

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

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DISABLED IN ACTION OF  
PENNSYLVANIA

v.

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY

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CIVIL ACTION NO. 03-CV-1577

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**DEFENDANT SEPTA’S MOTION FOR SUMMARY JUDGMENT**

Defendant Southeastern Pennsylvania Transportation Authority (“SEPTA”), by its counsel, moves the Court for summary judgment on Count I of Plaintiff’s Fourth Amended Complaint based on the statute of limitations, unclean hands, laches, and compliance with the alteration provisions of the Americans with Disabilities Act. SEPTA moves for summary judgment on Count II based on waiver, laches, the primacy of the applicable regulation, the absence of a private cause of action, res judicata and collateral estoppel.

**The EPVA Litigation**

1. On November 20, 1986, Eastern Paralyzed Veterans Association of Pennsylvania, Inc. (“EPVA”) commenced an action against the City of Philadelphia in this District, captioned Eastern Paralyzed Veterans Association of Pennsylvania, Inc., et al. v. Dudley R. Sykes, Civ. No. 86-6797, and subsequently joined SEPTA as an additional defendant.

2. EPVA’s Amended Complaint, **Exhibit “1,”** averred that EPVA consists of disabled veterans who are serviced by SEPTA and who seek the vindication of the civil rights of all disabled persons pertaining to access to public transportation. Amended Complaint at ¶ 3(a).

3. EPVA accordingly brought its action on behalf of itself and its individual

members who, it alleged, are part of a Class consisting of all mobility-impaired persons who have been and are denied access to SEPTA rail stations. Amended Complaint at ¶ 8.

4. EPVA's Amended Complaint likewise alleged that SEPTA was planning to renovate other stations but that, with one exception, all of the other renovated stations would be inaccessible to members of the Class. Amended Complaint at ¶ 43.

5. EPVA's Amended Complaint accordingly sought relief including certification of the Class pursuant to Fed.R.Civ.P. 23 and injunctive relief requiring that SEPTA render those stations accessible to members of the Class. Amended Complaint, Prayer For Relief at ¶¶ 2, 4, 5.

6. EPVA's causes of action were brought pursuant to Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act") (providing that disabled persons may not be excluded from any activity receiving federal financial assistance), and certain other statutes. Amended Complaint at ¶¶ 47-64.

### **The EPVA Settlement Agreement**

7. EPVA, SEPTA and the City of Philadelphia negotiated the settlement of all of EPVA's claims, resulting in a June 28, 1989 Settlement Agreement (the "Settlement Agreement"), **Exhibit "2."**

8. The Settlement Agreement provided that SEPTA, "in compromise of disputed claims," would make certain stations -- *agreed by the parties to be "key stations"* -- accessible to the mobility-handicapped on the timetable established therein.<sup>1</sup> Those stations

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<sup>1</sup> A decade before the Settlement Agreement, in 1979, the United States Department of Transportation ("DOT") had promulgated regulations to implement section 504 of the Rehabilitation Act of 1973 which addressed the characteristics and accessibility attendant to a rail system's "key stations."

included five stations on SEPTA's Market-Frankford Line, but *not* 15<sup>th</sup> Street Station, and four stations on SEPTA's Broad Street Line, but *not* City Hall Station. EPVA, in turn, released SEPTA from all claims that SEPTA violated any law or regulation regarding accessibility to its rail stations. Settlement Agreement at ¶¶ 1, 3, 6.a. and b.

9. The Settlement Agreement provided for notice of the settlement to members of the Class and the opportunity for members to object to its approval. Settlement Agreement at ¶ 7.a.4.

10. The Settlement Agreement was approved thereafter by the Court, per Judge Newcomer, on July 6, 1989, and *Disabled in Action of Pennsylvania ("DIA") admits that its membership on that date included members of the Class certified by Judge Newcomer*. DIA's Amended Responses and Objections to SEPTA's First Set of Requests for Admissions, **Exhibit "3"** at No. 32.

11. On July 10, 1989, Class counsel published a Notice of the proposed settlement to Class members -- which specifically identified each "key station" to be made accessible -- in *The Philadelphia Inquirer* and *The Philadelphia Daily News*, but he did not receive any objections from any person, *including DIA or any of its members*. Affidavit of Richard M. Zuckerman, Esquire, **Exhibit "4"** at ¶¶ 3, 4.

