

## QUESTIONS & ANSWERS

### ***Adapted from the Supplement to the 2013 DOJ/DOT Joint Technical Assistance on the Title II of the Americans with Disabilities Act Requirements To Provide Curb Ramps when Streets, Roads, or Highways are Altered through Resurfacing***

The Department of Justice (DOJ)/Department of Transportation (DOT) [Joint Technical Assistance on the Title II of the Americans with Disabilities Act \[ADA\] Requirements to Provide Curb Ramps when Streets, Roads, or Highways are Altered through Resurfacing](#) (Joint Technical Assistance) was published on July 8, 2013. This document responds to frequently asked questions that the Federal Highway Administration (FHWA) has received since the technical assistance document was published. In order to fully address some questions, the applicable requirements of Section 504 of the Rehabilitation Act of 1973 that apply to public entities receiving federal funding from DOT, either directly or indirectly, are also discussed. This document is not a standalone document and should be read in conjunction with the [2013 Joint Technical Assistance](#). Additional MoDOT specific answers are provided to when necessary.

**Q1: The Joint Technical Assistance states that “resurfacing is an alteration that triggers the requirement to add curb ramps if it involves work on a street or roadway spanning from one intersection to another, and includes overlays of additional material to the road surface, with or without milling.” What constitutes “overlays of additional material to the road surface” with respect to milling, specifically, when a roadway surface is milled and then overlaid at the same height (i.e., no material is added that exceeds the height of what was present before the milling)?**

**FHWA A1:** A project that involves milling an existing road, and then overlaying the road with material, regardless of whether it exceeds the height of the road before milling, falls within the definition of “alteration” because it is a change to the road surface that affects or could affect the usability of the pedestrian route (crosswalk). See *Kinney v. Yerusalim*, 9 F.3d 1067 (3rd Cir. 1993). Alterations require the installation of curb ramps if none previously existed, or upgrading of non-compliant curb ramps to meet the applicable standards, where there is an existing pedestrian walkway. See also Question 7.

**MoDOT A1:** MoDOT has committed to remove all barriers to access when completing a roadway alteration in its 2010 ADA Transition Plan. Existing ramps must be made compliant and new ramps must be added for intersecting pedestrian facilities on the altered roadway. It is not MoDOT’s obligation to correct or supply curb ramps on side roads not affected by the pavement alteration. At intersections where an existing curb ramp is present on one side of the street but there is not a pedestrian circulation path along the opposite side street, a new curb ramp is not required on the opposite side of the street where the sidewalk is nonexistent. The existing curb ramp must be made compliant as outlined in response FHWA A1. This guidance is

relevant regardless of right-of-way ownership, see Q3 for additional information on right-of-way not owned by MoDOT.

**Q2: If a roadway resurfacing alteration project does not span the full width of the road, do I have to put in curb ramps?**

**FHWA A2:** It depends on whether the resurfacing work affects a pedestrian crosswalk. If the resurfacing affects the crosswalk, even if it is not the full roadway width, then curb ramps must be provided at both ends of the crosswalk. See 28 CFR 35.151(i).

Public entities should not structure the scope of work to avoid ADA obligations to provide curb ramps when resurfacing a roadway. For example, resurfacing only between crosswalks may be regarded as an attempt to circumvent a public entity's obligation under the ADA, and potentially could result in legal challenges.

If curb ramp improvements are needed in the vicinity of an alteration project, it is often cost effective to address such needs as part of the alteration project, thereby advancing the public entity's progress in meeting its obligation to provide program access to its facilities. See Question 12 below for further discussion.

**Q3: When a road alteration project triggers the requirement to install curb ramps, what steps should public (state or local) entities take if they do not own the sidewalk right-of-way needed to install the required curb ramps?**

**FHWA A3:** The public entity performing the alteration is ultimately responsible for following and implementing the ADA requirements specified in the regulations implementing title II. At the time an alteration project is scoped, the public entity should identify what ADA requirements apply and whether the public entity owns sufficient right-of-way to make the necessary ADA modifications. If the public entity does not control sufficient right-of-way, it should seek to acquire the necessary right-of-way. If a complaint is filed, the public entity will likely need to show that it made reasonable efforts to obtain access to the necessary right-of-way.

**MoDOT A3:** If MoDOT does not own the right-of-way, agreements must be consulted to determine the extent of the contractual agreement between the entity and Commission. During the scoping process, entities should be integrated in to the planning process to allow them time to be able to plan, design and program improvements necessary to fulfill their ADA obligations. If the entity does not fulfill their contractual agreement and participate in appropriate ADA improvements, consideration must be given to the obligation to maintain the roadway surface in accordance with the agreement. If MoDOT decides to continue with the alteration without participation from the public entity, regardless of the right of way ownership, then MoDOT must construct the new curb ramps to remove the barrier to access in accordance with 28 CFR 35.151(i) at the time of or before the alteration.

