of egress from the City-owned City Hall Subway Station Concourse running east-west under City Hall and is situated about 120 feet east of the paid area (the area in which a passenger must pay a fare to occupy) of City Hall Subway Station (JA at 885, 887). Two other escalators and two sets of stairs in City Hall Courtyard also lead to and from the concourse (JA at 869).

The work in City Hall Courtyard was confined to the escalator and “cosmetic” work to the head house covering the escalator (JA at 268, ¶¶ 17-18).

Skip Brooke, Director of Engineering in SEPTA’s Bridges and Buildings Engineering Department, oversaw the escalator replacement program (JA at 266, ¶

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<sup>9</sup> The FTA determined that the project contained several technical deficiencies unrelated to vertical accessibility (JA at 1042, ¶ 17). SEPTA subsequently corrected those deficiencies (JA at 1042, ¶ 18).

1; JA at 867, 885). Brooke, a licensed architect for 27 years, described the work during his deposition in this case. Brooke testified:

The scope of the work at was to remove the existing escalator, which was not operable, and replace it with a new escalator in the same general location, period.

(JA at 869). Brooke explained that the moving part of an escalator sits in a wellway, which can be thought of as a diagonal “hallway” through which the escalator travels. (JA at 901). Workers removed the old escalator equipment from the wellway and retained some parts for use in the new escalator (JA at 268, ¶ 17; JA at 877). Workers lengthened the edges of the wellway in order to support an ADA-compliant escalator, but did not make any further modifications<sup>10</sup> (JA at 893, 901).

Photographs of the project, which are included in the Appendix, depict the extent of the work (JA at 910-63). The photographs demonstrate that all work was confined to the escalator equipment within the wellway and did not involve alteration to any load-bearing structures (JA at 910-63). As the photos show, even the tiles in the wellway remained untouched during the project (JA at 955-58, 960-61). The escalator replacement in City Hall Courtyard cost nearly

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<sup>10</sup> The ADA requires two consecutive moving steps to become flat at the top and bottom of an escalator in order to extend the area on which an individual may board and exit the elevator (JA at 866). The new escalator complied with this requirement (JA at 866).

\$1.2 million<sup>11</sup> (JA at 270, ¶ 35). No work was done at concourse level or within the paid areas at City Hall Subway Station (*i.e.*, the ticket area, passenger waiting area, or platforms) (JA at 869). City Hall Subway Station is not wheelchair-accessible (JA at 871-72).

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<sup>11</sup> Brooke estimated the cost to install an elevator at approximately \$2 million (JA at 270, ¶ 36).

## **VII. SUMMARY OF ARGUMENT**

The District Court committed reversible error when it ordered SEPTA to install elevators at Suburban Station/Penn Center and City Hall Courtyard in downtown Philadelphia. The District Court ignored DOT regulations that have the force of law and substituted its judgment for the agency's expertise. DOT's interpretation of the ADA is entitled to deference under the *Chevron* doctrine.

The District Court's rejection of DOT regulations is flawed in two distinct ways. First, neither the stair replacement at the 15th Street Stairwell nor the escalator replacement at City Hall Courtyard involved removal or alteration of a load-bearing structural element. DOT regulations do not mandate installation of an elevator unless the improvements require major structural modifications.

Second, the District Court incorrectly held that the Penn Center Concourse was not readily accessible to people who use wheelchairs even though SEPTA installed an elevator 340 feet from the 15th Street Stairwell. The 16th Street elevator is one of two elevators that SEPTA built at Penn Center as part of the Suburban Station/Penn Center renovation project. The District Court's holding directly contradicts DOT regulations, which require only one wheelchair-accessible entrance to a facility.

Finally, the District Court also erred when it ordered SEPTA to install an elevator in City Hall Courtyard without requiring the City of Philadelphia to be

joined as a party. The City, which owns City Hall Courtyard, has not given SEPTA permission to install an elevator at that location. Thus, the City must be joined in order for DIA to obtain the relief it seeks in this lawsuit.

## **VIII. ARGUMENT**

### **A. The ADA Mandates A Balancing Approach Between Accessibility and Costs.**

The ADA balances improvements to access for the disabled against the costs of those improvements. The statute does not require a transit authority to incur excess costs, a principle upon which SEPTA relied before the District Court. The District Court, however, rejected the balancing act mandated by the statute and concluded:

[U]nder the governing legislation and related regulations, the only considerations to be made when determining whether an alteration was made in an accessible manner to the maximum extent feasible are those of technical feasibility, not economic feasibility.

(JA at 28).

The District Court's conclusion is fundamentally flawed. The statutory provision on which DIA bases its claims provides, in pertinent part:

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the

alterations are made) in such a manner that, *to the maximum extent feasible*, the altered portions of the facility 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) (emphasis added).<sup>12</sup>

In enacting the ADA, Congress charged the Access Board with establishing and maintaining minimum guidelines and requirements for building accessibility, including accessibility to transportation facilities. 42 U.S.C. § 12204(a), (b). The Access Board's Americans With Disabilities Act Accessibility Guidelines ("ADAAG") establish scoping and technical requirements for the design, construction, and alteration of buildings and facilities covered by Titles II and III of the ADA.

Similarly, Congress charged the DOT with rule-making authority to implement regulations applicable to public transportation services. 42 U.S.C. § 12143(b) (paratransit services); 42 U.S.C. § 12149 (fixed-route services, including rapid and light rail); 42 U.S.C. § 12164 (intercity and commuter rail services). Congress directed that DOT's regulations be consistent with the Access Board's minimum guidelines. 42 U.S.C. §§ 12149(b), 12163.

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<sup>12</sup> DIA also brought its claims under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. *See DIA v. SEPTA*, 539 F. 3d at 207 n. 11 ("[p]rocedures, rights, and remedies provided by Section 227 of the ADA are identical to those provided by Section 504").

DOT has incorporated the ADAAG into its regulations, except where modified by Appendix A to 49 C.F.R. Part 37.<sup>13</sup> DOT has not modified any of the ADAAG provisions that SEPTA has cited in support of its legal argument. Under DOT regulations, a transportation facility “shall be considered to be readily accessible to and usable by individuals with disabilities” if it complies with DOT regulations and the ADAAG. 49 C.F.R. § 37.9. Thus, the ADAAG provisions incorporated by the DOT establish the standards for accessible design and effectively operate as a regulation issued by DOT.

**B. SEPTA’s Work Projects Did Not Trigger a Requirement for Elevator Installation at the 15th Street Entrance to Penn Center Concourse or at City Hall Courtyard.**

**1. The ADAAG and DOT Regulations Do Not Require Installation of an Elevator Unless the Project Involves Major Structural Modifications.**

DOT regulations and the ADAAG establish as a matter of law that SEPTA had no obligation to install an elevator at the 15th Street Stairwell or in City Hall Courtyard. In the construction and interpretation section of its regulations, DOT provides the following explanation about the meaning of the statutory phrase “to the maximum extent feasible”:

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<sup>13</sup> The Guidelines are codified at 36 CFR Part 1191, Appendices B and D, and are available on the Access Board’s web site. The 1991 version of the ADAAG is applicable in this case. 49 C.F.R. §37.9(c).

[T]he term “to the maximum extent feasible” should be construed as not requiring entities to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member *unless* the load-bearing structural member is otherwise being removed or altered as part of the alteration.

49 C.F.R. Appendix D, Section 37.43 - Alteration of Transportation Facilities by Public Entities (citing S. Rept. 101–116, at 68)<sup>14</sup> (emphasis added).

In its interpretation of the statutory phrase “to the maximum extent feasible,” the DOT accepted the Access Board’s standard. Critically, ADAAG 4.1.6(1)(f) addresses the circumstances in which an elevator must be installed between floors where a transit authority is making improvements at a station. This provision reads:

If an escalator or stair is planned or installed ***where none existed previously and major structural modifications are necessary for such installation***, then a means of accessible vertical access shall be provided that complies with the applicable provisions.

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<sup>14</sup> The DOT also states: “[I]n looking at facility concepts like “disproportionality” and “to the maximum extent feasible,” the Department will consider any expenses related to accessibility for passengers.” Appendix D to 49 C.F.R. Part 37 - Construction and Interpretation of Provisions, Section 37.43 Alteration of Transportation Facilities by Public Entities.

ADAAG § 4.1.6(1)(f)<sup>15</sup> (emphasis added). In commentary to the ADAAG, the Access Board has explained the meaning of this requirement: “For example, 4.1.6(1) describes the type of work that triggers provision of vertical access between floors (*major structural modification* resulting from replacement or addition of stairs or escalators).” A Guide to the ADAAG, Alterations [4.1.6] and Historic Preservation [4.1.7] (emphasis added).<sup>16</sup>

The evidence of record before the District Court establishes that the projects at the 15th Street Stairwell and at City Hall Courtyard involved no alteration or removal of a load-bearing structure, which bears the weight and force resting upon it. This conclusion rests on the testimony of Mr. Heiser, a licensed professional engineer for 30 years who oversaw SEPTA’s Suburban Station project, and Skip Brooke, an architect for 27 years who was in charge of the

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<sup>15</sup> Section 4.1.6 of the ADAAG lays the framework for building alterations. An alteration may not have the effect of decreasing the accessibility or usability of a facility below the requirement for new construction. ADAAG § 4.1.6(1)(a). The technical criteria for new construction are applied as to each element or space altered, provided the new-construction criteria are technically feasible. ADAAG § 4.1.6(1)(b). Thus, if a stairway is replaced, it must meet the requirements of ADAAG §§ 4.1.6(3)(b) and 4.9 if technically feasible. Compliance may be followed on an element-by-element basis, unless the work amounts to a full alteration of a particular room or space. ADAAG § 4.1.6(1)(c). Thus, piecemeal modifications do not always rise to an “alteration” under the ADAAG.