12. On July 28, 1989, following a hearing on the fairness, adequacy and reasonableness of the Settlement Agreement, Judge Newcomer entered an "Order and Judgment Approving Settlement," **Exhibit "5."** That Order confirmed the Class as consisting of all mobility-handicapped persons living, working, or traveling in Philadelphia and the contiguous counties; held that the Settlement Agreement was fair, adequate, and reasonable; and dismissed

the subject action with prejudice.

**The Enactment of the ADA**

13. On July 26, 1990, the Americans with Disabilities Act of 1990 (“ADA”) took effect and addressed, among other things, how rail stations were to be made accessible to individuals with disabilities. DOT thereafter promulgated regulations to implement the ADA which set forth the criteria and accessibility for key stations which were substantially identical to those utilized to implement the Rehabilitation Act. ADA key station criteria, 49 C.F.R. §§ 37.47, 37.51, **Exhibit “6;”** Rehabilitation Act key station criteria, 49 C.F.R. §§ 27.87, 27.89, **Exhibit “7.”**

14. To strike a balance between providing access to persons with disabilities and limiting prohibitive costs on businesses, the ADA did not and does not require public entities to make *all* existing stations accessible to individuals who use wheelchairs. See H.R. Rep. 101-485(III)(1990) at 60.

15. With regard to stations constructed *prior* to its enactment, the ADA required only those previously constructed stations *designated by the public entity* as “key stations” to be made accessible to individuals with disabilities. 42 U.S.C.A. § 12147(b).

16. The Settlement Agreement, along with a similar settlement agreement in New York City, were the subject of discussions in committees debating the ADA. See S. Rep. No. 101-116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. at 56, 94 (1989); H. Rep. No. 101-485(I), 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. at 9 (1990); H. Rep. No. 101-485(II), 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. at 96-97 (1990); H. Rep. No. 101-485(IV), 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. at 52 (1990).

17. The Senate Committee on Labor and Human Resources specifically stated in its

official report that “the settlement agreements recently reached in New York City ... and Philadelphia ... are in full compliance” with the ADA key station accessibility requirements and “these plans would satisfy the bill’s requirement for accessibility of key stations.” S. Rep. No. 101-116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. at 56, 94 (1989).

18. The House Committee on Public Works and Transportation stated in its official report:

The Committee finds special merit in local settlement agreements (such as those negotiated in New York and Philadelphia) regarding the identification of key stations, when they have been negotiated in good faith by public entities and representatives of the disability community. The Committee expects the criteria established by the Secretary to find that these *local agreements fully meet the requirements of this subsection*.

H. Rep. No. 101-485 (I), 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. at 9 (emphasis added).

19. The House Committee on Education and Labor agreed that the Philadelphia and New York Settlement Agreements listed the “key stations” for each city and were in “full compliance” with the ADA key station requirements. H. Rep. No. 101-485 (II), 101<sup>st</sup> Cong. 2<sup>nd</sup> Sess. at 96-97.

20. The House Committee on Energy and Commerce stated that it did not intend “this legislation [the ADA] to upset in any manner the settlement agreements recently reached by commuter authorities in New York and Philadelphia with respect to key stations.” H. Rep. No. 101-485 (IV), 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. at 52 (1990).

21. Roland Mross, Deputy Administrator of the Urban Mass Transportation Administration of DOT, testified as follows before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation:

The transit agencies and members of the disabled community would work together to plan the strategy for key station accessibility. The pattern of New York and Philadelphia, which already have worked out agreements to retrofit key stations, would serve as an excellent model in this regard for other cities. The ADA, as passed by the Senate, *would require no incremental effort by the cities of New York and Philadelphia.*

H. Rep. No. 101-32, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. at 14 (1989) (emphasis added).

**DIA's Failure to Object to the ADA Regulations During the Rulemaking Process**

22. On April 4, 1991, the DOT published a Notice of Proposed Rulemaking ("NPRM") that addressed various proposals to amend rules implementing the ADA and that included amendments to regulations concerning key stations. See 56 Fed. Reg. 13856 at 1.

