UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MICHAEL KENNEDY,

Plaintiff,

**MEMORANDUM OF LAW**

-against-

VINCENT FITZGERALD, GUY AND NANCY EASTER, BASKIN-ROBBINS U.S.A., CO., and CITY OF SYRACUSE, NEW YORK,

00-cv-0132 (HGM/GJD)

Defendants.

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**UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**


BILL LANN LEE
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
RENEE M. WOHLENHAUS, Deputy Chief

M. CHRISTINE FOTOPULOS
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035
(202) 305-7475

THOMAS J. MARONEY
United States Attorney
Northern District of New York

WILLIAM H. PEASE, Civil Chief
Assistant United States Attorney
100 South Clinton Street
Syracuse, NY 13261-7198
(315) 448-0672

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## PRELIMINARY STATEMENT

The United States moves for leave to participate as amicus curiae in this case in order to oppose the City of Syracuse's Motion to Dismiss and/or for Summary Judgment, and to address the proper construction of Title II of the Americans with Disabilities Act ("Title II" or "ADA"),[1] Section 504 of the Rehabilitation Act ("Section 504"),[2] and the implementing regulations under Title II.[3] Plaintiff Michael Kennedy, who has cerebral palsy and requires the use of a motorized wheelchair for mobility, has made several attempts to enter the Baskin-Robbins ice cream store identified in the complaint, and each time has been denied access due to the presence of a single concrete step. In order for the store to be made fully accessible to persons with disabilities, a wheelchair ramp must be constructed which will necessarily encroach upon the city sidewalk. The owners of the property, Guy and Nancy Easter, have agreed to construct the ramp and have twice applied to the City for a building permit for this purpose. However, the owners owe back taxes on the property. The City requires all building plans that affect city property to be approved by the City, and has a policy of refusing to grant building permits to entities that are tax delinquent. Consequently, the City has repeatedly refused to grant the owners the building permit that would authorize the construction of the ramp. Despite having been informed numerous times of the discriminatory effect this refusal has had on persons with disabilities, the City has refused to modify its policy.[4]

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[1] 42 U.S.C. §§ 12131-34.

[2] 29 U.S.C. § 794.

[3] 28 C.F.R. Part 35.

[4] These are the facts as alleged by the plaintiff, which the Court must accept as true for the purpose of ruling on the City's Motion to Dismiss (or, with respect to its alternative Motion for Summary Judgment, read in the light most favorable to the non-moving party.) See Cohen v. Koenig, 25 F.3d 1168 (2nd Cir. 1994). In its Motion, the City asserts that its refusals to grant both of the owners' applications for a building permit were based on several factors, only one of

The plaintiff has brought this action against the property owners, the franchisor, the franchisee, and the City, alleging violations of Titles II and III of the ADA, Section 504 and various state laws.[5] For his complaint against the City, the plaintiff alleges that the City has discriminated against him and other persons with disabilities by refusing to modify its zoning policy in order to grant the building permit that would allow for construction of the wheelchair ramp. (Plaintiff's Complaint, p. 2-3.) In its Motion to Dismiss and/or for Summary Judgment, the City argues inter alia that the plaintiff has failed to state a cause of action under which relief can be granted and/or that the City is entitled to judgment as a matter of law, asserting that (1) in the circumstances of this case, the City has no obligation to accommodate persons with disabilities; (2) persons with disabilities are not entitled to "special treatment"; (3) any encroachment upon the City's property would constitute an unconstitutional taking of private property for public use without just compensation; and (4) the City cannot be liable because it did not intentionally discriminate against persons with disabilities. Each of these arguments is incorrect as a matter of law.[6]

For the following reasons, the United States respectfully urges this Court to deny the City's Motion to Dismiss and/or for Summary Judgment.

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which was the owners' tax delinquency. The existence of this disputed issue of material fact, while it has no effect on the applicable legal principles discussed below, certainly precludes a judgment on the pleadings. See also Eric L. v. Bird, 848 F.Supp. 303, 313-14 (D.N.H. 1994) (denying motion to dismiss complaint brought under Title II and Section 504 where plaintiffs' claims presented fact issues).

[5] For purposes of this amicus brief, the United States will address only the plaintiff's claims against the City, and only those claims arising under Title II and Section 504.

[6] The United States takes no position on the additional arguments made by the City in its Motion to Dismiss and/or for Summary Judgment.