<sup>16</sup> The “Guide to the ADAAG” may be found on the Access Board’s website.

escalator replacement project (JA at 257, ¶ 58; JA at 869, 893, 901). Their testimony was unequivocal and un rebutted.

Photographs included in the Appendix support the testimony of SEPTA's witnesses. Photographs taken during construction at the 15th Street Stairwell depict both the demolition and rebuilding of the 15th Street Stair (JA at 778-861). The pictures establish that no work was performed to any of the support structures or walls supporting the Stairwell, which includes a below-ground courtyard (JA at 778-861). Instead, the demolition and reconstruction of the stairs occurred in the middle of the 15th Street Stairwell and impacted no roof or walls that required the alteration or removal of load-bearing structural elements (JA at 778-861).

Photographs of the construction site in City Hall Courtyard likewise demonstrate the absence of any major structural modifications. Indeed, they confirm that all work was confined to the escalator equipment within the wellway (JA at 910-63). Even the tiles in the wellway remained untouched during the project (JA at 955-58, 960-61). Accordingly, DOT regulations do not require installation of an elevator at either location, because neither improvement project involved major structural modifications.

**2. The District Court Ignored DOT's Regulations, Which Are Entitled to Deference under the *Chevron* Doctrine.**

In its decision, the District Court did not give deference to DOT's interpretation of the ADA. The District Court rejected SEPTA's contention that ADAAG § 4.1.6(1)(f) relieved the transit authority from any obligation to install an elevator at the 15th Street Stairwell and at City Hall Courtyard. The District Court opined:

Certainly, one could argue that conclusion is implied, but it is also possible to see this guideline as simply clarifying the requirements in a specific and unequivocal situation without stepping into the murky waters of other situations involving potential alterations to stairs and escalators. ... [t]he guideline simply does not state that a means of vertical access must be provided only when a new staircase or escalator is installed, and the Court refuses to read such a requirement in to the guideline.

(JA at 15-16). Thus, the District Court ignored the requirement that there must be a major structural modification before the obligation to build an elevator attaches.

The District Court's opinion runs afoul of the principle established by the Supreme Court in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that an agency's interpretation of statutory language is entitled to deference if Congress has charged the agency with rule-making authority and the agency's interpretation of the statute is a permissible construction of the language. *Id.* at 844-45. This principle makes eminent sense, because an agency with specific expertise is better able to articulate

the policy assumptions underlying statutory language that may not be crystal clear. *See also Schaar v. Lehigh Valley Health Services, Inc.*, 598 F.3d 156, 160, n.6 (3d Cir. 2010) (regulations issued by Secretary of Labor entitled to deference under *Chevron* doctrine); *Toretti v. Main Line Hospitals, Inc.*, 580 F.3d 168, 174-75 (3d Cir. 2009) (deferring to Health and Human Services regulations interpreting Medicare statute).

Appellate courts have reversed district courts that do not give proper deference to regulatory authority. For example, in *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003), this Court reversed a district court that declined to give deference to the Board of Immigration Appeals' ("BIA") interpretation of new legislation that contained an ambiguous provision. *Id.* at 396-97. Citing Supreme Court authority, this Court concluded that BIA's interpretation was entitled to deference because Congress had charged the Attorney General with administration and enforcement of immigration laws, including the power to grant authority to the BIA. *Id.* at 396 (citations omitted). The Court further concluded that BIA's interpretation was a reasonable, permissible construction of the statute. *Id.* *See also Shipbuilders Council of America v. United States Coast Guard*, 578 F.3d 234 (4th Cir. 2009) (reversing district court that failed to defer to Coast Guard's "persuasive" interpretation of statute governing issuance of certificates to trade vessels); *Beck v. City of Cleveland, Ohio*, 390 F.3d 912, 920-21 (6th Cir. 2005)

(reversing district court that did not defer to Secretary of Labor's regulations interpreting Fair Labor Standards Act); *Neal v. Board of Trustees of the Cal. State Universities*, 198 F.3d 763, 770 (9th Cir. 1999) (reversing district court for failing to defer to Department of Education's interpretation of Title IX).

The Supreme Court has recognized that the *Chevron* doctrine applies with equal force to regulatory authority under the ADA. In according deference to Department of Justice regulations in *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Supreme Court observed: “As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department’s views are entitled to deference. *Id.* at 645. *See also Helen v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995) (Department of Justice’s regulations interpreting Title II of the ADA are entitled to substantial deference under *Chevron*).

Similarly, the DOT’s regulations under Title II of the ADA are entitled to deference under the *Chevron* doctrine. *George v. Bay Area Rapid Transit*, 577 F. 3d 1005, 1009, n. 6 (9th Cir. 2009); *Neighborhood Ass’n of the Back Bay, Inc. v. Federal Transit Administration*, 463 F. 3d 50, 59 (1st Cir. 2006). Congress charged the DOT with promulgating rules within its specific expertise. Operating through the Federal Transit Administration, DOT, much like the

Department of Justice, provides technical assistance and conducts compliance reviews and assessments to ensure that federally financed projects meet ADA accessibility standards. For example, the FTA conducted an assessment of SEPTA's Suburban Station/Penn Center project (JA at 972-86). The DOT's interpretation of the phrase "to the maximum extent feasible" is a reasonable and permissible construction of the statute, because it reflects Congress' concerns about the costs of compliance. 49 C.F.R. Appendix D, Section 37.43 - Alteration of Transportation Facilities by Public Entities (citing S. Rept. 101-116, at 68).

If this Court declined to defer to the DOT's interpretation, the agency's rule-making authority would be rendered meaningless and courts would find themselves deciding whether a particular design or feature should have been included in a transportation project. In *George, supra*, the Ninth Circuit described the conundrum in which courts would find themselves if deference were not accorded to the DOT's regulations:

The interpretation of the ADA proposed by ... [plaintiffs] is very problematic. It would allow any person to file an action contending that, in the opinion of this particular plaintiff, a design feature ought to have been included in ... [a] structure. The courts are ill-equipped to evaluate such claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable .... It also would be difficult for anyone to design a ... structure if the design requirements are subject to being changed retroactively.

577 F. 3d at 1012 (citation omitted).

Here, the District Court ignored the DOT regulations, substituted its judgment for the DOT's judgment, and concluded that it should be the arbiter of engineering, architectural and policy determinations. The *Chevron* doctrine does not permit this result. Accordingly, this Court should reverse the District Court's decision, remand the case to the District Court, and direct it to apply the DOT's interpretation of the statutory language.

**C. Penn Center Concourse Meets ADA Standards Because There Are Two Wheelchair-Accessible Entrances.**

**1. The Access Board Rejected a "Distance" Test for Accessible Entrances.**

The District Court also erred by concluding that Penn Center Concourse was not "readily accessible" solely because the nearest elevator was 340 feet from the 15th Street Stairwell (JA at 24-25). The District Court opined that the ADAAG "[did] not excuse SEPTA for failing to make the 15th Street entrance wheelchair-accessible, regardless of whether it is part of Suburban Station (which already has accessible entrances), 15th Street Station (which has no

accessible entrance), or both”<sup>17</sup> (JA at 24). The District Court did not cite any regulatory or case authority to substantiate this conclusion. However, the District Court rejected SEPTA’s contention that the ADAAG required only one wheelchair-accessible entrance to the facility.

In its proposed guidelines, the Access Board considered a per-se rule regarding the maximum allowable distance between wheelchair-accessible entrances at a transportation facility. When it issued the proposed guideline on the number of required entrances, the Access Board sought public comment on four options: (1) where station entrances served different transportation fixed routes or groups of fixed-routes, an entrance serving each type of route or group must be accessible; (2) accessible entrances should be no more than 400 feet apart; (3) all entrances should be accessible; and (4) only one entrance should be accessible. 56 Fed. Reg. 11874, 11876-77 (March 20, 1991).

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<sup>17</sup> According to the District Court, DIA contended that the 15th Street Stairwell was an entrance to the 15th Street Subway Station, and SEPTA contended that it was an entrance to Suburban Station (JA at 20). The District Court did not decide this issue, and instead concluded that this “geographical” issue was not relevant to liability (JA at 19, n. 12). During construction at the 15<sup>th</sup> Street Stairwell, DIA’s counsel seemed to agree that the entrance served Suburban Station (JA at 246).

When it adopted final regulations, the Access Board struck a compromise between options 1 and 4. In comments accompanying the final rule, the Access Board observed:

The final guidelines have combined option one and option four so that one accessible entrance would be sufficient only if that entrance serves all different transportation fixed routes or groups of fixed routes. This requirement does not necessarily mean that the closest entrance will be the accessible entrance.

\* \* \*

The final guidelines provide that all accessible entrances shall, to the maximum extent practicable, coincide with those used by the majority of the general public. This provision acknowledges that it is not always practicable to place an accessible entrance to coincide with the entrance used by the general public. For example, an elevator may meet the surface at a location different from an escalator.

56 Fed. Reg. 45500, 45505-06 (Sept. 6, 1991). Thus, in the final guidelines, the Access Board specifically rejected the distance approach adopted by the District Court in this case.