23. The NPRM specifically addressed the use of the Settlement Agreement to satisfy SEPTA's obligation to identify key stations, stating in part:

Both Senate and House reports referred to settlements concerning station accessibility in New York and Philadelphia, suggesting that these agreements should be viewed as in compliance with ADA regulations. S. Rept. 101-116 at 56; H. Rept. 101-485, Pt. 1, at 34.

\* \* \*

As required by statute, public entity rail operators would have to submit a plan to the Secretary for complying with key station requirements. (*With respect to those cities in which agreements mentioned by the Committee reports have already been worked out (i.e., New York and Philadelphia), submission of the plans developed under the agreement would satisfy the requirement.*)

\* \* \*

The proposed rule is not intended to require a public entity to nominate as a key station every station that may meet one of the criteria. Rather, the aim of the provision is to ensure that the system, when viewed as a whole, becomes accessible to and usable by individuals with disabilities. The success of the public entity's key stations designations would be judged according to this standard. In looking at plans from New York and Philadelphia, the Department would be mindful of Congressional Reports' endorsement of them.

56 Fed. Reg. 13856 at 10 (emphasis added).

24. DIA did not offer a single objection with respect to the proposed rules. See U.S. Department of Transportation, Docket No. 47483, Applicant: Transportation for Individuals with Disabilities (Notice 91-7), **Exhibit “8.”**

25. On September 6, 1991, DOT issued notice that it was issuing a final version of the rules covered in the April 4, 1991 NRPM, which stated that “[t]he Department received over 260 written comments on the NPRM from a wide variety of disability community, transit industry, and other interested commenters” and “[i]n addition, the Urban Mass Transportation Administration (“UMTA”) held six public hearings, at which we received approximately 120 spoken and written comments.” 56 Fed. Reg. 45584 at 1.

26. This September 6, 1991 Notice contained no objection to the use of the key stations identified in the Settlement Agreement to satisfy SEPTA’s key station designation requirements. See 56 Fed. Reg. 45584 at 1.

27. DOT accordingly promulgated a regulation which deemed SEPTA as having already complied with the ADA “key station” identification obligations.

Exception for New York and Philadelphia.

- (a) The following agreements entered into in New York, New York and Philadelphia, Pennsylvania, contain lists of key stations for the public entities that are a party to those agreements for those service lines that are identified in the Agreements. *The identification of key stations under these agreements is deemed to be in compliance with the requirements of this Subpart.*

\* \* \*

- (2) Settlement Agreement by and between Eastern Paralyzed Veterans Association of Pennsylvania, Inc. and ... Southeastern Pennsylvania Transportation Authority, June 28, 1989.

49 C.F.R. § 37.53 (emphasis added).<sup>2</sup>

28. The comments to 49 C.F.R. § 37.53 specifically addressed the satisfaction of key station designation obligations for New York and Philadelphia, stating that “[t]his section formally recognizes that agreements concerning key station accessibility in New York City and Philadelphia have identified key stations, *which designations were intended to be recognized as complying with ADA key station selection requirements*” and that “[a]s suggested by a comment from one of the transit providers involved in the New York agreement, *the entities involved can limit their key station planning process to issues concerning the timing of key station accessibility.*” See 56 Fed. Reg. 45584 at 27 (emphasis added).

29. DIA admits that 49 C.F.R. § 37.53 is not arbitrary, capricious, nor manifestly contrary to the ADA. See DIA’s September 21, 2005 Contention Interrogatory Responses, excerpt, at ¶¶ 7-11, **Exhibit “9.”**

30. DIA has identified James Weisman as a trial witness, presumably to interpret the meaning of 49 C.F.R. 37.53 and opine regarding DOT’s intent in promulgating 49 C.F.R. 37.53, and to testify that:

a) he was personally involved in the promulgation of DOT’s ADA regulations;

b) by referencing the Settlement Agreement in 49 C.F.R. §37.53, DOT intended the Settlement Agreement to be a minimum requirement for SEPTA and that DOT did not intend that the stations identified in the Settlement Agreement to be the only stations designated “key.”