**Q4: The Joint Technical Assistance is silent on when it becomes effective. Is there an effective date for when states and local public entities must comply with the requirements discussed in the technical assistance?**

**FHWA A4:** The Joint Technical Assistance, as well as this Supplement to it, does not create any new obligations. The obligation to provide curb ramps when roads are altered has been an ongoing obligation under the regulations implementing title II of the ADA (28 CFR 35.151) since the regulation was initially adopted in 1991. This technical assistance was provided to respond to questions that arose largely due to the development of a variety of road surface treatments, other than traditional road resurfacing, which generally involved the addition of a new layer of asphalt. Although the Joint Technical Assistance was issued on July 8, 2013, public entities have had an ongoing obligation to comply with the alterations requirements of title II and should plan to bring curb ramps that are or were part of an alteration into compliance as soon as possible.

**Q5: Is the curb ramp installation work required to be a part of the Plans, Specifications and Estimate package for an alteration project or can the curb ramp work be accomplished under a separate contract?**

**FHWA A5:** The curb ramp installation work can be contracted separately, but the work must be coordinated such that the curb ramp work is completed prior to, or at the same time as, the completion of the rest of the alteration work. See 28 CFR 35.151(i).

**MoDOT A5:** Standalone ADA projects are not prohibited by the MoDOT Transition Plan commitment or federal law. Districts should consider the amount of additional cost associated with standalone ADA contracts, such as traffic control costs and mobilization costs.

**Q6: Is a curb ramp required for a sidewalk that is not made of concrete or asphalt?**

**FHWA A6:** The Joint Technical Assistance states that “the ADA does not require installation of ramps or curb ramps in the absence of a pedestrian walkway with a prepared surface for pedestrian use.” A “prepared surface for pedestrian use” can be constructed out of numerous materials, including concrete, asphalt, compacted soil, decomposed granite, and other materials. Regardless of the materials used to construct the pedestrian walkway, if the intent of the design was to provide access to pedestrians, then curb ramps must be incorporated where an altered roadway intersects the pedestrian walkway. See 28 CFR 35.151(i).

**MoDOT A6:** A pedestrian walkway must be firm, stable and slip resistant. If an area meets these criteria and is being used as a pedestrian walkway, regardless of its intended use, the facility can be considered a de facto pedestrian walkway, and it should be made accessible for all persons regardless of abilities. Facilities such as MoDOT U2 shoulders that have been made accessible on one end, must be made compliant and access must be provided on both ends.

**Q7: If an existing curb ramp is replaced as part of a resurfacing alteration, is there an obligation to address existing obstacles on the adjacent sidewalk at the same time?**

**FHWA A7:** Not under ADA. The Joint Technical Assistance addresses those requirements that are triggered when a public entity alters a roadway where the roadway intersects a street level pedestrian walkway (28 CFR 35.151(i)). Public entities are required to address other barriers on existing sidewalks, such as steep cross slopes or obstructions, as part of their on-going program access and transition plan obligations under title II of the ADA and Section 504 and in response to requests for reasonable modifications under the ADA or reasonable accommodations under Section 504. See 28 CFR 35.105, 35.130(b)(7), and 35.150(d); see also 49 CFR 27.7(e), 27.11(c)(2).

**MoDOT A7:** MoDOT has committed, through our Transition Plan, to making our facilities ADA compliant with the next project through that area. This commitment is above what is outlined in the FHWA A7 answer provided by DOJ and FHWA. MoDOT's transition plan commitment is to have all of our facilities compliant with the federal law by 2027. There is no ability to add items to the Transition Plan to be corrected at a later time. The Commission commitment was to correct the deficient ADA items, including cross slopes, with the next project through the area. In addition, MoDOT committed to let ADA only projects before 2027 to complete ADA Transition Plan work in areas not touched by STIP work before that date.

**Q8: Several pavement preservation treatment types are not listed in the technical assistance. If the treatment type is not specifically on the list of maintenance treatments, is it an alteration?**

**FWHA A8:** New treatments are always being developed and the best practice is for the city or other local public entity conducting the work, the state transportation agency, and FHWA to work together to come to an agreement on a reasonable determination of whether the unlisted treatment type is an alteration or maintenance and document their decisions. If the new treatment can be deemed to be the equivalent of any of the items listed as alterations, it is a reasonable interpretation that they are in fact alterations and should be treated as such.