**2. The ADAAG Standard, Which the DOT Adopted by Regulation, Is Entitled to Deference under the *Chevron* Doctrine.**

The District Court's holding that Penn Center Concourse is not "readily accessible" likewise runs afoul of the *Chevron* doctrine. The DOT regulations adopt the ADAAG's standard that a transportation facility need have

only one accessible entrance. ADAAG § 10.3.1, 10.3.2; ADAAG § 4.14; ADAAG § 4.1.6(1)(d). Section 10.3.1, which governs new construction of and alterations to stations, provides: “[A]t least one entrance to each station shall comply with 4.14, Entrances.”<sup>18</sup> ADAAG § 10.3.1(2). The key station provision, Section 10.3.2, contains the same requirement: “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 necessary for use of the transportation system.”<sup>19</sup> ADAAG § 10.3.2(1).

The work performed at Suburban Station/Penn Center Concourse exceeded ADAAG’s minimum requirements, because SEPTA built two wheelchair-accessible entrances that provide an accessible route for a person in a wheelchair to travel not only to the train platforms at Suburban Station, but also to navigate the entire Penn Center Concourse level. *See* ADAAG § 4.14.1 (an accessible entrance “shall also be connected by an accessible route to all accessible spaces or elements within the building or facility”); ADAAG § 4.3.2(2) (“[a]t least

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<sup>18</sup> ADAAG § 4.1.6(1)(d) reads, in relevant part: “No alteration of an existing element, space, or area of a building or facility shall impose a requirement for greater accessibility than that which would be required for new construction.”

<sup>19</sup> The specific requirements of Section 10 governing transportation facilities trump the general rule that at least 50 percent of entrances in new construction be accessible. ADAAG § 4.1.3(8).

one accessible route shall connect accessible buildings, facilities, elements, and spaces that are on the same site”).

The 16th Street elevator coincides with an entrance used by the general public (JA at 700). That elevator descends into the heart of Penn Center Concourse, which houses many commercial establishments from 15th Street to 17th Street (JA at 287-88). The Suburban Station/Penn Center project made the concourse level accessible to people in wheelchairs to the maximum extent feasible.

Even if an elevator were installed at the 15th Street Stairwell, a person in a wheelchair could not access 15th Street Subway Station. A person in a wheelchair cannot access 15th Street Subway Station from the Penn Center Concourse because there are steps leading from the 15th Street corridor of Penn Center Concourse to the 15th Street Subway Station (JA at 445, 635, 679). The decision to position the elevator at 16th Street – in the middle of Penn Center’s commercial hub – made eminent sense because of its optimal location.<sup>20</sup>

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<sup>20</sup> The FTA conducted an assessment of SEPTA’s Suburban Station renovation project and concluded that it met the ADA’s vertical accessibility requirements because it included two wheelchair-accessible entrances to the Suburban Station/Penn Center Concourse (JA at 973, 1042, ¶ 17). The District Court’s opinion renders the FTA assessment meaningless.

The District Court's decision that SEPTA must install an elevator at the 15th Street Stairwell because it is too far from the 16th Street elevator has no mooring. The DOT has spoken on this point: There need be only one wheelchair-accessible entrance to a facility. Here, there are two fully accessible entrances to the Penn Center Concourse. Accordingly, the District Court's decision must be reversed.

#### **D. The City of Philadelphia Is a Required Party in This Case.**

The City of Philadelphia is a "required party" to this action because it owns City Hall Courtyard, and the District Court abused its discretion by not requiring that the City be joined as a party. Fed. R. Civ. P. 19 requires that a party be joined when: (1) the court cannot grant complete relief among the existing parties, (2) the party to be joined has an interest in the subject matter of the action, and (3) an existing party or the party to be joined would be prejudiced in the absence of joinder.<sup>21</sup>

It is well-settled that a court of appeals may remand a case for failure to join a required party under Rule 19, even if the issue has not been raised by the

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<sup>21</sup> Rule 19 previously referred to "indispensable" parties. The Rule was amended in 2007 and now refers to those parties that are "required" to be joined. The Advisory Committee's Notes on the 2007 amendment indicate that this and other changes to the Rule were stylistic only. See also *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008) ("the substance and operation of the Rule both pre- and post-2007 are unchanged").

parties. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (“When necessary . . . a court of appeals should, on its own initiative, take steps to protect an absent party, who of course had no opportunity to plead and prove his interest below.”); *Steel Valley Authority v. Union Switch and Signal Division*, 809 F.2d 1006 (3d Cir. 1987) (holding that, where district court did not make an explicit Rule 19 determination, court of appeals should “engage in an independent analysis of indispensability”); *Finberg v. Sullivan*, 634 F.2d 50, 55 (3d Cir. 1980) (“[a]lthough the issue of necessary parties is not strictly jurisdictional, an appellate court should consider, on its own motion, any plausible argument that the interest of an absent party requires that party’s joinder.”).

In *Steel Valley Authority*, *supra*, an industrial association sought injunctive relief in state court to prevent a factory closing while it formulated a plan to acquire and operate two plants. The association alleged that the main defendant in the action, American Standard Corp., had threatened to remove equipment and fixtures necessary for plant operation. *Id.* at 1009. After American Standard removed the case to federal court, the association amended its complaint to name the property owner, Radice-East, as an additional defendant and sought remand because Radice-East’s presence, a non-diverse party, destroyed the court’s jurisdiction. *Id.* The district court refused to remand the case and held that

Radice-East had been fraudently joined as a defendant. A short time later, the district court dismissed the complaint. *Id.* at 1009-10.

On appeal, this Court focused on whether Radice-East was an indispensable party whose joinder would require remand of the proceedings to state court. The Court reasoned, *inter alia*, that any judgment rendered in the owner's absence would necessarily prejudice the owner's property interests because any injunction would preclude the owner's full use of the property. *Id.* at 1014. The Court also concluded that any judgment rendered in the owner's absence would not be adequate, because the owner would not be bound by such judgment. *Id.* at 1014-15. Thus, the Court held that the district court abused its discretion in failing to find that the property owner was an indispensable party. *Id.* at 1015.

The *Steel Valley Authority* analysis supports SEPTA's position that the City, which owns the City Hall Courtyard, must be joined as a party. The injunction sought by DIA would prejudice the City, because: (1) it would require construction, which is disruptive, and possible even dangerous to the public who uses the Courtyard; (2) it would require the demolition and alteration of City property, action that is usually taken only after public debate and vote; (3) any demolition or alteration would necessarily affect the value of the City's property; and (4) the City would face potential liability for any injuries or accidents involving the elevator, and for any upkeep or replacement that may become

necessary. Therefore, as the owner of that property, the City undoubtedly has an interest in this case.

Earlier in the litigation, DIA joined the City as a party because the City owned the 15th Street Stairwell. DIA and the City subsequently reached a settlement under DIA's Third Amended Complaint. In the settlement, the City agreed that it would give SEPTA permission to build an elevator at the 15th Stairwell and at Dilworth Plaza (JA at 89-90). The settlement agreement, however, makes no reference to an elevator installation in City Hall Courtyard, because DIA did not assert claim regarding City Hall Courtyard until it filed the Fourth Amended Complaint -- six months after the settlement agreement had been reached (JA at 97-108).

Despite SEPTA's argument that the City was a necessary party, the District Court did not undertake a Fed. R. Civ. P. 19 analysis in its decision. Instead, it stated that "there is no evidence from which to reasonably that [sic] the City would not allow the installation of an ADA-compliant elevator at the City Hall Courtyard"<sup>22</sup> (JA at 30). There also is no evidence in the record to conclude that the City would agree to the installation of the elevator in City Hall Courtyard.

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<sup>22</sup> SEPTA raised the joinder issue in a closing argument to the District Court, but did not file a motion (JA at 1160).

Indeed, the City, now under a different administration than the one in office at the time of the settlement with DIA, has advised SEPTA that it does not want an elevator installed in City Hall Courtyard (JA at 1163, ¶ 8).

There was no basis for the District Court to assume that the City would agree to installation of an elevator in City Hall Courtyard. Thus, the District Court abused its discretion by failing to find that the City is a required party under Rule 19.

### **IX. CONCLUSION**

For the foregoing reasons, SEPTA requests that the Court reverse the District Court's decision, remand the case to the District Court, and direct it to apply DOT regulations and to require the City to be joined as a party.

Respectfully submitted,

Dated: May 5, 2010

**STEVENS & LEE**

By s/ Jo Bennett

Michael G. Tierce

mgt@stevenslee.com

Jo Bennett

jb@stevenslee.com

1818 Market Street, 29th Floor

Philadelphia, PA 19103-1702

(215) 751-2883

Attorneys for Appellant

**CERTIFICATE OF ADMISSION TO BAR**

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: May 5, 2010

/s/ Michael G. Tierce

Michael G. Tierce

**CERTIFICATE OF ADMISSION TO BAR**

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: May 5, 2010

/s/ Jo Bennett

Jo Bennett

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the Microsoft Word word processing program, the foregoing Brief of Appellants contains 8,919 words.

Dated: May 5, 2010

/s/ Jo Bennett  
Jo Bennett

**CERTIFICATE OF TEXT**

I, Jo Bennett, hereby certify that the text of this electronically filed Brief and the text of the hard copies of the Brief are identical.

Dated: May 5, 2010

/s/ Jo Bennett  
Jo Bennett

**CERTIFICATE OF A VIRUS CHECK**

I, Jo Bennett, certify that a virus check has been performed on the PDF file containing the forgoing Brief. The virus check was completed using McAfee VirusScan Enterprise 8.5i.