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<sup>2</sup> 49 C.F.R. § 37.53 also satisfied the key station designation obligations of New York’s Metropolitan Transportation Authority (“MTA”) which, like SEPTA, had settled a class action lawsuit with EPVA by entering into a settlement agreement that embodied the key station concept.



Weisman Affidavit, “**Exhibit 62**” at ¶12; Weisman Deposition, “**Exhibit 63**” at 86, 123-124.

31. Mr. Weisman was never employed by DOT, nor did he ever author any regulations. Weisman Deposition, **Exhibit “63”** at 282-283. He was a member of a Federal Advisory Committee that, by his own admission, had no decision making authority regarding promulgation of the ADA regulations. *Id.* at 78.

32. During the ADA rulemaking process, on January 11, 1991, the Urban Mass Transportation Administration (UMTA) had issued a notice of intent to establish a Federal Advisory Committee (Advisory Committee), consistent with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I, Public Law 100-641, to aid UMTA and DOT in developing rules necessary to implement the ADA. 56 Fed. Reg. 1217.

33. Pursuant to ¶ 9(b) of 5 U.S.C.A. App. 2, “[u]nless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.” (Emphasis added).

34. The Advisory Committee’s charter specified that the Advisory Committee would *advise* the Secretary of DOT and the Administrator of UMTA on a rulemaking to be conducted by them to carry out the provisions of the ADA. 56 Fed. Reg. 1217. The advice was to have been used by the agency and the Department in their deliberations on both the Notice of Proposed Rulemaking and the Final Rule. *Id.* According to the Charter, the Advisory Committee would review issues submitted in comments on the proposed rule. *Id.* Significantly, the preamble specified that the Advisory Committee was to “act *solely in an advisory capacity* to

the agency and shall neither exercise any program management responsibility *nor make decisions directly* affecting the matters on which it provides advice.” Id. (emphasis added).

35. Mr. Weisman was deposed on 2 separate occasions regarding his membership on the Advisory Committee. Weisman Deposition, 8/25/05 and 10/11/2005, **Exhibit “63.”**

36. Mr. Weisman testified that he did not draft the ADA regulations, nor did any other member of the Advisory Committee. Id. at 84, 286-88. He admitted that he did not have any authority to draft regulations or to have his comments implemented by DOT, and that neither he nor the Advisory Committee had the power to draft, promulgate, approve or disapprove regulations. Id. at 282-283, 285, 288-291.

37. Mr. Weisman conceded that his opinion of 49 C.F.R. § 37.53 was his own personal opinion and not that of the Advisory Committee. Id. at 287.

38. Any testimony by Mr. Weisman interpreting 49 C.F.R. § 37.53 and the alleged intentions of DOT in promulgating that regulation is not legally competent evidence and must be excluded. Mr. Weisman’s membership on the Advisory Committee, which had no authority, does not render him competent to testify as to the meaning of regulations or the intentions of DOT or any other administrative agency.

**DIA’s Failure to Object to the Regulations During SEPTA’s Public  
Participation and Planning Process**

39. In order to comply with the 49 C.F.R. § 37.53(b) obligation to use its public participation and planning process solely to develop and submit plans for timely completion of key station accessibility to the Federal Transit Administration (“FTA”), SEPTA published notice of and held a public hearing on July 7, 1992 to solicit comments regarding its proposed key

stations. See SEPTA Notice, **Exhibit “10.”**

40. SEPTA’s Final ADA Key Station Plan and Schedule was distributed on SEPTA paratransit vehicles, commuter railcars, and at all key stations. Additionally, the July 7, 1992 public hearing was advertised in both *The Philadelphia Inquirer* and *The Philadelphia Tribune*. Final ADA Key Station Plan and Schedule, July 23, 1992, **Exhibit “11”** at 15.