## ARGUMENT

### I. THE CITY OF SYRACUSE IS OBLIGATED UNDER TITLE II AND SECTION 504 TO MAKE REASONABLE MODIFICATIONS TO ITS ZONING POLICIES IN ORDER TO AVOID DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

Title II of the ADA prohibits public entities, including the City of Syracuse, from discriminating against persons with disabilities. It provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132; see also 28 C.F.R. § 35.130(a).[7]

This general prohibition against discrimination has been specifically implemented in regulations adopted by the Attorney General. See 42 U.S.C. § 12134; 28 C.F.R. Part 35 ("DOJ Regulations"). One of these regulations imposes an affirmative duty on a public entity to "make reasonable modifications in policies, practices, or procedures" when such modifications are "necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). Reasonable modifications are not required, however, where "the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity" to which the policy or practice relates. Id.

In the circumstances of this case, the City's implementation of its "neutral" policy or practice to deny permits to tax delinquent property owners places disproportionate burdens on people with mobility impairments who seek to enter the ice cream store. "Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled

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[7] Section 504 contains a similar prohibition: "No otherwise qualified individual with a disability...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." 29 U.S.C. §794(a).

persons public services disproportionately due to their disability." Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996) (applying the reasonable modifications requirement to find that Hawaii's animal quarantine law discriminated against visually-impaired persons); see also Olmstead v. L.C., 119 S.Ct. 2176, 2186 (1999) ("Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than simply the "uneven treatment of similarly situated individuals" or actions taken "on account of [individuals'] disabilities.")

The Second Circuit has affirmed that Title II and Section 504 apply to a public entity's zoning decisions. Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 44 (2nd Cir. 1997) (holding that "[b]oth the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity.") In that case, the Court ruled that the plaintiffs were likely to succeed on their claim that the City had violated Title II and Section 504 by refusing to grant a permit to a drug and alcohol rehabilitation facility, because the plaintiffs had been denied the benefits of the City's zoning activity on the basis of their disability. Id. at 49.

In its capacity as the federal agency charged with implementing and enforcing the ADA, the Department of Justice at the direction of Congress has published a Technical Assistance Manual which includes several illustrations of the reasonable modifications requirement. See 42 U.S.C. § 12206(c)(3); The Americans with Disabilities Act: Title II Technical Assistance Manual ("TA Manual") (November 1993), § II-3.6000 at 14-15. One of these examples specifically addresses the obligation to modify zoning policies in order to permit construction of a wheelchair ramp:

> A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

TA Manual § II-3.6100 at 14. In reaching its decision in Innovative Health Systems, the Second

Circuit specifically approved of the DOJ Regulations and TA Manual, noting:

> [T]he Department of Justice's regulations are entitled to controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute,"...and its manual is given substantial deference unless another reading is compelled by the regulation's plain language...[T]here is nothing to suggest that the regulations are contrary to the statute or that either the preamble or the manual is inconsistent with the regulations.

Id. at 45, n.8; see also Trovato v. City of Manchester, 992 F.Supp. 493, 499 (D.N.H. 1997) (finding violations of Title II, Section 504 and the Fair Housing Act[8] where the city "failed to show how granting plaintiffs an exception [to a residential setback requirement] would fundamentally alter or subvert the purposes of its zoning variance.")[9]

Thus, the law is clear in this circuit that the reasonable modification requirement in Title II and Section 504 applies to the zoning activities of public entities. In this context, a public entity is required to modify its zoning policies and practices when such modifications are necessary to avoid discrimination against persons with disabilities, unless the modification would

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[8] 42 U.S.C. §§ 3601-3631 (1994) ("FHA"). The FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap," and defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(1) and (f)(3)(B).

[9] The Trovato decision enjoys the support of a long line of circuit court decisions in the disability context brought under the FHA, which have applied that law's comparable "reasonable accommodation" requirement to zoning decisions and which are thus instructive in this case. See Innovative Health Systems at 45 n.9 (finding no error in "[t]he district court's reference to the [FHA, where that court had]...noted that courts have interpreted the similarly-broad prohibition of disability discrimination in the FHA to cover local zoning decisions... ."). See, e.g., Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993); City of Edmonds v. Washington State Building Code Council, 18 F.3d 802 (9th Cir. 1994), aff'd, 115 S.Ct. 1776 (1995); Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996); and Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1103 (3rd Cir. 1996) ("Courts interpreting the reasonable accommodation provision of the [FHA] have ruled that municipalities...must change, waive or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities") (quotations omitted).

fundamentally alter the nature of underlying zoning program. In the circumstances of this case, the City's policy or practice to deny building permits to tax-delinquent property owners works to disproportionately burden persons with disabilities, because it prevents the owners from constructing the ramp that is necessary to make the ice cream store accessible to persons with disabilities. Persons without disabilities are not similarly burdened, because they do not need the ramp to enjoy equal access to the store. The plaintiff here is not requesting "special" treatment, but simply a level playing field. Therefore, the plaintiff has alleged sufficient facts to state a claim that Title II and Section 504 require the City to modify its tax-delinquency policy or practice (e.g., make an exception in this case) in order to permit construction of the ramp, unless to do so would constitute a fundamental alteration of its zoning program.