Dated: May 5, 2010

/s/ Jo Bennett  
Jo Bennett

**CERTIFICATE OF SERVICE**

I, Jo Bennett, certify that, on this 5th day of May, 2010, I caused to be served via the Court's CM/ECF filing system electronic copies of Appellant's Brief (containing Joint Appendix, Vol. I), and hard copies of the Joint Appendix, Volumes II through V, via Federal Express on counsel of record at the following addresses:

Stephen F. Gold, Esq.  
Public Interest Law Center of Philadelphia  
1709 Benjamin Franklin Parkway, 2nd Floor  
Philadelphia, PA 19103

Rocco J. Iacullo, Esq.  
Disability Rights Network  
1315 Walnut Street  
Suite 400  
Philadelphia, PA 19107

**To the Clerk's Office for the Third Circuit Court of Appeals:**

1. Ten hard copies each of Appellant's Brief (containing Joint Appendix, Vol. I) by Federal Express;
2. Four hard copies of Joint Appendix, Volumes II through V, by Federal Express; and
3. One electronic copy of Appellant's Brief (containing Joint Appendix, Vol. I) via the Court's CM/ECF filing system.

Date: May 5, 2010

/s/ Jo Bennett  
Jo Bennett

**Appeal No. 09-3964**

**United States Court of Appeals  
for the Third Circuit**

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Disabled in Action Of Pennsylvania,  
Plaintiff-Appellee,

v.

Southeastern Pennsylvania Transportation Authority,  
Defendant-Appellant.

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Appeal from Order of the United States District Court  
for the Eastern District of Pennsylvania  
Case No. 2:03-cv-01577  
Judge Gene E.K. Pratter

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**JOINT APPENDIX  
VOLUME I of V (PAGES JA1 - JA31)**

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**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

Dated: May 5, 2010

*Attorneys for Appellant*

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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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DISABLED IN ACTION OF  
PENNSYLVANIA,

Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY,

Defendant.

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: CIVIL ACTION NO. 03-1577  
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: (JUDGE PRATTER)  
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**NOTICE OF APPEAL**

Notice is hereby given that SEPTA, the Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the District Court's decision granting the Plaintiff's Motion for Summary Judgment and denying the Defendant's Motion for Summary Judgment [Docketed No. 170]. This Notice of Appeal timely follows the entry of the last Order entered by the Court on September 11, 2009 [Docketed No. 171].

Pursuant to Third Circuit Local Appellate Rule 3.1, a copy of this notice is being provided to the trial judge, the Honorable Gene E. K. Pratter.

Respectfully submitted,

STEVENSON AND LEE

Dated: October 9, 2009

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

**CERTIFICATE OF SERVICE**

I, Jo Bennett, certify that on this 9th day of October, 2009, SEPTA's Notice of Appeal was filed electronically and is 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: October 9, 2009

By: /s/ Jo Bennett  
Jo Bennett

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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|---------------------------------------------------------------|---|-------------------|
| <b>DISABLED IN ACTION OF<br/>PENNSYLVANIA,</b>                | : |                   |
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|                                                               | : |                   |
| <b>Plaintiff,</b>                                             | : |                   |
|                                                               | : |                   |
| <b>v.</b>                                                     | : |                   |
|                                                               | : |                   |
| <b>SOUTHEASTERN PENNSYLVANIA<br/>TRANSPORTATION AUTHORITY</b> | : |                   |
|                                                               | : |                   |
|                                                               | : |                   |
|                                                               | : |                   |
| <b>Defendant</b>                                              | : | <b>03-CV-1577</b> |

**ORDER**

AND NOW, this 11th day of September, 2009, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 155), Defendant's Response thereto (Docket No. 162), Plaintiff's Reply (Docket No. 166, 168), Defendant's Motion for Summary Judgment (Docket No. 163), Plaintiff's Response thereto (Docket No. 167), and following oral argument on June 19, 2009, **IT IS HEREBY ORDERED** that Plaintiff's Motion (Docket No. 155) is **GRANTED** and Defendant's Motion (Docket No. 163) is **DENIED**. SEPTA shall, no later than October 30, 2009 submit to the Court, with a copy to Plaintiff's counsel, a proposed schedule of compliance with this Order.

BY THE COURT:

\_\_\_\_\_  
S/Gene E.K. Pratter  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

JA0004

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**DISABLED IN ACTION OF  
PENNSYLVANIA,**

**Plaintiff,**

**v.**

**SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY,**

**Defendant**

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**03-CV-1577**

**M E M O R A N D U M**

PRATTER, J.

SEPTEMBER 11, 2009

In a case with a long and disputatious history before this Court, the parties once again seek summary judgment. Plaintiff Disabled in Action of Pennsylvania (DIA) and Defendant Southeastern Pennsylvania Transportation Authority (SEPTA) both urge this Court to conclude the case, brought under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq., and the Rehabilitation Act of 1973 (RHA), 29 U.S.C. §§ 701, et seq., by ruling summarily in its favor. At stake are, according to DIA, the rights of handicapped individuals who wish to have equal access to Philadelphia public transit, or, according to SEPTA, the fruitless expenditure of scarce resources.

**FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

DIA is a non-profit corporation that advocates for the civil rights of, and services for,

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<sup>1</sup> Because previous opinions in this case have fully set forth the factual and procedural history of the dispute between DIA and SEPTA, see, e.g., DIA v. SEPTA, No. 03-CV-1577, 2006 WL 3392733 (E.D. Pa. Nov. 17, 2006), the Court will seek the benefits of brevity in setting forth the relevant facts.

persons with disabilities. DIA Statement of Facts ¶ 1. SEPTA is “a body corporate and politic which exercises the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof and which provides public transportation in various Southeastern Pennsylvania locales.” SEPTA Resp. to DIA Statement of Facts (“SEPTA Resp.”) ¶ 8. SEPTA operates a “vast network of fixed-route services including bus, subway, subway-elevated, regional rail, light rail, and trackless trolley, as well as customized community service.” DIA Statement of Facts ¶ 9 (quoting DIA Mot. Summ. J. Ex. 3, SEPTA Fiscal Year 2006 Capital Budget, 5). Many of DIA’s members use SEPTA for public transportation. Id. ¶ 2.

The Market-Frankford Elevated Subway Line is a high speed rapid rail line that runs through the City of Philadelphia. SEPTA Resp. ¶ 12. The Broad Street Subway Line runs through the City from Fern Rock Station to Pattison Avenue Station. DIA Statement of Facts ¶ 62. Both stations at issue in this case, namely, the 15th and Market Street Station on the Market-Frankford Line and the City Hall Station on the Broad Street Line, are close to one another in a geographically central location<sup>2</sup> and are interchanges for multiple SEPTA rail lines. See DIA Statement of Facts ¶¶ 17, 70; SEPTA Resp. ¶¶ 17, 70. The 15th and Market Streets Station is located underground in the vicinity of 15th Street and Market Street. DIA Statement of Facts ¶ 15; SEPTA Resp. ¶ 15. The City Hall Station is located underground in the vicinity of Broad and Market Streets. DIA Statement of Facts ¶ 56; SEPTA Resp. ¶ 56.

There are two primary means of ingress by which a pedestrian can descend from 15th and Market Streets to the concourse and subway entrances below. From the southwest side of Market

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<sup>2</sup> Both of the transit stations are located in the central part of Philadelphia’s Center City business district, close to City Hall, various government buildings, and many high-rise office buildings.

Street at 15th Street, a pedestrian may utilize a stairway which leads directly to a concourse area and the Market-Frankford Line cashier booths. See SEPTA Resp. ¶ 20 (“15th Street Market-Frankford Station has its own street level open-air entrance located at the southwest corner of 15th and Market Streets in an area commonly known as ‘the Clothespin.’”) From the northwest side of Market Street at 15th Street, another stairway descends to the 15th Street Courtyard which, if one turns northward, leads to Suburban Station and, if one turns southward and travels about 20 feet, leads to the cashier booths for the Market-Frankford Line. See SEPTA Resp. ¶ 20 (“[I]n order to reach the 15th Street Market-Frankford Station, an individual who enters the Suburban Station Transit Facility at the 15th Street Courtyard must travel south in the 15th Street corridor, exit Suburban Station, and travel over underground transit lines before entering 15th Street Market-Frankford Station.”); June 19, 2009 Tr. at 20, 32. The parties dispute whether the stairway located on the northwest side of Market Street is an entrance to the 15th Street Market-Frankford Station or an entrance to the Suburban Station transit facility. DIA Statement of Facts ¶ 20; SEPTA Resp. ¶ 20.

There are several ways to access the City Hall Station on the Broad Street Subway Line. There are two stairways, one at Dilworth Plaza at street level, on the west side of City Hall, which leads to the lower north concourse, and another at street level at the City Hall Courtyard, which leads to the lower south concourse. DIA Statement of Facts ¶ 65. There is also a single escalator that runs from the lower south concourse to the southeast portion of the City Hall Courtyard.<sup>3</sup> DIA Statement of Facts ¶ 66. From the lower south concourse under the City Hall

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<sup>3</sup> SEPTA vigorously disputes that this escalator is an “exit” from City Hall Station, contending that it is not. However, SEPTA admits that it is an exit from the lower south concourse. See SEPTA Resp. ¶ 65.

Courtyard, a pedestrian can head east, without using any stairs, to reach the 13th Street and 11th Street Stations on the Market-Frankford Line, DIA Statement of Facts ¶ 68; SEPTA Resp. ¶ 68, and can travel east and then south, again without using any stairs, to reach the South Broad Street concourse, the Walnut-Locust Broad Street Subway Station and the Port Authority Transit Corporation (PATCO) station located at 15th and Locust Street. DIA Statement of Facts ¶ 69; SEPTA Resp. ¶ 69.