41. DIA submitted written testimony at the July 7, 1992 public hearing, *none of which mentioned the designation of key stations or the Key Station Plan*. Disabled in Action’s Written Testimony, SEPTA Public Hearing, July 7, 1992, **Exhibit “12.”**

42. Subsequently, at SEPTA’s Regular Board Meeting held on July 23, 1992, DIA President Erik Von Schmetterling, on behalf of DIA, made specific complaints and submitted written demands and correspondence to the Board, *none of which mentioned the designation of key stations or the Key Station Plan*. Minutes of SEPTA Regular Board Meeting, July 23, 1992, **Exhibit “13.”**

43. After that Board meeting, the Board adopted the Key Station Plan. SEPTA Board Resolution dated July 23, 1992, **Exhibit “14.”**

44. SEPTA submitted its Key Station Plan to DOT’s FTA by July 26, 1992 in accordance with the ADA and DOT regulations. See 42 U.S.C. § 12147(b)(2)(3) and § 12162(e); 49 C.F.R. § 37.53. DIA’s counsel, Stephen F. Gold, Esquire (“Gold”), thereafter inquired of SEPTA as to the progress of the key station modifications on multiple occasions, but without complaint as to the key station designations.<sup>3</sup>

45. SEPTA, in its publicly available Capital Budgets, has reported annually -- *for 14*

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<sup>3</sup> See Gold-Kilcur correspondence, collectively **Exhibit “15.”**

*consecutive years* -- on the progress of its Key Station Plan, specifically utilizing “key station” terminology. See SEPTA, Capital Budgets, Fiscal Years 1993-2006, excerpts attached collectively as **Exhibit “16.”** *Prior to filing its initial Complaint in this action, DIA had never lodged an objection to SEPTA’s key station designations.*

46. As of this date, SEPTA has made ADA accessible 31 of its 35 key stations on its rapid and commuter rail systems. Lister Affidavit, **Exhibit “17”** at ¶ 3. Two more key stations are anticipated to be accessible within the next 12 months. Id. at ¶ 4.

#### **The 1996 Amendment to the Settlement Agreement**

47. On May 23, 1996, seven years after the Settlement Agreement and six years after the enactment of the ADA, the EPVA v. Sykes parties filed with the Court a “Stipulation and Order Preliminarily Approving Amendment of Settlement Agreement,” **Exhibit “18,”** pursuant to which EPVA consented to the replacement of two of the previously agreed upon key stations with two other stations.

48. On July 9, 1996, following notice to the Class of the proposed amendment and a Hearing, Judge Newcomer approved the amendment as fair, adequate and reasonable. **Exhibit “19.”**

#### **The DIA Litigation**

49. On March 14, 2003 -- fourteen years after Judge Newcomer’s approval of the Settlement Agreement, eleven years after the enactment of 49 C.F.R. § 37.53 and seven years after the Court-approved amendment to the Settlement Agreement -- DIA initiated the captioned action and thereafter filed a Fourth Amended Complaint against SEPTA on February 15, 2005. **Exhibit “20.”**

50. Count I alleges that SEPTA has violated the ADA and the Rehabilitation Act by: (1) altering Suburban Station's 15<sup>th</sup> Street Courtyard without providing an elevator at that location and (2) replacing an escalator in the southeast corner of the City Hall Courtyard without providing for an elevator at that location. **Exhibit "20," ¶60**

51. Count II alleges that 15<sup>th</sup> Street Station and City Hall Station are "key stations" under the ADA. **Exhibit "20," ¶ 61**

52. DIA's Fourth Amended Complaint alleges that it is an organization open to anyone who has a disability which, like EPVA, includes persons with mobility impairments (¶ 6); and that its participants, as did EPVA's, seek wheelchair access to the City Hall and 15<sup>th</sup> Street Stations. **Exhibit "20," ¶ 61; Prayer For Relief, ¶ C.**

53. Like the EPVA v. Sykes Amended Complaint, DIA's Fourth Amended Complaint seeks relief premised on causes of action under Section 504 of the Rehabilitation Act, and also asserts causes of action under the ADA and DOT regulations implementing the ADA.

54. DIA is contending through the instant litigation that other stations existing at the time of the Settlement Agreement, which were not included therein by the agreement of those parties, are in fact key stations; and it further contends that the EPVA v. Sykes parties included as key stations in the Settlement Agreement certain stations which are not in fact key stations. Plaintiff's Amended Responses to Defendant SEPTA's Contention Interrogatories, **Exhibit "21"** at No. 4.