## II. THE PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO STATE A CLAIM THAT A MODIFICATION TO THE CITY'S POLICY IN THIS CASE IS REASONABLE AND WOULD NOT FUNDAMENTALLY ALTER THE CITY'S ZONING PROGRAM

In his complaint against the City, the plaintiff has alleged that the City has violated Title II and Section 504 by refusing to modify its policy or practice to deny permits to property owners who owe back taxes to the City, and that the City is obliged under Title II and Section 504 to grant an exception to its policy in this case as a reasonable modification. (Plaintiff's Complaint, p. 2-3.) The City responds that to grant a building permit in these circumstances "would allow [the] property owner to circumvent the City's efforts to protect the public fisc by collecting back taxes." (City of Syracuse's Memorandum of Law, p. 15.)[10]

[10] The City makes the additional argument that permitting construction of the ramp "would also frustrate the City's efforts to protect the public by ensuring that handicap ramps are a sufficient distance from poles, guy wires, and fire hydrants and do not imperil pedestrian traffic." (City of Syracuse's Memorandum of Law, p. 15.) Again, this argument relates to a disputed issue of material fact. For purposes of ruling on the City's Motion to Dismiss and/or for Summary Judgment, the facts alleged in the complaint — that the City has refused to grant the

Requiring the City to modify its policy or practice in this instance would not fundamentally alter the administration of the City's zoning program. It does not require changes in land use classifications or restrictions, nor does it leave the City without its traditional means of collecting past due taxes. It merely requires the City to allow a ramp to be built as the City routinely does when tax delinquency is not at issue. In the majority of cases where a property owner requests a building permit in order to improve the property and thereby increase its value, the purpose of the policy — to encourage payment of property taxes by imposing a penalty on delinquent taxpayers — would seem to be effectuated. However, in this case, the property owners' motive is not profit, but their obligation to comply with federal law. Refusing to grant the permit to the property owners does not penalize them; instead, it penalizes persons with disabilities, by denying them the equal access guaranteed by federal law. Because the purpose of the tax delinquency policy arguably could not be realized in this situation, it also arguably cannot be frustrated by the requirement that the City make an exception. Consequently, the Court may be able to find that modification of this policy in these circumstances in order to permit construction of the ramp would cause no fundamental alteration to the City's zoning program.

In any case, whether a given modification would constitute a fundamental alteration under Title II and Section 504 is necessarily a fact-based determination, resolution of which is inappropriate at this stage of the litigation. See, e.g., Staron v. McDonald's Corp., 51 F.3d 353, 357-358 (2nd Cir. 1995) (reversing the dismissal of a suit brought under the "reasonable modifications" requirement in Title III of the ADA[11], where it was not "possible to conclude on

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owners a building permit solely on the basis of their tax delinquency — will be presumed to be true. However, should the City be able to prove that it denied the building permit pursuant to some other policy or practice, it is still obliged under Title II and Section 504 to make reasonable modifications to that policy or practice in order to avoid discrimination against persons with disabilities.

[11] The reasonable modifications requirement in Title III, which applies to places of public accommodation, provides: "[D]iscrimination includes...a failure to make reasonable

the pleadings that plaintiffs' suggested modification [was] necessarily unreasonable")[12]; and L.C. v. Olmstead, 138 F.3d 893 at 905 (11th Cir. 1998), aff'd in part, vac'd in part and rem'd, 119 S.Ct. 2176, 2190 (1999) (remanding to trial court for determination of whether community placement would constitute "fundamental alteration" of the State's mental health care delivery system).[13] Moreover, the burden is on the public entity to prove that the relief sought by the plaintiff — here, an exception to the City's policy or practice to deny building permits to tax-delinquent entities — would constitute a fundamental alteration of the underlying activity.