Originally, plans to replace the stairway at 15th and Market were included in a project that encompassed renovations in an area bounded by 15th, 18th, Market and Cuthbert Streets. SEPTA Statement of Facts ¶ 6; DIA Resp. ¶ 6. Ten years ago, on or about September 27, 1999, the United States Department of Commerce notified SEPTA that SEPTA and the City of Philadelphia were the recipients of an Economic Development Administration Award to partially fund a proposed project entitled "Renovation of 15th and Market Streets Headhouse at Suburban Station." SEPTA Mot. Summ. J. Ex. 54 at COP-247. The Award letter included a "project definition" stating that the project "would involve various renovations to the 15th and Market Street entrances and related areas serving the renovation of entrances to the underground train station concourse; demolition of existing facilities; the construction/installation of new stairs, landscaping, lighting, signage, finishes, canopies; and all appurtenances." *Id.* at COP-251. The terms of the Award required that construction commence within 18 months after receipt of the Award and that the construction period would be 29 months. *Id.* at COP-250. Therefore, the construction of the new stairway was put into an "accelerated phase" of the project. SEPTA Statement of Facts ¶ 21; DIA Resp. ¶ 21.

Prior to the commencement of the construction project prompted by the Award, the

entrance at the northwest corner of the 15th and Market Streets consisted of a stairway that descended into the center of a courtyard and two escalators enclosed within a headhouse. DIA Statement of Facts ¶ 45; SEPTA Resp. ¶ 45.

In February 2001, SEPTA began construction to replace the concrete stairway. DIA Statement of Facts ¶ 47; SEPTA Resp. ¶ 47. When the project was concluded, the stairway was replaced and situated along the southeastern wall of the courtyard. The replacement stairway brings an ambulatory person from street level to the same point within the courtyard as did the old stairway. See DIA Statement of Facts ¶ 47; SEPTA Resp. ¶ 47. The parties agree that these stairs were replaced because, due to deterioration of the concrete, the old staircase was beyond repair. DIA Statement of Facts ¶¶ 50, 53; SEPTA Resp. ¶¶ 47, 53. The new stairway was opened to the public on August 8, 2002. DIA Statement of Facts ¶ 58; SEPTA Resp. ¶ 58. Later, as part of the Suburban Station Renovation Project, two elevators were installed that provided vertical access from street level to the Suburban Station concourse level at JFK Boulevard near 17th Street and on 16th Street between Market Street and JFK Boulevard. SEPTA Statement of Facts ¶ 16; DIA Resp. ¶ 16.

In August 2003, SEPTA completed the replacement of an escalator in the southeast corner of the City Hall Courtyard. DIA Statement of Facts ¶ 71; SEPTA Resp. ¶ 71. The parties agree that the escalator that was replaced had deteriorated and was inoperable. SEPTA asserts that it reasonably opted to replace the escalator rather than to try to repair it. DIA Statement of Facts ¶ 72; SEPTA Resp. ¶ 72. The escalator ascends from the City Hall concourse, one level above the City Hall Station boarding area, to the City Hall Courtyard. SEPTA Resp. ¶ 73.

The replacement of this escalator was part of the Escalator Replacement Program that

SEPTA initiated in 1999. DIA Statement of Facts ¶ 73; SEPTA Resp. ¶ 73. Although the parties dispute the reason for doing so, SEPTA relocated the truss in the wellway for the new escalator.<sup>4</sup> DIA Statement of Facts ¶ 75, 76; SEPTA Resp. ¶¶ 75, 76. The new escalator was installed in the same wellway that the old escalator had occupied. SEPTA Resp. ¶¶ 75, 76. The headhouse of the escalator bears the words "Broad Street Subway Exit Only." See Pl.'s Ex. 44 (photograph of escalator headhouse).

In this litigation, DIA seeks declaratory and injunctive relief under the ADA and RHA that would ultimately require SEPTA to modify the Courtyard at the northwest corner of 15th and Market Street and the exit from the lower southeast concourse to the southeast portion of the City Hall courtyard to make them accessible to individuals who use wheelchairs. The procedural background of this case is fully set forth in the opinion at DIA, 2006 WL 3392733, at \*8-10. In that opinion, the Court granted SEPTA's motion for summary judgment and denied DIA's motion for summary judgment. Specifically, the Court dismissed DIA's Count I on statute of limitations grounds. DIA timely appealed the Court's decision, and the Third Circuit Court of Appeals reversed the Count I portion of this Court's decision to hold that Count I was not barred by the statute of limitations. See DIA v. SEPTA, 539 F.3d 199 (3d Cir. 2008). Upon the remand of the case here, both parties again filed motions for summary judgment.<sup>5</sup>

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<sup>4</sup> The truss is the structural piece that physically supports the escalator along its length. DIA Statement of Facts ¶ 76. The parties dispute the reason why the truss for the new escalator needed to be relocated. DIA contends that the prior escalator had inadequate vertical clearance for the new escalator, while SEPTA contends that a contractor's mistake resulted in the replacement escalator lacking the necessary vertical clearance. DIA Statement of Facts ¶ 75; SEPTA Resp. ¶ 75.

<sup>5</sup> The present summary judgment motions deal with Count I, the only claim left in the case.

## DISCUSSION

### A. Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id. The standards by which a court decides a summary judgment motion do not change when, as here, the parties file cross-motions. SEPTA v. Pa. Pub. Util. Comm’n, 826 F. Supp. 1506, 1512 (E.D. Pa. 1993).

### B. The ADA and the Rehabilitation Act of 1973

The ADA and the Rehabilitation Act of 1973 require, as to public transportation facilities, that:

[w]ith respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility 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). As previously framed by Third Circuit Court of Appeals, “the relevant question is to what extent any alterations to a facility provide an opportunity to make the facility more accessible to handicapped persons.” DIA v. Sykes, 833 F.2d 1113, 1120 (3d Cir. 1987)

(discussing a Rehabilitation Act claim). The ADA directed the Department of Transportation to issue regulations to effectuate the provisions of the ADA relating to public transportation and to do so in a manner consistent with the guidelines issued by the Architectural and Transportation Barriers Compliance Board.<sup>6</sup> See 42 U.S.C. § 12149. The Department of Transportation's regulations can be found at 49 C.F.R. Part 37. They state, in pertinent part, that a transportation facility is readily accessible if it complies with the DOT's regulations and with ADAAG. See 49 C.F.R. § 37.9.<sup>7</sup>

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<sup>6</sup> These guidelines are called the ADA Accessibility Guidelines, or "ADAAG," and the portions applicable to the transportation facilities at issue here are the 1991 version of ADAAG. See 49 C.F.R. § 37.9(c); 49 C.F.R. Appendix A.

<sup>7</sup> No Third Circuit court has addressed the issues of the allocation of burdens of proof and persuasion in a case involving alterations under the ADA, either in the context of public transportation facilities or in the context of other types of facilities covered by the ADA, and neither of the parties here has briefed this issue. The Second Circuit Court of Appeals recently addressed the burdens issue in a Title III case. See Roberts v. Royal Atlantic Corp., 542 F.3d 363 (2d Cir. 2008). In Roberts, the plaintiffs claimed that the defendant-resort altered portions of the facility without making them readily accessible to the maximum extent feasible. See id. The court borrowed from case law involving "reasonable accommodations" under the Rehabilitation Act in setting out the proper allocation of burdens, holding that a plaintiff bears the burden of production (and "not a heavy one") and must set forth a facially plausible argument that a modification is an alteration and that the alteration could be or could have been made readily accessible. See id. at 370-72. Once the plaintiff does this, the defendant carries the burden of persuasion to establish that the modification is not an alteration and/or that the plaintiff's accessibility proposal is impossible in light of the nature of the facility. The court reasoned that this burden-shifting approach is appropriate because defendants in ADA cases have "superior access" to facility-related information. See id.

The Third Circuit Court of Appeals has specifically approved of the Second Circuit Court of Appeals' burden-shifting approach in Rehabilitation Act claims. See Walton v. Mental Health Assoc. of Southeastern Pa., 168 F.3d 661, 670 (3d Cir. 1999) (adopting the Second Circuit approach, and noting that it "places the burden on the party holding evidence with respect to the particular issue"). As the Second Circuit Court of Appeals noted in Roberts, such an approach also makes sense in ADA alterations cases where the defendant has "superior access" to facility-related information. The Court need not decide whether this approach is the right analytical framework to apply here, however, because the parties here have not attacked each other's positions in terms of having or not having burdens and, in any event, the Court finds that the

No one disputes that SEPTA is a public entity. Nor does SEPTA challenge DIA's assertion that DIA has standing to pursue this case. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (organization has standing when it suffers "concrete and demonstrable" injury, for instance, when its resources must be expended on remedying allegedly discriminatory actions by defendant). Thus, the present dispute comes down to three questions: 1) Was the construction done at the 15th and Market Courtyard and/or at the City Hall Courtyard an "alteration" under the ADA? 2) Are the altered facilities "readily accessible?" 3) Is it technically "feasible" for SEPTA to make the altered facilities (or portions thereof) accessible for individuals who use wheelchairs?

*1. Alterations*

The first question the Court must answer is whether the construction at issue constituted alterations for purposes of the ADA. Alterations are defined as:

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; see also ADA Accessibility Guidelines ("ADAAG") § 3.5 ("An alteration is a change to a building or facility that affects or could affect the usability of the building or facility or part thereof."). SEPTA contends that the replacement of the stairway at the northwest corner of 15th and Market was not an alteration, and neither was the replacement of the City Hall

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plaintiff has proved, and the defendant has not disproved, that SEPTA altered its facilities without making them readily accessible to the maximum extent feasible.

