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EASTERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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JOAN BARDEN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIV. NO. S-99-497 MLS JFM
)	
CITY OF SACRAMENTO, et al.)	
)	
Defendants.)	

ORDER

On October 27, 2000, the court heard opposing motions, asserted by both plaintiffs and defendants, for summary adjudication. Laurence W. Paradis, Esq., and Melissa W. Kasnitz, Esq., appeared on behalf of plaintiffs (Joan Barden, Susan Barnhill, Hollynn DeLil, Jeffrey Evans, Tony Martinez, Brenda Pickern, Jeff Thom, Suzanne Fitts Valters, Mitch Watkins, and Carol Wolfington); Gerald C. Hicks, Esq., appeared on behalf of defendants (City of Sacramento and Mike Kashiwagi). After considering the parties' written submissions and hearing oral argument, the court now renders its decision.

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1 **I. Factual and Procedural Background.**

2 This is a disability access case. Plaintiffs are
3 individuals with mobility or vision disabilities who filed suit
4 against the City of Sacramento ("City") and its Public Works
5 Director, Mike Kashiwagi.¹ Plaintiffs allege that the City failed
6 to comply with its obligations under the Americans With Disabilities
7 Act ("ADA") when it resurfaced city streets and, consequently, many
8 curb ramps are inaccessible to disabled persons.

9 Plaintiffs assert the following claims for relief:

- 10 (1) violation of Title II of the Americans With
11 Disabilities Act of 1990;
12 (2) violation of Section 504 of the Rehabilitation Act
13 of 1973;
14 (3) violation of California Civil Code § 54 et seq. ;
15 (4) violation of California Civil Code § 51 et seq. ;
16 (5) violation of California Government Code § 4450 et
17 seq. ; and
18 (6) declaratory relief pursuant to the aforementioned
19 statutes.

20 See First Amended Complaint, filed Apr. 6, 1999.

21 Each side now moves for summary adjudication of various
22 issues. The court will address the motions of each side in turn.

23 **II. Standard of Review.**

24 Federal Rule of Civil Procedure 56(c) provides that
25 summary judgment is appropriate when the court is satisfied "that
26 there is no genuine issue as to any material fact and that the
27 moving party is entitled to a judgment as a matter of law." The
28 moving party always bears the initial responsibility of informing

¹ Concerns relating to the needs of persons with vision disabilities are not raised by the instant motions.

1 the district court of the basis for its motion, and identifying
2 those portions of the record which it believes demonstrate the
3 absence of a genuine issue of material fact. See **Celotex Corp. v.**
4 **Catrett**, 477 U.S. 317, 323 (1986).

5 If the moving party meets its initial responsibility, the
6 burden shifts to the nonmoving party to establish the existence of
7 a genuine issue of material fact. See **Matsushita**, 475 U.S. at 585-
8 86. The nonmoving party may not simply rely upon its pleading
9 denials, but must tender evidence of specific facts in the form of
10 affidavits or admissible discovery material, or both, in support of
11 its contention that a genuine issue of material fact exists. See
12 **Celotex**, 477 U.S. at 324. If the nonmoving party fails to make a
13 showing sufficient to establish a triable issue of fact as to an
14 essential element of his case, and on which he will bear the burden
15 of proof at trial, summary judgment may appropriately be granted.
16 See *id.* at 322.

17 **III. Analysis.**

18 **A. Plaintiffs' Motion for Summary Adjudication.**

19 Plaintiffs move for summary adjudication on the issue of
20 the City's obligation under the ADA to install fully accessible curb
21 ramps. Curb ramps are sloping ramps that allow persons who use
22 wheelchairs or motorized scooters to access sidewalks at
23 intersections. Plaintiffs assert it is undisputed that from 1992 to
24 1999 the City failed to comply with the requirement that it install
25 fully accessible curb ramps when it overlaid city streets.²
26

27 ² The term "overlay," as it is used by the parties, refers to
28 placing an additional layer of asphalt on top of an existing
street.

1 Plaintiffs seek a declaration that the City's past practice was in
2 violation of the ADA.

3 The code of federal regulations implementing the ADA
4 provides in pertinent part:

5 (b) Alterations. Each facility or part of a facility
6 altered by, on behalf of, or for the use of a public
7 entity in a manner that affects or could affect the
8 usability of the facility or part of the facility
9 shall, to the maximum extent feasible, be altered in
such a manner that the altered portion of the
facility is readily accessible to and usable by
individuals with disabilities, if the alteration was
commenced after January 26, 1992.

10 (e) Curb ramps.

11 (1) Newly constructed or altered streets,
12 roads, and highways must contain curb
13 ramps or other sloped areas at any
intersection having curbs or other
barriers to entry from a street level
pedestrian walkway.

14 (2) Newly constructed or altered street level
15 pedestrian walkways must contain curb
16 ramps or other sloped areas at
intersections to streets, roads, or
highways.

17 28 C.F.R. § 35.151. Resurfacing a street is an alteration within
18 the meaning of section 35.151 which must be accompanied by the
19 installation of accessible curb ramps. See **Kinney v. Yerusalim**, 9
20 F.3d 1067, 1075 (3rd Cir. 1993).