**Q9: When does a combination of two or more 'maintenance' treatments rise to the level of being an alteration?**

**FHWA A9:** The list of the pavement treatments that are considered maintenance, as stated in the 2013 Joint Technical Assistance document, are Chip Seals, Crack Filling and Sealing, Diamond Grinding, Dowel Bar Retrofit, Fog Seals, Joint Crack Seals, Joint Repairs, Pavement Patching, Scrub Sealing, Slurry Seals, Spot High-Friction Treatments, and Surface Sealing. The combination of two or more maintenance treatments may rise to the level of being an alteration.

The best practice is for the city or other local public entity conducting the work, the state transportation agency, and FHWA to work together to come to an agreement on a reasonable

determination, document their policies, and apply that determination consistently in their locality.

**Q10: When will utility trench work require compliance with ADA curb ramp requirements?**

**FWHA A10:** The answer to this question depends on the scope and location of the utility trench work being done. If the utility trench work is limited to a portion of the pavement, even including a portion of the crosswalk, repaving necessary to cover the trench would typically be considered maintenance and would not require simultaneous installation or upgrading of curb ramps. Public entities should note that the ADA requires maintenance of accessible features, and as such, they must ensure that when the trench is repaved or other road maintenance is performed, the work does not result in a lesser level of accessibility. See 28 CFR 35.133(a). If the utility work impacts the curb at a pedestrian street crossing where no curb ramp exists, the work affecting the curb falls within the definition of “alteration,” and a curb ramp must be constructed rather than simply replacing the curb. See 28 CFR 35.151(b) and 35.151(i).

If a public entity is unsure whether the scope of specific trench work and repair/repaving constitutes an alteration, the best practice is for the public entity to work together with the state transportation agency and the FHWA Division to come to an agreement on how to consistently handle these situations and document their decisions.

**Q11: Is full-depth pavement patching considered maintenance?**

**FWHA A11:** The answer to this question depends on the scope and location of the pavement patch. If the pavement patch work is limited to a portion of the pavement, even including a portion of the crosswalk, patching the pavement would typically be considered maintenance and would not require simultaneous installation or upgrading of curb ramps. Public entities should note that the ADA requires maintenance of accessible features, and as such, they should ensure that when the pavement is patched or other road maintenance is performed, the work does not result in a lesser level of accessibility. See 28 CFR 35.133(a). If the pavement patching impacts the curb at a pedestrian street crossing where no curb ramp exists, the work affecting the curb falls within the definition of “alteration,” and a curb ramp must be constructed rather than simply replacing the curb. See 28 CFR 35.151(b) and 35.151(i).

If a public entity is unsure whether the scope of specific full-depth pavement patching constitutes an alteration, the best practice is for the public entity to work together with the state transportation agency and the FHWA Division to come to an agreement on how to consistently handle these situations and document their decisions.

**Q12: Do any other requirements apply to road alteration projects undertaken by public entities that receive federal financial assistance from DOT either directly or indirectly, even if such financial assistance is not used for the specific road alteration project at issue?**

**FHWA A12:** Yes, if a public entity receives any federal financial assistance from DOT whether directly or through another DOT recipient, then the entity must also apply DOT's Section 504 requirements even if the road alteration project at issue does not use federal funds. See 49 CFR 27.3 (applicability of DOT's Section 504 requirements) and 27.5 (definition of "program or activity").

DOT's Section 504 disability nondiscrimination regulations are found at 49 CFR Part 27. These regulations implement Section 504 of the Rehabilitation Act of 1973 (Section 504). In 2006, DOT updated its accessibility standards by adopting the 2004 Americans with Disabilities Act Accessibility Guidelines (2004 ADAAG<sup>2</sup>) into its Section 504 regulations at 49 CFR 27.3 (referencing 49 CFR Part 37, Appendix A). These requirements replaced the previously applicable ADA Standards for Accessible Design (1991) (formerly known as 1991 ADAAG). At that time, DOT's regulation adopted a modification to Section 406 of the 2004 ADAAG which required the placement of detectable warnings on curb ramps.

**Q13: In addition to the obligations triggered by road resurfacing alterations, are there other Title II or Section 504 requirements that trigger the obligation to provide curb ramps?**

**FHWA A13:** In addition to the obligation to provide curb ramps when roads are resurfaced, both DOJ's Title II ADA regulation and DOT's Section 504 regulation (applicable to recipients of DOT Federal financial assistance), require the provision of curb ramps if the sidewalk is installed or altered at the intersection, during new construction, as a means of providing program accessibility, and as a reasonable modification under title II or a reasonable accommodation under Section 504.