55. Further, in attempting to relitigate the alleged key station status of 15<sup>th</sup> Street Station and City Hall Station already resolved in EPVA v. Sykes and incorporated into DOT regulation 49 C.F.R. § 37.53, DIA's proposed witnesses are to testify regarding the alleged key

station characteristics of those stations, which testimony would have been presented of necessity by the EPVA Class had EPVA v. Sykes been tried. DIA's Responses to SEPTA's First Set of Interrogatories, **Exhibit "22"** at No. 9c.

56. DIA and its counsel state that they are unable to locate documents that are germane to the approval of the Settlement Agreement and the promulgation of 49 C.F.R. § 37.53. **Exhibit "3"** at ¶¶ 6-12, 17-20, 34-36, 38-42, 44, 53-54, 56-66, 73, 76-78, 82-83, 90-93 and 95.

57. The cost of making City Hall Station and 15<sup>th</sup> Street Station accessible is currently estimated to be \$100,000,000. Heiser Affidavit, 3/14/06, **Exhibit "23"** at ¶ 10.

**Count I is Barred by the Statute of Limitations**

58. Count I is barred by the statute of limitations as DIA was aware of each fact allegedly giving rise to a cause of action more than two years before it filed suit.

59. DIA's cause of action regarding the 15<sup>th</sup> Street Courtyard accrued on August 3, 2000 and the limitations period expired on August 3, 2002.

60. On August 3, 2000, DIA's counsel, Gold, wrote to the City of Philadelphia's Commissioner of the Department of Licenses & Inspections, expressing concern that the City allowed SEPTA to apply for a variance to perform construction in the 15<sup>th</sup> Street Courtyard without providing an elevator at that location. Gold Deposition, 11/4/05, "**Exhibit "24"**" at 33-34; Letter from Gold to McLaughlin, 8/3/00, **Exhibit "25."**

61. On September 28, 2000, Gold wrote to the City Solicitor's Office, stating that the elevator issue should be resolved before construction commenced or he would "act sooner than later." Gold Deposition, 11/4/05, **Exhibit "24"** at 35-37; Letter from Gold to Winebrake, 9/28/00, **Exhibit "26."**

62. On November 14, 2000, Fredrick K. Pasour, Esquire (“Pasour”) of the City Solicitor’s Office responded to Gold’s letter, stating that he understood that a lawsuit might be commenced to enjoin construction at the 15<sup>th</sup> Street Courtyard. Pasour advised Gold that a permit had been issued for construction, and requested that any legal action be brought “in an expeditious manner.” Letter from Pasour to Gold, 11/14/00, **Exhibit “27.”**

63. After reading Pasour’s letter, Gold chose not to file suit. Gold Deposition, 11/4/05, **Exhibit “24”** at 38-39.

64. Nancy Salandra (“Salandra”), DIA’s Executive Director, authorized Gold to write the letters to the L&I Commissioner and City Solicitor. Salandra Deposition, 11/4/05, **Exhibit “28”** at 42-43, 45, 48. Salandra also read Pasour’s letter in or around November 2000 and testified that it was the subject of a DIA meeting at which a decision was made not to file suit at that time. **Exhibit “28”** at 49-50, 51-55.

65. The construction of the 15<sup>th</sup> Street Courtyard began in February 2001 and was completed on August 8, 2002. Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶ 39; Heiser Affidavit, 3/14/06, **Exhibit “23”** at ¶ 7. SEPTA would now be required to expend \$810,000 to install an elevator in the 15<sup>th</sup> Street Courtyard. Heiser Affidavit, 3/14/06, **Exhibit “23”** at ¶ 8. Furthermore, inconvenience to the public will result from the additional construction. *Id.* at ¶ 9.

66. DIA previously has asserted that the statute of limitations was equitably tolled because it claimed that SEPTA agreed to build elevators at City Hall in lieu of an elevator in the 15<sup>th</sup> Street Courtyard. Plaintiff’s Reply In Support of Its Motion for Partial Summary Judgment, **Exhibit “30”** at 4-5.