21 Defendants acknowledge that the law requires the City to
22 construct fully accessible curb ramps on streets that are overlaid,
23 and they admit the City did not construct fully accessible curb
24 ramps when it overlaid streets between 1992 and 1999. However,
25 defendants argue that plaintiffs' motion is moot because the City
26 changed its practice in 1999. Defendants explain that presently the
27 City constructs fully accessible curb ramps when it overlays
28 streets, and it has "made the installation of compliant curb ramps

1 at previously overlaid streets a priority in its curb ramp
2 construction program" Def's. Mem. of P. & A. in Opp'n,
3 filed Oct. 10, 2000, p. 3.

4 "[V]oluntary cessation of allegedly illegal conduct does
5 not deprive the tribunal of power to hear and determine the case,
6 i.e., does not make the case moot, unless there is no reasonable
7 expectation that the wrong will be repeated." **Public Util. Com'n v.**
8 **Federal Energy Regulatory Com'n**, 100 F.3d 1451, 1460 (9th Cir. 1996).
9 Thus, it is necessary to examine whether there is any reasonable
10 expectation that the City will return to its former practice of
11 neglecting to construct compliant curb ramps when it overlays
12 streets, or whether the City might abandon its commitment to
13 constructing curb ramps on streets it overlaid between 1992 and
14 1999.

15 In support of their contention that plaintiffs' motion is
16 moot, defendants offer the declaration of Mike Kashiwagi. He
17 attests:

18 As of early 1999, the City of Sacramento changed its
19 practice such that the City now installs curb ramps
20 and replaces non-compliant curb ramps when overlaying
21 a street. The City is committed to installing
22 compliant curb ramps in those areas where streets
23 were or are to be overlaid, and . . . will continue
24 to install compliant curb ramps on all future
25 overlays, as well as past overlays that should have
26 included the installation of compliant curb ramps.

27 On June 27, 2000, the Sacramento City Council adopted
28 Resolution No. 2000-410 appropriating \$4,500,000 in
funds to the Curb Ramp Construction Program.

[T]he City is in the process of constructing
approximately 1,500 curb ramps per year. [Five
hundred] are dedicated to past overlays; and . . .
[three hundred] are dedicated to present overlays and
other street projects facilitating the installation
of a curb ramp.

1 The City's intent is to continue to install 1,500
2 curb ramps per year with an approximate apportionment
3 as set forth above. As there are approximately 3,000
4 curb ramps which need to be installed as a result of
5 past overlays, the City anticipates that these ramps
6 will be completed in six years.

7 Declaration of Mike Kashiwagi, filed Oct. 10, 2000 ¶¶ 2-5.
8 Defendants offer no evidence of a binding commitment on the part of
9 the City to construct fully accessible curb ramps at intersections
10 of streets that were overlaid between 1992 and 1999.

11 Although defendants' current policy appears to comply with
12 the ADA's curb ramp requirements, the fact remains that their policy
13 violated the ADA until March 1999. Thus, for a period of seven
14 years, the City ignored its obligation to install compliant curb
15 ramps at locations where streets were altered. Moreover, there is
16 nothing to prevent the City from abandoning its commitment to
17 construct compliant curb ramps at previously overlaid intersections,
18 or from engaging in unnecessary delay. As long as the City's policy
19 regarding curb ramps is voluntary rather than mandatory, there is a
20 reasonable expectation that the City might avoid its obligations
21 under the ADA, or delay in fulfilling them. On this basis, the
22 court concludes that plaintiffs' motion for summary adjudication
23 must be granted.

24 **B. Defendants' Motion for Summary Adjudication.**

25 **1. Does the City Have an Obligation to Ensure,
26 Through its Permitting Process, That Private
27 Driveways Are Constructed in a Manner That
28 Facilitates the Access of Disabled Persons to
Public Sidewalks?**

Defendants move for summary adjudication on the issue of
whether the City has an obligation to operate its permit program
pertaining to private driveways in a manner that facilitates program

1 access to the public sidewalk. Specifically, defendants seek to
2 foreclose plaintiffs' claim that the City, when issuing permits for
3 the construction or alteration of private driveways, must ensure
4 that private driveways are constructed such that driveway ramps can
5 be traversed by disabled persons. Driveway ramps are the sloping
6 areas that permit automobiles to cross the sidewalk when moving from
7 the street to a driveway.

8 Title II of the ADA prohibits public entities from
9 excluding disabled individuals from receiving the benefits of a
10 public program, service, or activity. See 42 U.S.C. § 12132.
11 Public entities are required to "operate each service, program, or
12 activity so that the service, program, or activity, when viewed in
13 its entirety, is readily accessible to and usable by individuals
14 with disabilities." 28 C.F.R. § 35.150(a). Therefore, if the City
15 provides sidewalks, a "program" within the meaning of the ADA, it
16 must provide them so as to permit access for disabled persons.