Courtyard escalator. Not surprisingly, DIA claims that both replacements were indeed alterations within the meaning of the law.

There is no dispute that SEPTA demolished the stairs located at the northwest corner of 15th and Market and replaced them with a new set of stairs and that the escalator at City Hall was replaced with an entirely new escalator. DIA argues that these replacements should be considered alterations and cites two Third Circuit Court of Appeals cases, as well as cases from other circuit and district courts to support its position. SEPTA counters that the replacements were merely one step along the continuum of normal maintenance and interprets the cases cited by DIA as either distinguishable or wholly inapplicable.

First, DIA cites Kinney v. Yerusalem, 9 F.3d 1067 (3d Cir. 1993). In Kinney, the Third Circuit Court of Appeals examined the meaning of “alteration.” Plaintiffs had sued the City of Philadelphia, seeking an injunction that would require the City to install curb ramps at intersections when it resurfaced streets. Id. at 1069. The parties filed cross motions for summary judgment that turned on the issue of whether street resurfacing constituted an alteration for purposes of the ADA. Id. Because resurfacing the street makes driving on and crossing it easier and safer, and prevents damage to vehicles and injury to people, the court upheld the district court’s holding that resurfacing enhanced the usability of the street and, therefore, was an alteration. Id. at 1073-74. Hence, DIA argues that, as with street resurfacing, the installation of a new stairway or escalator when an old one is unsafe and in disrepair similarly enhances the usability of the stairway or escalator, making the work at issue in this case ADA “alterations.”

SEPTA counters that Kinney was decided under different regulations from the ones applicable here, involved a regulatory mandate compelling public entities to lay out a transition

plan with regard to the installation of curb cuts, and used Title III criteria “wholly inapplicable to public entities providing mass transportation,” rather than Title II criteria. See SEPTA Resp. at 24.<sup>8</sup>

SEPTA also argues that applying the general reasoning of Kinney inappropriately ignores specific guidance applicable to the instant case, namely guidelines that “(1). . .require[] vertical access at an escalator or stair only where none previously existed and major structural modifications are required for the installation, (2). . .require[] only one accessible entrance to a building so long as signage is appropriate, and (3). . .requir[e] only one accessible route from an accessible entrance [in key stations].” Id. at 25.<sup>9</sup>

As to the first guideline that SEPTA contends should be considered here, the referenced regulation states that, “If an escalator or stair is planned or installed where none existed previously and major structural modifications are necessary for such installation, then a means of accessible vertical access shall be provided. . .” ADAAG § 4.1.6(1)(f). ADAAG § 4.1.6(1)(f) does not explicitly say that vertical access is only required under such circumstances. Certainly, one could argue that conclusion is implied, but it is also possible to see this guideline as simply clarifying the requirements in a specific and unequivocal situation without stepping in to the murky waters of other situations involving potential alterations to stairs and escalators.

Responding to SEPTA’s argument, DIA appears to mischaracterize the requirement regarding

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<sup>8</sup> DIA counters that the Kinney is not based on Title III, but on Title II, that the alterations requirement there was nearly identical to the alterations requirement at issue in this case, and that the Kinney court relied upon the definition of “alteration” in ADAAG.

<sup>9</sup> The latter reasons 2 and 3 are more appropriately related to the discussion of accessibility, so these arguments will be discussed later.

new stairs and escalators as a requirement covering new construction, despite the fact that the regulation covers the addition of a staircase or escalator to an existing structure and despite the fact that the regulation appears in a section of the regulations specifically devoted to alterations. Regardless, the guideline simply does not state that a means of vertical access must be provided only when a new staircase or escalator is installed, and the Court refuses to read such a requirement in to the guideline.

Both DIA and SEPTA purport to rely on DIA v. Sykes, 833 F.2d 1113 (3d Cir. 1987), a pre-ADA decision. Sykes concerned renovations to the Columbia Avenue subway station. Id. at 1114-15. In that case, one stairway on the northbound side was either partially or entirely reconstructed, as were two stairways on the southbound side. On the northeast side, a new headhouse, two new stairways, and a new escalator were installed. Id. at 1120. The court held that it was “beyond dispute” that the northeast side construction was an “alteration” for purposes of compliance with applicable regulations. Id. at 1121. As to the construction of the stairways on the southbound side, the appellate court held that it was not clear whether those renovations amounted to normal maintenance or to an “alteration,” and so the court remanded the case for consideration of this issue. Id.

The parties disagree as to whether the northbound or southbound construction in Sykes is more like the present case. DIA claims that the northbound side demolition and replacement of a stairway parallels both the 15th Street stairway and City Hall Station escalator reconstruction, omitting the addition of new stairways and a new escalator in addition to the replacement of the stairway in that case. SEPTA, in turn, emphasizes the fact that in Sykes one of the stairways and escalator were installed where none existed previously. SEPTA also contends that the remand of

the Sykes case as to the southbound side demonstrates that the construction in this present case is not sufficient to meet the threshold of normal maintenance. Thus, SEPTA ignores that the Third Circuit Court of Appeals expressly refused to rule in Sykes on whether the construction on the southbound side was an alteration, which naturally permits the implication that construction involving the partial or total reconstruction of an existing stairway could be an alteration, not that the partial or total reconstruction of an existing stairway is never an alteration under the statute. All in all, then, the Court concludes that Sykes does not definitively favor either party here.

SEPTA also argues that the replacements of the stairs and escalator do not constitute alterations because the replacements did not change the access to the station; nor did they substantially change the locations of the stairs and escalator.<sup>10</sup> SEPTA points to a letter from FTA Regional Administrator Sheldon A. Kinbar to SEPTA's general manager, noting that under the ADA, "where elevators, escalators and other accessibility features exist, they must be maintained." See Def.'s Ex. 69. The author of this letter asks for a schedule for "repair or replacement" of out-of-service elevators and escalators.

SEPTA contends that these statements, coupled with the absence of any mention that the replacement of an escalator might trigger a vertical accessibility requirement, show that the FTA equates "repair" with "replacement" and, therefore, that a replacement "is merely normal maintenance." SEPTA emphasizes that no "major structural modifications," such as moving walls, were involved in the replacement of either the stairway or the escalator. Rather, in a straight-faced flourish of euphemistic word-smithing, SEPTA declares that "replacement" is

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<sup>10</sup> The new stairway was installed at a different starting point but ends at the same place as the old stairway.

simply the “final act of maintenance” in the normal life of a stairway or escalator. See SEPTA Statement of Facts ¶ 45. SEPTA contends that absent “major structural modifications,” usability and accessibility cannot be affected, and, therefore, no alteration has taken place. SEPTA also submits the testimony of expert Donald L. Kloehn, who opines that SEPTA’s replacements do not constitute alterations. See Def.’s Ex. 50.

DIA responds that SEPTA’s argument ignores the plain meaning of the statute, that the terms “remodeling, renovation, rehabilitation, reconstruction,” which are included in the DOT’s definition of alteration at 49 C.F.R. § 37.3, apply here. DIA also disputes SEPTA’s interpretation of the Kinbar letter, noting that Mr. Kinbar did not discuss any requirements related to alterations and that his letter was not a comprehensive consideration of all ADA requirements that could possibly be implicated.<sup>11</sup> DIA claims that SEPTA’s expert, Mr. Kloehn, misunderstands the ADA’s requirements. DIA suggests that Mr. Kloehn focused on whether a reconstruction altered the accessibility of a facility, not whether it altered the usability of a facility, noting that accessibility was the old standard under the Rehabilitation Act. In this regard, DIA cites Mr. Kloehn’s deposition testimony in which he stated that the replacement of the stairway could be called remodeling, renovation, and reconstruction. See Pl.’s Ex. G at 75.

DIA’s point regarding the plain language of the governing statute is more persuasive on this issue. It is undisputed that (1) the old stairway and escalator were removed and replaced with a new stairway and escalator, (2) the new stairway and escalator are not the same as the old

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<sup>11</sup> Both parties appear ready to accept the Kinbar letter as admissible evidence and accept that its contents could be officially efficacious. The Court questions those assumptions, but concludes that even if the parties’s assumptions were correct, the letter does not help or undermine either litigant.

ones, and (3) the old stairway and escalator were in disrepair when replaced. Indeed, 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. The Court finds it inescapable as a conclusion that replacing a stairway that is unsafe and an escalator that is inoperable with a safe stairway and an operating escalator unequivocally enhances the usability of the stairway and escalator portions of the SEPTA facilities. Hence, the Court holds that the replacements of the stairway and escalator at issue here were alterations under the statute.

2. *Accessibility*

a. 15th and Market Courtyard

In order to come within the reach of the statute at issue here, the alterations must be to “an existing facility or part thereof used in the provision of designated public transportation services.” 42 U.S.C. § 12147(a). As to the 15th and Market Courtyard, DIA and SEPTA appear to agree that it is a facility or part of a facility used in the provision of public transportation services, but the parties diverge when it comes to the question of which facility it is a part of. Rather than addressing the issue of which station the 15th and Market Courtyard is part of, however, the Court concludes that the choice does not matter.<sup>12</sup>

SEPTA argues that certain of the ADAAG provisions, as well as case law, relieve it from

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<sup>12</sup> The Third Circuit Court of Appeals noted in its opinion concerning this case that the 15th and Market Courtyard “undisputedly provides access to the Market-Frankford Station,” and thus assumed for purposes of that opinion that the Courtyard is an entrance to that Station, leaving it up to this Court to determine the relevance of the issue on remand. See DIA, 539 F.3d at 202 n.1. This Court finds that SEPTA has not met the ADA’s requirements regardless of which facility, Suburban Station or 15th Street Station, the Courtyard is a part of, so the “geographical” issue is not relevant to liability in this case.

any obligation to provide vertical access at the 15th and Market Courtyard for individuals with wheelchairs if that Courtyard is part of Suburban Station. SEPTA also argues that even if the Courtyard is not part of Suburban Station, individuals in wheelchairs are able to get to the bottom of the stairs at 15th and Market by taking an elevator at 16th between JFK and Market and traveling through the concourse. Thus, SEPTA concludes that the 15th and Market Courtyard is already readily accessible.