## III. THE REQUIREMENT THAT THE CITY MODIFY ITS ZONING POLICY IN ORDER TO AVOID DISCRIMINATION DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION

The Fifth Amendment to the U.S. Constitution prohibits the Federal government from taking private property "for public use, without just compensation." U.S. Constitution, amend. V. The United States Supreme Court has repeatedly held that "[o]ne of the principal purposes of the takings clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Dolan v. City of

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modification in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations... ." 42 U.S.C. § 12182(b)(2)(A)(ii); see also 28 C.F.R. § 36.302.

[12] In Staron, the Second Circuit also noted that it was not "necessary at this point in the lawsuit to bind [the] plaintiffs to the one specific modification they prefer[red]," and that they "should be allowed the opportunity" to "demonstrate after discovery that [alternate] modifications...are both 'reasonable' and 'necessary.'" Id. at 358 (citations omitted).

[13] See also Williams v. Wasserman, 937 F.Supp. 524, 528 (D. Md. 1996) (whether there was a "fundamental alteration" was a disputed issue of material fact precluding summary judgment); and Anderson v. Department of Public Welfare, 1 F.Supp.2d 456, 466 (E.D. Pa. 1998) (same).

Tigard, 512 U.S. 374, 384 (1994), citing Armstrong v. United States, 364 U.S. 40, 49 (1960). In its Motion, the City argues that to the extent that satisfaction of the plaintiff's claims would require the City to grant the building permit and thereby permit an encroachment upon the City sidewalk, such a requirement would constitute a "physical taking" of its property in violation of the takings clause. This argument is without merit for several reasons.

First, it is improperly raised in the context of a Motion to Dismiss and/or for Summary Judgment. The City may not claim, as a basis for dismissing an action brought under perfectly valid federal law, that enforcement of federal law constitutes a taking of its property. The takings clause does not bar the government from taking private property for public use; the government may do so without restriction so long as the governmental act stems from some proper legislative authorization. Hendler v. United States, 952 F.2d 1364, 1378 (Fed. Cir. 1991). All the takings clause requires is that, whenever the government takes private property for public use, it provides just compensation. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987); Narramore v. United States, 960 F.2d 1048, 1049 (Fed. Cir. 1992).

The clause is thus "designed 'not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.' Furthermore, the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking. All that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation at the time of the taking.'" Preseault v. Interstate Commerce Comm., 494 U.S. 1, 11 (1990). Therefore, even if Title II and Section 504 could be interpreted to effect a taking in this case (and we argue that they cannot), they remain perfectly valid federal legislation, and therefore must be enforced by the Court in this case because a means of obtaining just compensation exists in the Court of Federal Claims.

In any case, the City's argument must fail on its merits as well. The City relies principally upon Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) for its argument that Title II and Section 504 would effect a taking, citing that case for the proposition that any regulation that requires a property owner to permit an permanent physical invasion of its property effects an unconstitutional taking. (City of Syracuse's Memorandum of Law, p. 7-8.)[14] In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the Supreme Court delineated two situations in which governmental action will be considered a per se taking, therefore requiring just compensation: (1) when a regulation compels a permanent physical invasion of property; or (2) when a regulation denies an owner all economically beneficial or productive use of its land. Id. at 2893. It appears from the City's Motion that its sole argument is that enforcement of Title II and Section 504 in the circumstances of this case would effect a physical taking under the first prong of the Lucas test. However, insofar as the issue of a regulatory taking may also be raised, the City likewise fails to meet the burden of showing any regulatory taking in this case.

First, as the City itself concedes, nothing in Title II or Section 504 authorizes or requires a permanent physical invasion of any property. Instead, these laws simply prohibit public entities from discriminating against persons with disabilities. The laws do not take any property; they require only that the City's long-established and voluntary practice of granting building permits that affect City property be conducted in a nondiscriminatory manner. As the court held in Pinnock v. International House of Pancakes, 844 F.Supp. 574 (S.D. Cal. 1993), "[s]ince the ADA merely regulates the use of property and does not give anyone physical occupation of [the] property, it [does not effect a physical taking]." Id. at 587. Thus, to the extent that any

[14] Only one reported case has addressed a takings claim under the ADA, and there it was rejected. See Pinnock v. International House of Pancakes, 844 F.Supp. 574 (S.D. Cal. 1993) (rejecting a claim by a Title III entity that the economic impact of the ADA's accessibility requirements effected an unconstitutional taking.)

encroachment upon the City's property may occur as a consequence of granting the permit, it can only be attributed to the City's own practice of allowing such encroachments — not to the application of any federal civil rights law.

