MEMORANDUM

To: **City of Hiawatha**

From: **Mark J. Parmenter, City Attorney**

Re: **Sidewalks/ADA Compliance**

Date: **August 20, 2019**

Issue: Is the City of Hiawatha required to replace all sidewalks with greater than 1/4 inch vertical change in perpetuity in order to comply with the ADA?

The ADA requires each public entity to plan and construct sidewalks that are accessible. What does that mean for Hiawatha sidewalks?

Currently, Hiawatha City Code 136.02 (2) states that a "defective sidewalk" includes one in which there are vertical or horizontal separations equal to one inch or more.

Under the Title II ADA Standards for Accessible Design 2010 ("2010 Standards") section 303.2, the section on vertical changes states "Changes in level of 1/4 inch (6.4 mm) high maximum shall be permitted to be vertical." Specifically, Chapter 3 is Titled "Building Blocks" and the provisions of Chapter 3 "shall apply where required by Chapter 2 or where referenced by a requirement in this document."

However, this code section applies to "all areas of newly designed and newly constructed buildings and facilities and altered portions of existing buildings and facilities shall comply with these requirements." *See* 2010 Standards 201.1.

2010 Standards: 202.4 States,

> Alterations affecting primary function areas. In addition to the In addition to the requirements of 202.3, an alteration that affects or could affect the usability of or access to an area containing a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area, including the rest rooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, unless such alterations are disproportionate to the overall alterations in terms of cost and scope as determined under criteria established by the Attorney General. In existing transportation facilities, an area of primary function shall be as defined under regulations published by the Secretary of the Department of Transportation or the Attorney General.
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> "EXCEPTION: Residential dwelling units shall not be required to comply with 202.4"

It is important to note that all of the 2010 Standards pertain to "Buildings and facilities" as opposed to general sidewalks within the City. The standards exist to ensure disabled patrons can access city-owned facilities.

The City must determine if it must

(1) Change its code to define a defective sidewalk as one that has a greater than 1/4 inch vertical change, or
(2) Is it sufficient to continue to define a defective sidewalk as one that has a vertical separation in excess of 1 inch and repair/replace sidewalks with greater than 1/4 inch vertical change when new construction is performed and substantial alterations are made to the sidewalk and surrounding streets?

28 CFR § Chapter 35 outlines the Title II requirements under the ADA. These include the following:

28 §35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131-12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110-325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

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28 CFR § 35.104 Definitions.

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in §35.151.

28 CFR § 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

28 CFR § 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

28 CFR § 35.107 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

28 CFR § 35.151 New construction and alterations.

(a) *Design and construction.* (1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity **shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.**

. . .

(b) *Alterations.* (1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity **in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such 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.**

(2) The path of travel requirements of §35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

. . .

(4) *Path of travel.* An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

. . .

(ii) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(A) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(B) For the purposes of this section, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

(C) *Safe harbor.* If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

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28 CFR 35.151(i) states:

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

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

The Access Board provides the ADA Accessibility Guidelines (ADAAG). The document can be found here: https://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/background/revised-draft-guidelines/introduction

The ADAAG covers a wide variety of facilities and establishes minimum requirements for new construction and alterations. It defines P*edestrian Access Route* as "A continuous and unobstructed walkway within a pedestrian circulation path that provides accessibility" and *Pedestrian Circulation Path* as "A prepared exterior or interior way of passage provided for pedestrian travel." *Walkway* is defined as "the continuous portion of the pedestrian access route that is connected to street crossings by curb ramps or blended transitions."

The ADAAG states:

R101.1 General. This document contains scoping and technical requirements for accessibility to facilities for pedestrian circulation and use located in the public right-of-way. Advisory notes are for informational purposes only. These requirements are to be applied during the design, construction, additions to, and alterations of facilities in the public right-of-way to the extent required by regulations issued by Federal agencies.

*Advisory R101.1 General. Access requirements are also addressed in the Manual on Uniform Traffic Control Devices (MUTCD), FHWA/US DOT, 2003 (**http://mutcd.fhwa.dot.gov**). MUTCD is a reference standard in this guideline. Key transportation industry guidance documents also address accessibility in the public right-of-way and can provide useful information on design and construction. They include 'Guide for the Planning, Design, and Operation of Pedestrdvisory R101.1 General. Access requirements are also addressed in the Manual on Uniform Traffic Control Devices (MUTCD), FHWA/US DOT, 2003 (**http://mutcd.fhwa.dot.gov**). MUTCD is a reference standard in this guideline.*

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It also notes the ADAAG does not "address existing facilities unless they are included in the scope of an alteration undertaken at the discretion of a covered entity" **R101.2.** "All newly designed and newly constructed facilities located in the public right-of-way shall comply with these requirements. All altered portions of existing facilities located in the public right-of-way shall comply with these requirements to the maximum extent feasible." **R201.1 Scope**. The advisory note state that the ADAAG covers "facilities for pedestrian circulation and use in the right-of-way." **R201.1 Scope.**

The ADAAG provides the following provisions and advisory notes:

R301.2 Components. Pedestrian access routes shall consist of one or more of the following components: walkways, ramps, curb ramps (excluding flared sides) and landings, blended transitions, crosswalks, and pedestrian overpasses and underpasses, elevators, and platform lifts. Stairways and escalators shall not be part of a pedestrian access route. All components of a pedestrian access route shall comply with the applicable portions of this document.