### **New Construction and Alterations**

DOJ's Title II ADA regulation provides that 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. In addition, the regulation provides that newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways. See 28 CFR 35.151(i). These curb ramps must comply with the 2010 Standards.<sup>3</sup>

DOT's Section 504 Federally assisted regulation also requires the provision of curb ramps in new construction and alterations. See 49 CFR 27.19(a) (requiring recipients of DOT financial assistance to comply with DOJ's ADA regulation at 28 CFR Part 35, including the curb ramp requirements at 28 CFR 35.151(i)); 49 CFR 27.75 (a)(2) (requiring all pedestrian crosswalks constructed with Federal financial assistance to have curb cuts or ramps).

### **Program Accessibility**

Both DOJ's Title II ADA regulation and DOT's Section 504 regulation require that public entities/recipients operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This obligation, which is known as providing "program accessibility," includes a requirement to evaluate existing facilities in the public right-of-way for barriers to accessibility, including identifying non-existent or non-compliant curb ramps where roads intersect pedestrian access routes (sidewalks or other pedestrian walkways). After completing this self-evaluation, a public entity/recipient must set forth a plan for eliminating such barriers so as to provide overall access for persons with disabilities. See 28 CFR 35.150, and 49 CFR 27.11(c).

Since March 15, 2012, the DOJ title II regulation requires the use of the 2010 Standards for structural changes needed to provide program access.

Under Section 504, self-evaluations and transition plans should have been completed by December 29, 1979. Under the ADA, transition plans should have been completed by July 26, 1992, and corrective measures should have been completed by January 26, 1995. While these deadlines have long since passed, entities that did not develop a transition plan prior to those dates should begin immediately to complete their self-evaluation and develop a comprehensive transition plan.

### **Reasonable Modification /Accommodation**

In addition to alteration and program accessibility obligations, public entities may have an obligation under title II and Section 504 to undertake curb ramp construction or alteration as a "reasonable modification/accommodation" in response to a request by, or on behalf of, someone with a disability. Such a request may be made to address a non-compliant curb ramp outside of the schedule provided in the public entity's transition plan. A public entity must appropriately consider such requests as they are made. 28 CFR 35.130(b)(7); 49 CFR 27.7(e).

<sup>1</sup> The 2010 Standards can be found on DOJ's website at [http://www.ada.gov/2010ADAstandards\\_index.htm](http://www.ada.gov/2010ADAstandards_index.htm).

<sup>2</sup> In 2004, the United States Architectural and Transportation Barriers Board (U.S. Access Board) published the Americans with Disabilities Act Accessibility Guidelines (2004 ADAAG), which serve as the basis of the current enforceable ADA standards adopted by both DOT and DOJ.

<sup>3</sup> The 2010 Standards include a provision on equivalent facilitation that allows covered entities to use other designs for curb ramps if such designs provide equal or greater access. See section 103 of the [2010 Standards](#).

## Additional Questions and Answers

### **Q14: What should be considered when scoping for existing or new ADA facilities?**

**MoDOT A14:** ADA facilities are another lane of traffic and should be scoped and designed with the same considerations as applied to a roadway project. The Public Right of Way Accessibility Guidelines (PROWAG) do not require sidewalks be built, but if they are provided then they must be constructed in accordance with the PROWAG guidelines. Considerations for additional right-of-way should be the same as what would be considered for a roadway lane of traffic.

PROWAG guidelines and good engineering judgment must be used when designing pedestrian facilities. Elements of PROWAG are not eligible for design exceptions, but sufficient flexibility exists within the ADA guidelines to provide a practical facility that is both usable and accessible for all users.

### **Q 15: When will safety projects require compliance with ADA requirements?**

**MoDOT A15:** The extent of how safety projects will affect ADA facilities will depend on the scope of the safety improvement. Striping and signing projects are considered maintenance operations. Guardrail on its own would not be considered an alteration but if roadway alterations are necessary, such as curb and gutter alterations or geometric roadway changes may cause the project to be considered an alteration. Coordination with the Non-Motorized Transportation Engineer and FHWA is encouraged in questionable situations.

### **Q16: How are ADA requirements addressed with other transportation modes?**

**MoDOT A16:** Coordination with other modes of transportation is highly encouraged, and is drawing national attention as a greater focus is being placed on pedestrian facilities. Bringing representatives from other transportation modes into the core team or having planning discussions during the scoping process will facilitate the process of providing a complete transportation solution. Bringing these other transportation modes to the project may provide an opportunity to access other funding sources.