Secondly, the proposed encroachment at issue here would not qualify as a "physical taking" under the Supreme Court's analytical framework. In Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2nd Cir. 1992), cert. denied, 507 U.S. 987 (1993), the Second Circuit had an opportunity to review the Supreme Court's cases addressing claims of physical takings.[15] In that case, the Second Circuit stated:

> Loretto helps define what constitutes a physical taking...The Loretto Court explained that a permanent physical occupation occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. Id. at 435...The Court added that absolute exclusivity of the occupation and absolute deprivation of the owner's right to use and exclude others from the property were hallmarks of a physical taking. Id. at 435 n.12.

Bongartz at 93 (some citations omitted; emphasis added). In Loretto, the Court found a taking where a state statute required a private landlord to permit a cable television company to install cable television on his property for the cable company's exclusive use and profit. In contrast, if the City is required, as a reasonable modification of its zoning policy or practice, to permit an encroachment upon five feet of the city sidewalk, there will be no "absolute deprivation" of the City's right to possess, use and dispose of that property.[16] The City, as well as any and all

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[15] In Bongartz, the Court found that a developer had failed to establish a physical taking where a state environmental board denied a land use permit for building vacation homes in a deer habitat, thereby preventing the developer from exercising the right to "exclude" deer from the property. Id. at 95.

[16] The City does not identify which property interests will allegedly be impaired by application of Title II and Section 504, insisting only that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." (City of Syracuse's Memorandum, p. 7, citing Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987) and excising the first part of the quoted sentence: "as to property reserved

members of the public, will not be "absolutely depriv[ed]" of the right to use the space. City officials, employees, and other pedestrians will still be able to use the sidewalk area, including the ramp.[17] Therefore, even if Title II and Section 504 could somehow be said to compel the City to permit an encroachment upon its sidewalk, the Loretto test for a "physical taking" could not be met on these facts.[18]

Finally, Title II and Section 504 cannot take away any property right that did not already exist. In Lucas, the Supreme Court made clear that there can only be an unconstitutional taking where there has been an impairment to a property interest that was actually and lawfully possessed by the owner prior to the taking. Id. at 1027. In the circumstances of this case, the only limitation that Title II and Section 504 place on the City's property is to prohibit the City from disposing of its property in a discriminatory manner. Because the City and members of the

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by its owner for private use."). It is unclear what kind of interest the City could have in reserving a public sidewalk for its own "private use" or in "exclud[ing] others" from such use. See also Yee v. City of Escondido, 503 U.S. 519, 531 (1992) (holding that when property owners "voluntarily open their property to occupation by others, [they] cannot assert a per se right to compensation based on their inability to exclude particular individuals"); and Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980) (finding no taking where a shopping center which was open to the public was prohibited from excluding peaceful activists).

[17] Moreover, at this stage in the litigation, it is unclear what options may be available under New York property law that would allow the City to permit construction of the ramp while retaining its property rights in the sidewalk. For example, the City remains free to adopt a zoning policy which places certain conditions on its grants of easements, as long as it ensures that its implementation of such a policy in any given case does not discriminate against persons with disabilities.

[18] Similarly, Title II and Section 504 do not effect the second kind of per se taking under Lucas — the denial of all economically beneficial or productive use of the land. In this context, the Supreme Court has set forth three factors to be considered: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). Requiring the City to discontinue or substantially alter its intended use of the property affected does not amount to a taking — the government must make all uses of the property economically infeasible. Again, it is difficult to envision what kind of economic interest the City might have in this space of

public will still have unrestricted use of the ramp, this is the only "property interest" that these federal laws could be said to affect. However, the City does not possess the right to use its property in a discriminatory manner; the right to discriminate against persons with disabilities is not one of the "bundle of sticks" that inheres in the City's ownership of its sidewalk. For example, if a city regularly granted easements to all male citizens but denied them to female citizens, no court would sanction the city's choice to hide behind the Fifth Amendment and claim that it had a right to use its property as it wished.

The same principle applies to discrimination on the basis of disability, which is the necessary result of the City's actions in this case, and the reason why Title II and Section 504 require the City to take affirmative steps to avoid it. The takings clause cannot be used as a shield for unlawful discrimination. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (rejecting a takings clause challenge to Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, et seq., which prohibits "place[s] of public accommodation" from discriminating on the basis of race.) Therefore, under the facts as alleged in this case, any resultant encroachment upon the City sidewalk, even if it could be said to be effected by Title II and Section 504, would not constitute an unconstitutional taking of private property without just compensation.