R301.3 Width

R301.3.1 Continuous Width. The minimum continuous and unobstructed clear width of a pedestrian access route shall be 1.2 m (4.0 ft), exclusive of the width of the curb.

Advisory R301.3.1 Continuous Width. The pedestrian access route provides a minimum accessible route of passage within a sidewalk or other walkway that may not comprise the full width of the pedestrian circulation route, particularly in urban areas. Industry-recommended sidewalk widths can be found in 'Guide for the Planning, Design, and Operation of Pedestrian Facilities', American Association of State Highway and Transportation Officials, July 2004 (www.aashto.org). The minimum width must be maintained without obstruction. Where a pedestrian access route turns or changes direction, it should accommodate the continuous passage of a wheelchair or scooter. As with street or highway design for vehicles, additional maneuvering width or length may be needed at recesses and alcoves, doorways and entrances, and along curved or angled routings, particularly where the grade exceeds 5%. Individual segments of pedestrian access routes should have a minimum straight length of 1.2 m (4.0 ft).

R301.5.2 Surface Discontinuities. Surface discontinuities shall not exceed 13 mm (0.50 in) maximum. Vertical discontinuities between 6.4 mm (0.25 in) and 13

mm (0.5 in) maximum shall be beveled at 1:2 minimum. The bevel shall be applied across the entire level change.

Advisory R301.5.2 Surface Discontinuities. Surfaces with individual units laid out of plane and those that are heavily textured, rough, or chamfered, will greatly increase rolling resistance and will subject pedestrians who use wheelchairs, scooters, and rolling walkers to the stressful (and often painful) effects of vibration. It is highly desirable to minimize surface discontinuities; when discontinuities on the pedestrian access route are unavoidable, they should be widely separated.

Again, however, it is important to remember that the scope of the ADAAG relates to facilities as opposed to general sidewalk and other walking paths.

How are other municipalities handling this issue?

A review of the settlement agreement entered into between the City of Cedar Rapids and the Department of Justice ensures that the City of Cedar Rapids will provide " (1) a plan for identifying all streets, roads, and highways that have been constructed or altered since January 26, 1992; and (2) a timetable for providing curb ramps or other sloped areas complying with the applicable architectural standards at all intersections of those streets, roads, and highways that have been constructed or altered since January 26, 1992, that have curbs or other barriers from a street level pedestrian walkway. The plan and timetable must be approved by the United States and will specify completion of all required curb ramps or other sloped areas complying with the applicable architectural standards within four (4) years of the effective date of this Agreement."

The agreement also states: "Cedar Rapids will provide curb ramps or other sloped areas complying with the 2010 ADA Standards at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, whenever a street, road, or highway is constructed or altered. Annually, the ILA will confirm to the United States that Cedar Rapids has provided curb ramps or other sloped areas, where required, that are in compliance with the 2010 ADA Standards."

Our review of the City of Cedar Rapids Code of Ordinances finds no definition for a "defective sidewalk" but rather encourages the City residents to advise the City when a sidewalk appears unsafe due to cracking or buckling and provides an option to allow homeowners to make repairs on their own.

28 CFR 35.151 requires that when alterations are made, they are consistent with 2010 Standards of the ADA. Much of the focus is on ensuring that there are ramps/sloped edges at intersections of streets which make it feasible for disabled individuals to walk on the pathway. However, when any alterations are made, the sidewalks need to be accessible.

Conclusions

Based upon the rules contained within 28 CFR Chapter 35, the City likely complies with ADA requirements so long as it ensures any sidewalk is constructed appropriately when new

construction occurs or alterations (road resurfacing, etc.) take place in the vicinity of the sidewalks, specifically at or near city-owned facilities, i.e., City Hall, etc. Of course, when streets are replaced, curb ramps should be placed to make the City as accessible as possible. Our opinion is that if sidewalks are replaced or repaired, whether residential, commercial or industrial, they need to comply with all ADA regulations and requirements. We are not of the opinion that ADA requires all residential, commercial and industrial sidewalks to be no more than ¼ inch of level with the adjacent sidewalk or driveway at all times. Finally, we could not find any requirement that when replacing a section of sidewalk that is four (4) feet wide that it must then be replaced with a five (5) foot wide section of concrete.

Should you have any question or need further research and review, please let me know. Thank you.

Respectfully,

Mark J. Parmenter, City Attorney