### **Q17: How are ADA requirements addressed with tight right-of-way projects that have signals and lighting? (No place to put poles etc.)**

**MoDOT A17:** Projects must be designed to accommodate the needs of the public. If a pedestrian circulation path is required, then equal consideration to provide an ADA compliant facility must be provided. Sufficient right-of-way for all of the needed improvements should have been purchased at the time the roadway right-of-way was purchased. When sidewalks are added, this is another lane of traffic and should be afforded the same considerations. If obtaining right-of way is impractical, then other design elements should be employed, just as we would do for any other lane of traffic. MoDOT is a total transportation department, not only a vehicle department.



**Q18: Where a surface only maintenance agreement exists and deeds indicate that MHTC does not own the right-of-way, what is required under ADA when MoDOT performs an alteration?**

**A5a:** Under the ADA, the triggering event is an “alteration”. Once the threshold is met, ADA improvements are mandatory; the only question is which entity must make the improvements. When an agreement exists between the parties, such a determination is a matter of contract interpretation. When MHTC clearly does not own the right-of-way, its obligation is to maintain the thruway surface of the road and provide accessible ramps for intersection crosswalks. Where MHTC clearly does not own the right-of-way, for the alteration to be completed, it is the obligation of the owner to make the ADA repairs. If the owner does not agree to make the ADA improvements, MHTC’s surface maintenance project cannot go forward. The owner’s failure to pay for the ADA improvements would make MHTC’s ability to perform its obligation under the contract impossible. The ability to terminate the agreement if the owner fails to provide the ADA improvement is MoDOT’s best leverage.

MHTC has the ability to continue with the alteration if so desired, but would be obligated to remove the barriers to access as outlined in Question 3 above.

**Q19: Where MHTC owns the right-of-way but has a surface only maintenance agreement that states a city or a county will maintain the sidewalks, what is MoDOT’s responsibility under ADA for sidewalks when re-surfacing a roadway?**

**MoDOT A19:** As outlined in A3, the existing agreement is a contractual obligation. The triggering event of an “alteration” will obligate the ADA deficiencies to be corrected. The standard clause in MHTC’s Municipal Agreement requires a city or county to maintain sidewalks constructed on MHTC’s right-of-way as part of the project. Normally, maintenance would include minor issues such as pothole repair, small crack repair, removal of snow and ice etc. Structural repairs to bring the sidewalk into ADA compliance were not contemplated as part of the stipulated obligation for maintaining sidewalks. If the sidewalks require more than routine maintenance to bring them into ADA compliance, such work would be MHTC’s responsibility as owners of the sidewalk and the right-of-way.

**Q20: When do pedestrian signals have to be installed?**

**MoDOT A20:** Signal Warrants are discussed in EPG Section 902.3 and in the MUTCD. If a pedestrian signal or school crossing warrant is met and a traffic control signal is justified by an engineering study, the traffic control signal shall be equipped with pedestrian signal heads complying with the provisions set forth in EPG 902.6 Pedestrian Control Features. For further information on school crossing signalization see EPG 902.11 Traffic Control for Schools.

**Q21: Can existing sidewalks be removed?**

**MoDOT A21:** The short answer is No, sidewalks cannot be removed. See PROWAG 2005 Section R202.3.1 Prohibited Reduction in required Access (See also PROWAG 2011 R202.3.3) which states, *“An alteration shall not decrease or have the effect of decreasing the accessibility of a facility or an accessible connection to an adjacent building or site below the requirements for new construction in effect at the time of the alteration.”* Further, pedestrian detour routes must be provided when areas of the sidewalk are out of service due to maintenance activities or alteration work. See PROWAG 2005 Section R205 Alternative Pedestrian Access Route states, *“When an existing pedestrian access route is blocked by construction, alteration, maintenance, or other temporary conditions, an alternate pedestrian access route complying to the maximum extent feasible with R301, R302, and Section 6D.01 and 6D.02 of the MUTCD shall be provided.”*

**Q22: What does the term “Barriers to Access” really mean? Is it only about curb ramps?**

**MoDOT A22:** No. The term “Barriers to Access” includes any element of the pedestrian access route that is not ADA compliant. Barriers to Access include, but are not limited to: grade, cross slope, width, passing space intervals, vertical clearance, changes in level, grates and gaps, protruding objects, and surfacing that is not firm, stable and slip resistant.

MoDOT, in its 2010 ADA Transition Plan, committed to bring pedestrian facilities associated with roads and bridges that are undergoing alterations into compliance with current ADA standards. Stating, “Every effort will be made to remove all barriers and provide easy access to the transportation facilities over which the department has control.” This includes removal of all barriers within pedestrian spaces like sidewalks, trails, shared use paths, crosswalks, curb ramps, accessible parking and loading spaces, driveway crossings and paved approaches.