DIA, on the other hand, argues that the 15th and Market Courtyard is part of 15th Street Station, and because 15th Street Station has no readily accessible entrance, SEPTA was required to provide one when it altered the 15th and Market Courtyard. In the alternative, DIA contends that even if the 15th and Market Courtyard is part of Suburban Station, the ADAAG does not relieve SEPTA of making the Courtyard accessible to individuals in wheelchairs because the Department of Transportation regulations require more than merely meeting ADAAG's standards and because SEPTA does not, in any event, meet those standards. DIA also argues that an elevator located 340 feet away from the Courtyard does not make the Courtyard "accessible."

Aside from ADAAG § 4.1.6(1)(f), which SEPTA claims obligates it to install an elevator only if a new staircase or escalator is built where none previously existed (an argument which this Court addressed, supra), SEPTA also cites ADAAG §§ 10.3.2(1), 10.3.2(2) and 4.1.6(1)(h).

Sections 10.3.2(1) and 10.3.2(2) concern requirements for Key Stations, of which Suburban Station is one. As DIA points out, the Department of Transportation's regulations regarding alterations make clear that the Key Station requirements are "separate from and in addition to" the general alterations requirements. 49 C.F.R. §§ 37.47(a), 37.51(a). Thus, even if SEPTA is in compliance with the Key Stations guidelines, that does not excuse it from

complying with the general alterations guidelines and regulations.<sup>13</sup>

SEPTA also claims that ADAAG § 4.1.6(1)(h) requires only one accessible entrance to a facility, provided that signage is appropriate. ADAAG § 4.1.6(1)(h) states:

Entrances: If a planned alteration entails alterations to an entrance, and the building has an accessible entrance, the entrance being altered is not required to comply with 4.1.3(8), except to the extent required by 4.1.6(2). If a particular entrance is not made accessible, appropriate accessible signage indicating the location of the nearest accessible entrance(s) shall be installed at or near the inaccessible entrance, such that a person with disabilities will not be required to retrace the approach route from the inaccessible entrance.

ADAAG § 4.1.6(1)(h). Section 4.1.3(8), which is specifically referenced, provides minimum requirements for entrances for newly constructed buildings; the portion of that rule that may possibly come into play here is the requirement that a new building must have at least as many accessible entrances as it has fire exits.<sup>14</sup> However, even if SEPTA has appropriate signage and is exempt from providing as many accessible entrances as it has fire exits, that does not necessarily mean that SEPTA is only obligated to provide one accessible entrance.

DIA apparently has no quarrel with existing signage but counters that if a large facility like Suburban Station only needed to have one accessible entrance, people with disabilities

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<sup>13</sup> On a related note, with regard to the FTA review that SEPTA argues demonstrates that its Suburban Station renovation project was in compliance with the ADA, *see* SEPTA Ex. 74, DIA sensibly argues that to the extent the FTA review only looked at whether the renovations met “Key Station” requirements, not all alteration requirements, the FTA approval is of no moment.

<sup>14</sup> The remainder of the guideline directs how many accessible entrances must be part of an accessible route (at least 50%) and how many accessible entrances must be provided for each tenancy in the building; it also sets forth requirements for entrances from garages and tunnels and provides specific guidance for entrances to correctional and judicial facilities. Thus, whether SEPTA is exempt from these other requirements or not has no bearing on the issues here, as many of them are inapplicable in any case.

would be unacceptably disadvantaged by having to traverse possibly blocks and blocks while non-disabled people could easily access their desired destination. DIA also points out that the regulations promulgated by the DOT to effectuate the ADA require compliance with ADAAG and with DOT regulations; hence, compliance with ADAAG does not inexorably equal compliance with the ADA. See 49 C.F.R. § 37.9 (stating that a transportation facility must meet the requirements of ADAAG and the requirements of the DOT regulations to be considered readily accessible).

In addition to this regulation, SEPTA cites several cases which, it argues, hold that one accessible entrance is enough under the guidelines. SEPTA's confidence in citing these cases is puzzling. None of them interpret the guideline sections cited by SEPTA, and each is easily distinguishable, as discussed below.

For example, in Kasten v. Port Auth. of NY & NJ, No. 98-CV-4988, 2002 WL 31102689 (E.D.N.Y. Sept. 10, 2002), the court held that one elevator connecting all four floors of an airport terminal was sufficient to comply with the ADA. Id. at \*4. However, the Kasten plaintiffs did not contend that the subject terminal was either newly constructed or altered; thus, the more restrictive alteration requirements were not triggered. The court noted in dicta that the guidelines applicable to new construction of airport facilities require at least one accessible route between parking and an accessible building entrance, and that under the circumstances of that case, one elevator would have been enough even if the terminal was newly constructed. However, of considerable significance for present purposes, the court also noted that "the phrase 'at least one' indicates that the existence of a single accessible route may not suffice in every situation." See id.; see also, e.g., Durante v. County of Belknap, No. Civ. 03-333-SM, 2005 WL 361450, at \*2

(D.N.H. Feb. 16, 2005) (holding that only one accessible entrance was required under the circumstances of that case, but not addressing a situation with alterations or new construction); Long v. Coast Resorts, Inc., 32 F. Supp. 2d 1203, 1212 (D. Nev. 1999) (noting in dicta that “[e]very entrance or exit is not required to be wheelchair-accessible,” but certainly not holding that only one entrance to a facility need be accessible in every case).

SEPTA also cites Sykes for the proposition that only one accessible entrance is required. In Sykes, the court did apply a standard that required “at least one primary entrance” to be wheelchair-accessible. See Sykes, 833 F.2d at 1120. However, not only does that standard predate both the ADA and the ADAAG, but the court did not address whether the language “at least one primary entrance” should be construed as requiring only one accessible entrance or, as the Kasten court posited, as indicating that “the existence of a single accessible route may not suffice in every situation.” See Kasten, 2002 WL 31102689, at \*4. Indeed, the Sykes court did not explicitly address the issue of whether one or more than one accessible entrance was required.

SEPTA cites two more cases which it argues show that the Courtyard is already readily accessible to disabled individuals because its 16th Street elevator allows individuals in wheelchairs to access the Courtyard: Hassan v. Slater, 41 F. Supp. 2d 343 (E.D.N.Y. 1999), and Civic Assoc. of the Deaf of NYC, Inc. v. Giuliani, 970 F. Supp. 352 (S.D.N.Y. 1997). In Hassan, a disabled individual sued railroad operators when they shut down a train station, requiring him to travel an additional four and a half miles to reach an accessible station. The court ruled against the plaintiff. See Hassan, 41 F. Supp. 2d at 344-46. A crucial difference between that case and this one that SEPTA does not address is that in Hassan, the entire facility, i.e., the

station, was eliminated for everyone, disabled and non-disabled alike. While the burden of traveling extra distances falls more heavily on disabled individuals under such circumstances than on those who are not disabled, the complete elimination of access for everyone is not as discriminatory as it would be to force disabled individuals to travel extra distances while non-disabled individuals do not have to suffer the burden of additional travel.

In Giuliani, disabled individuals sued the City of New York when the number of street alarm boxes was reduced, arguing that deaf individuals who had to travel an additional distance to report an emergency from the street were discriminated against because hearing individuals could report a street emergency using either the alarm boxes or readily available pay phones. See Giuliani, 970 F. Supp. at 359-63. The court held that there was no alteration, so the question was not whether the City had an affirmative obligation to make the system readily accessible to the maximum extent feasible, but rather whether the system was readily accessible as it existed. Id. at 361. The court found that there was not enough evidence regarding accessibility to support extending a preliminary injunction preventing the City from removing call boxes (or restoring only some call boxes in certain areas), but, ultimately, the court left the question of accessibility open. Id. at 363-64.

The guidelines and cases cited by SEPTA do not excuse SEPTA for failing to make the 15th and Market Courtyard wheelchair-accessible, regardless of whether it is part of Suburban Station (which already has accessible entrances), 15th Street Station (which has no accessible entrance), or both. Still open, then, is the question of whether the Courtyard is readily accessible as required by the statute. SEPTA would have the Court find that an elevator located 340 feet away makes the Courtyard readily accessible. DIA would, obviously, have the Court find that

the Courtyard is not readily accessible by the “availability” of the elevator 340 feet away.

Counsel for DIA pointed out that a wheelchair-bound individual who wanted to get to the bottom of the 15th and Market Courtyard would have to travel 680 feet more than a person who is not in a wheelchair (340 feet to the elevator from 15th and Market and 340 feet back to the Courtyard). At oral argument, SEPTA’s response to this dose of physical reality amounted to little more than a verbal shrug, acknowledging the basic accuracy of the distance calculation.