## IV. THE CITY MAY BE LIABLE FOR DAMAGES UNDER TITLE II AND SECTION 504 EVEN IN THE ABSENCE OF ANY DISCRIMINATORY ANIMUS TOWARDS PERSONS WITH DISABILITIES

Finally, the City argues that the ADA requires a plaintiff to prove that "his status as a disabled person was a motivating factor in the City['s decisions and that those decisions] resulted from an intent to discriminate." (City of Syracuse's Memorandum of Law, p. 9.)[19] The City

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sidewalk that could possibly be destroyed by the construction of the ramp.

[19] The City makes a similar argument with respect to Section 504, alleging that that law requires a plaintiff to demonstrate that "his handicap was the sole basis for the alleged discrimination." Id.

states that it did not intentionally discriminate against the plaintiff nor did it even consider the plaintiff's status as an individual with a disability in making its decision. In contrast, the plaintiff is arguing, and the ADA requires, that the City should have considered the consequences its decision would have on persons with disabilities when it applied its zoning policy in this case, because in light of such consequences, the City was obligated to make a reasonable modification to its policy in order to avoid discriminating against persons with disabilities.

It is settled in the Second Circuit that compensatory damages are available to victims of discrimination under Title II and Section 504.[20] See Bartlett v. New York State Board of Bar Examiners, 156 F.3d 321, 330-331 (2nd Cir. 1998), vac'd on other grounds and rem'd, 119 S.Ct. 2388 (1999). "The law is well settled that intentional violations of Title VI, and thus the ADA and Rehabilitation Act, can call for the award of money damages." Id. (citation omitted).

In Bartlett, a woman with a learning disability sued the Board of Law Examiners for failing to provide her with requested accommodations. The Board had repeatedly denied her request for accommodations based on use of a diagnostic test that the Court had found to be an inaccurate indicator of the plaintiff's learning disability. Id. at 331. The Court found that by repeatedly using a test that was inaccurate the defendants had exercised sufficient intent for an award of damages to be appropriate under the ADA and Rehabilitation Act. The Court found that "intentional discrimination may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy...[or] custom." Id. at 331, citing Ferguson v. City of Phoenix, 931 F.Supp. 688, 697 (D. Ariz. 1996), aff'd, 157 F.3d 668 (9th Cir.

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[20] The remedies available for violations of Title II of the ADA are coextensive with those available under Section 504 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. See 42 U.S.C. § 12133 (providing that Title II affords plaintiffs the "remedies, procedures and rights" set forth in 29 U.S.C. § 794a). That section governs the relief available under Section 504, and there gives such plaintiffs the "remedies, procedures and rights set forth in title VI...."

1998), cert. denied, 119 S.Ct. 2049 (1999); Canton v. Harris, 489 U.S. 378, 385 (1989).[21] The "deliberate indifference" standard "does not require personal animosity or ill will." Bartlett at 331.

Consequently, the standard for intentional discrimination is satisfied on the facts alleged in this case, where the City has continued to deny that it has any responsibility to modify its policies despite the fact that it has been repeatedly made aware of the fact that the plaintiff is an individual with a disability and, along with all other persons with disabilities, is being denied equal access to the store. In both the first and second applications for a building permit, the owners made clear that the purpose of the application was to install a wheelchair ramp that was necessary to make the store accessible to persons with disabilities as required by Title III of the ADA. Moreover, in the year and a half since the owners submitted their first application, attorneys representing the plaintiff and the United States Attorney for the Northern District of New York have had numerous verbal and written communications with various representatives of the City, by which they have informed the City that its refusal to modify its policies constitutes a direct violation of Title II and Section 504. The plaintiff has alleged sufficient facts to support a finding that by denying the owners' repeated requests, the City has been deliberately indifferent to the effect its decisions were having on persons with disabilities, and consequently, compensatory damages are an available remedy in this case.

## CONCLUSION

For these reasons, the United States respectfully urges this Court to deny the City's Motion to Dismiss and/or for Summary Judgment.

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[21] See also Proctor v. Prince George's Hospital Center, 32 F.Supp.2d 820, 829 (D. Md. 1998) ("[I]ntentional discrimination is shown by an intentional, or willful violation of the Act itself...[even if the defendants] believed themselves to be within the confines of the law").

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
RENEE M. WOHLENHAUS, Deputy Chief

_____

M. CHRISTINE FOTOPULOS
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 305-7475

THOMAS J. MARONEY
United States Attorney
Northern District of New York

WILLIAM H. PEASE
Civil Chief
Assistant United States Attorney
100 South Clinton Street
Syracuse, NY 13261-7198
(315) 448-0672

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