17 At the hearing, the court inquired of plaintiffs' counsel
18 whether the ADA had been interpreted to require a public entity to
19 operate its permit programs to facilitate access by disabled persons
20 to separate public programs. Plaintiffs' counsel responded that the
21 issue was one of first impression. Although not directly on point,
22 defendants directed the court to two cases supporting the conclusion
23 that the City is not obligated under the ADA to operate its permit
24 program for private driveways to facilitate access for disabled
25 persons to public sidewalks. See, e.g., **Tyler v. City of Manhattan**,
26 849 F. Supp. 1429 (D. Kan. 1994) (concluding that the regulations
27 implementing Title II do not cover programs and activities of
28 entities that are licensed or certified by a public entity); **Reeves**

1 **v. Queen City Transportation, Inc.**, 10 F. Supp. 2d 1181 (D. Colo.
2 1998) (declining to hold the Public Utilities Commission liable for
3 violation of Title II simply because it issued a certificate of
4 public necessity and convenience to an offending entity).

5 In view of the lack of any regulation or a decision of any
6 court requiring a public entity to operate its permit programs so as
7 to facilitate access of disabled persons to public sidewalks, this
8 court will decline to impose new obligations on the City. The court
9 recognizes that this may, in some instances, result in difficulties
10 for disabled persons when traversing driveway ramps. However, the
11 alternative is to require the City to direct private property owners
12 to modify driveway construction plans for private driveways so as to
13 facilitate program access of disabled persons to public sidewalks.
14 Such a requirement would place new obligations on both the City and
15 private property owners. In the absence of authority indicating
16 that Congress intended to impose these obligations when it enacted
17 the ADA, this court must decline to extend the reach of the ADA to
18 include these obligations. Therefore, defendants' motion for
19 partial summary judgment as to this issue must be granted.

20 **2. Did Plaintiffs Comply with the Presentment**
21 **Requirements of the Government Claims Act (also**
22 **referred to as the California Tort Claims Act)?**

23 Plaintiffs' third and fourth claims for relief are subject
24 to the presentment requirements of California Government Code § 905
25 et seq. Accordingly, plaintiffs were required to state in their
26 tort claim the basis for their claims for damages. Defendants argue
27 that plaintiffs' tort claim addressed the issue of curb ramps only
28 and, therefore, plaintiffs' claims for damages under state law are
limited to damages resulting from inadequate curb ramps. Defendants

1 also attack plaintiffs' tort claim with respect to damages resulting
2 from curb ramps, contending that it does not state with sufficient
3 specificity the dates, places, and other circumstances giving rise
4 to plaintiffs' claims for damages.

5 To the extent defendants argue that plaintiffs' tort claim
6 lacks sufficient specificity to preserve their damages claims with
7 respect to inadequate curb ramps, defendants are incorrect. The
8 purpose of the Government Claims Act is to put public entities on
9 notice so that they can investigate and settle claims against them
10 as appropriate. Although plaintiffs' tort claim does not direct the
11 City to specific locations where accessible curb ramps were lacking,
12 the City is obligated to construct fully accessible curb ramps at
13 locations where it altered or renovated the street. Without a
14 doubt, the City is capable of determining which streets it overlaid
15 or renovated during the relevant time period. Therefore,
16 plaintiffs' general statement ("The violations at issue include, but
17 are not limited to: (1) The City of Sacramento's failure to provide
18 proper and adequate curb ramps at public rights-of-way during
19 renovation and/or alteration (e.g. resurfacing) of city streets. .
20 . ,") is sufficient to put defendants on notice such that defendants
21 could investigate and settle the claims, if appropriate. Because
22 the purpose underlying the tort claim requirement was satisfied, the
23 court concludes that plaintiffs' tort claim is sufficient to
24 preserve their claims for damages resulting from inaccessible curb
25 ramps. Thus, insofar as defendants' motion is based upon
26 plaintiffs' failure to state the basis for their claims with
27 sufficient specificity, the motion must be denied.

28 //

1 **IV. Conclusion.**

2 In sum, the court finds that the City failed to meet its
3 obligations under the ADA because it failed to install fully
4 accessible curb ramps when overlaying or renovating streets between
5 January 26, 1992 and March 1, 1999. Therefore, plaintiff's motion
6 for summary adjudication on this issue is hereby GRANTED. The court
7 concludes, however, that plaintiffs have failed to present any
8 authority imposing upon the City the additional obligation to
9 operate its permit program for private driveways so as to facilitate
10 the access of disabled persons to public sidewalks; on this issue,
11 defendants' motion for summary adjudication is hereby GRANTED.
12 Finally, the court concludes that plaintiffs' administrative tort
13 claim is sufficient to preserve their claims for damages resulting
14 from the City's failure to provide fully accessible curb ramps, and
15 on this issue defendants' motion for summary adjudication is hereby
16 DENIED.

17 IT IS SO ORDERED.

18 DATED: November 20, 2000.

19
20 
21 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Eastern District of California
November 20, 2000

* * CERTIFICATE OF SERVICE * *

2:99-cv-00497

Barden

v.

City of Sacramento

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 20, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: 

Deputy Clerk