Requiring individuals in wheelchairs to travel more than the length of two football fields to reach the same point that everyone else can reach without such effort flies in the face of the principles of equal access promoted by the ADA. The Court notes that this same principle is expressed in ADAAG § 10.3.1(1), a guideline governing the new construction of fixed facilities and stations for public transportation, which states that “[e]lements such as ramps, elevators or other circulation devices, fare vending or other ticketing areas, and fare collection areas shall be placed to minimize the distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public.” (emphasis added.) Although this guideline does not apply directly to the alterations here, it affirms that minimizing extra travel burdens on those with disabilities is an important consideration for public transportation facilities. Thus, the Court concludes the 15th and Market Courtyard as SEPTA has now configured it is not readily accessible to individuals with disabilities.

b. City Hall Courtyard

As to the escalator from the concourse level to street level at the southeast corner of the City Hall Courtyard, SEPTA claims that it is not part of the City Hall Broad Street Station, but

rather is part of the lower south concourse. SEPTA points out that to get from the bottom of the escalator to the platform, a person must traverse the mezzanine to the ticket booths, go through a turnstile and take a flight of stairs to either the north- or south-bound platforms (i.e., access from platforms to the escalator is not direct).

To prove that the escalator is part of City Hall Station, DIA cites to minutes of a April 20, 2001 meeting between SEPTA and the City of Philadelphia which discusses the replacement of the escalator at “City Hall Station (Southeast entrance)” (Pl.’s Ex. 42), as well as renovation schematics labeled “City Hall Station Renovations” that show the escalators, Pl.’s Exs. 33, 34, and photographs showing the escalator headhouse on which the words “Broad Street Subway, Exit Only” appear, Pl.’s Ex. 44.

With respect to the issue of whether the escalator is an exit from (and therefore a part of) City Hall Station, the Third Circuit Court of Appeals called SEPTA’s definition of “exit” “hyper-technical.” DIA v. SEPTA, 539 F.3d at 205 n.8. The photograph showing the escalator as clearly labeled “Broad Street Subway Exit Only” suggests that SEPTA’s argument is not only hyper-technical, but also disingenuous. What SEPTA seems to be trying to achieve with its “hyper-technical” definition is significant inasmuch as providing an elevator at the location where the escalator is found will not allow disabled individuals to access the platform of the station. While this is undoubtedly true, that fact does not make the escalator any less a part of City Hall Station. As DIA argues, the ADA speaks of alterations to a facility or “a part thereof,” see 42 U.S.C. § 12147(a), and the ADA is an incremental statute. Given that eventually SEPTA will alter the stairway to the platform, triggering a requirement of additional accessibility, at that point, wheelchair-bound individuals will have an accessible exit waiting for them at the

mezzanine level.

Having concluded that the escalator is a part of City Hall Station, the next question, then, is whether the altered portion of City Hall Station at issue is readily accessible. There are no guidelines regarding exits. The evidence before the Court, then, is that none of the exits (or entrances that also serve as exits) directly from City Hall Station are accessible. Unlike with the 15th and Market Courtyard, SEPTA does not argue that the escalator at City Hall Station is otherwise readily accessible.<sup>15</sup> Thus, the Court concludes the City Hall Courtyard escalator is not readily accessible to individuals with disabilities.

### 3. *Feasibility*

The final piece of the puzzle is to determine whether it is technically feasible to grant DIA the relief it seeks. The ADA requires that when alterations are made, they should be completed “in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.” See 42 U.S.C. § 12147(a) (emphasis added). According to the Department of Transportation ADA regulations, “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 accessibility standards through a planned alteration.” 49 C.F.R. § 37.43(b). Thus, contrary to what one might consider—especially during times of inescapable

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<sup>15</sup> The parties spent relatively little time in their briefs and at oral argument on the City Hall Station issues, as compared to the 15th and Market Courtyard issues. Given the level of intense engagement exhibited by both parties in this case, however, the Court assumes that if an argument was to be made regarding whether the City Hall Courtyard escalator was readily accessible, it would have appeared in the parties’ briefs.

economic challenges in the public and private sectors—under the governing legislation and related regulations, the only considerations to be made when determining whether an alteration was made in an accessible manner to the maximum extent feasible are those of technical feasibility, not economic feasibility. Cf. Title III Final Rule, 56 Fed. Reg. at 35,581 (Department of Justice comments on similar provision applying to Title III cases, which states: “The legislative history of the ADA indicates that the concept of feasibility only reaches the question of whether it is possible to make the alteration accessible in compliance with this part. Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible.”)

a. 15th and Market Courtyard

DIA argues that Terry G. Heiser, a professional engineer employed by SEPTA as a Senior Project Manager, stated in a March 14, 2006 affidavit, “If the Court were now to order that an elevator should be built in the 15th Street Courtyard, it would take approximately three years to design and construct an elevator in that location. I approximate the total cost of such an elevator to be \$810,000.” Def.’s Ex. 23 at ¶ 8. Therefore, DIA argues, the addition of an elevator to the 15th and Market Courtyard is “feasible.” Trying to retreat from the impact of its engineer’s affidavit, SEPTA replies in its response to DIA Statement of Facts ¶ 60, that at his deposition, Mr. Heiser said that it was “probably” feasible to install an elevator, that he would “have to see what the interferences are going down there,” and that the likelihood of feasibility was “more than 50/50.” See Pl.’s Ex. 24, Heiser Dep. at 54, lines 11-21. However, in a June 26, 2009 letter in which SEPTA clarified its position regarding whether an elevator could feasibly be installed (“June 26, 2009 Letter”), SEPTA disputed the feasibility of installing an elevator at the City Hall

Courtyard, but, as to the 15th and Market Courtyard, rested on its argument that only one entrance to a facility be made accessible without pursuing the feasibility issue. Noting also that Mr. Heiser's affidavit followed his deposition by some five months, the Court finds that SEPTA could feasibly install an elevator at the 15th and Market Courtyard.<sup>16</sup>

b. City Hall Courtyard

As to the City Hall Courtyard, the evidence issue is largely similar. DIA argues that Skip Brooke, a professional architect and SEPTA's Director of Engineering in the Bridges and Buildings Department, stated in an affidavit that "[t]he approximate cost to install one elevator in the City Hall Courtyard would be approximately \$2 million." See Def.'s Ex. 35 at ¶ 36. It also cites to deposition testimony in which Mr. Brooke stated that "[a]s far as I know, it is technically feasible to install an elevator in [City Hall Courtyard to the concourse level]." See Brooke Dep., Pl.'s Ex. 35 at p. 95, lines 14-16. SEPTA's response is that Mr. Brooke's testimony is "not unequivocal." See June 26, 2009 Letter. SEPTA points to another portion of Mr. Brooke's deposition in which he testified that "[f]rom an engineering point of view, virtually anything is feasible." See Brooke Dep., Pl.'s Ex. 35 at p. 82, lines 24-25. At that point in the deposition, SEPTA's counsel volunteered that Mr. Brooke was not the "right person to ask" about technical

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<sup>16</sup> Following the Second Circuit Court of Appeals' approach with respect to burden allocation in Roberts, discussed supra, DIA needed to set forth a facially plausible option to make the altered portion of the facility readily accessible; SEPTA then bore the burden of showing that the option was not feasible. Certainly, SEPTA has failed to present any evidence that an elevator could not be installed at 15th and Market. However, even assigning the burden entirely to DIA, the Court finds that DIA has presented the sworn affidavit of one of SEPTA's own employees estimating the cost and time required to install an elevator at that location, which is uncontradicted by any other evidence. Nowhere does SEPTA's engineer suggest that installation of an elevator is not feasible.

feasibility. See id. at p. 83, line 14. Of course, counsel's gratuitous (and possibly improper) comment during the deposition is of no evidentiary value. However, SEPTA also points to Mr. Brooke's testimony that he and his department did not develop any vertical accessibility plans for City Hall Station. See id. at p. 122, lines 6-11. While Mr. Brooke's deposition testimony is "not unequivocal," Mr. Brooke's affidavit clearly lays out the cost and time to install an elevator at the City Hall Courtyard, and neither his deposition testimony nor any other evidence contradicts the concept of the feasibility of such an installation.

SEPTA also argues that because the City of Philadelphia owns the Courtyard, SEPTA would need the City's permission to install an elevator. SEPTA then notes that DIA did not present any evidence regarding the willingness of the City to allow such an installation. Given the City's settlement with DIA, which settlement explicitly granted permission for the installation of an elevator at 15th and Market Courtyard and at least some locations at City Hall Station (albeit not at the location discussed here), see Docket No. 49, there is no evidence from which to reasonably that the City would not allow the installation of an ADA-compliant elevator at the City Hall Courtyard. In fact, the settlement agreement strongly suggests that the City would not oppose such a plan. Thus, the Court finds that SEPTA could feasibly install an elevator at the City Hall Courtyard.<sup>17</sup>

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<sup>17</sup> SEPTA also argues, by citation to 49 C.F.R. § 37.43(a)(2) and (e)(1), that it would be absurd to require SEPTA to spend \$2 million more on a \$1.2 million project. However, the "path of travel" provision that SEPTA invokes to support this argument of disproportionate cost does not apply here. That provision states that when an alteration is made that affects the usability of an area of a facility containing a primary function, the path of travel to the altered area must also be made accessible, unless the cost is disproportionate to the cost of the alterations. This provision only applies when the cost to alter the path of travel is disproportionate, not when the cost of making the alteration itself is disproportionate to an

**CONCLUSION**

For the reasons discussed above, summary judgment with respect to Count I of the Fourth Amended Complaint will be entered in favor of DIA. An appropriate Order follows.

BY THE COURT:

S/Gene E.K. Pratter  
Gene E.K. Pratter  
United States District Judge

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alteration done without accessibility considerations. Moreover, as noted above, under the actually applicable legislative and regulatory scheme, cost is not a relevant factor in considering the feasibility of an accessibility feature.