67. This Court approved a Stipulation barring DIA from raising that claim. The

Stipulation states as follows:

Plaintiff is hereby precluded from presenting *any claim* that Defendant SEPTA allegedly agreed to construct elevators at City Hall in lieu of construction of an elevator at the northwest corner of 15<sup>th</sup> and Market Streets *or* that SEPTA is liable for failing to abide by any such alleged agreement *at trial or in any hearing or in any other proceeding; said claims are hereby dismissed with prejudice.*

Docket #36, Order of the Honorable Clifford Scott Green, 7/20/04 (emphasis added). Based on the Stipulation, this Court ordered references to the alleged agreement stricken. Docket #70, Order of the Honorable Gene E.K. Pratter, 12/23/04.

68. SEPTA did not engage in any acts of concealment designed to mislead DIA regarding the installation of elevators at City Hall and did not prevent DIA from asserting its rights.

69. Gold testified that he met with Fran Egan, SEPTA's former Assistant General Manager for Public, Government and Customer Affairs, sometime in 2000 and that Egan represented that SEPTA would build elevators at City Hall, with construction commencing at the end of 2002 and ending in 2004. Gold Deposition, 11/4/05, **Exhibit "24"** at 13-14, 16-22, 24. SEPTA denies that Ms. Egan, who is now deceased, made any such representation.

70. Neither Gold nor DIA's Executive Director ever attempted to confirm whether Ms. Egan had authority to make that alleged representation or to confirm that elevators at City Hall would be built by a certain date. Gold Deposition, 11/4/05, **Exhibit "24"** at 22, 24, 25-29; Salandra Deposition, 11/4/05, **Exhibit "28"** at 29, 31-32.

71. DIA's Executive Director did nothing to follow up other than wait for construction to begin. Salandra Deposition, 11/4/05, **Exhibit "28"** at 31-34. According to DIA's Executive Director, there was "no point" in trying to confirm that elevators at City Hall



would be completed by a certain date because of her perception that SEPTA wouldn't meet that date. Id. at 31-33.

72. Ms. Egan's job duties involved developing political and public support for SEPTA. Torres Affidavit, **Exhibit "31"** at ¶ 4. She was also responsible for building and maintaining relationships with government and community groups within the five county region. Id. Ms. Egan had no input into how SEPTA's Capital Budget was developed or what funding was assigned to particular Capital Projects. Id. at ¶ 6. She had no decision-making or advocacy role regarding whether a particular Capital Project got funded, nor did she have any authority to commit any funding to a Capital Project. Id.

73. SEPTA is not bound by any statements made by Ms. Egan to DIA as Egan had no authority to commit to a timetable for the City Hall elevators or commit funds for this project. Id.; Burnfield Affidavit, **Exhibit "32"** at ¶ 18. Only SEPTA's Board of Directors has the statutory authority to approve a multi-million dollar expenditure such as the installation of elevators at City Hall. 74 Pa.C.S.A. § 1751(a); Burnfield Affidavit, **Exhibit "32"** at ¶ 18.

74. SEPTA is a statutorily created Commonwealth agency and its powers are limited by statute. 74 Pa.C.S.A. § 1711. SEPTA's enabling statute provides that it is governed by its Board. Id. at § 1712(a).

75. Regarding the adoption of SEPTA's Operating and Capital Budgets, the enabling statute specifically states:

... the board shall cause to be prepared and submitted to it a tentative operating budget and a tentative capital budget for the ensuing fiscal year. The tentative budgets shall be considered by the board and, subject to any revision and amendments as may be determined, shall be adopted prior to the first day of the ensuing

fiscal year as the budgets for that year. The board shall establish such rules as are necessary, for proper observance of the budgets. Simultaneously with the adoption of the capital budget, the board shall adopt a tentative capital program covering the ensuing six years.

74 Pa.C.S.A. § 1751(a).

76. Public hearings are held prior to the adoption of the Capital Budget by the Board. Advance notice of the hearings are required. 74 Pa.C.S.A. § 1751(b). Notice of the hearings is published on SEPTA's website, in *The Philadelphia Inquirer*, *The Philadelphia Daily News*, *The Philadelphia Tribune*, other local newspapers, and at SEPTA stations. Burnfield Affidavit, **Exhibit "32"** at ¶12; Excerpts from transcripts of SEPTA public hearings, **Exhibit "33,"** SEP9035, 9038-9039, 9497, 9501-9502.

77. At the hearings, the proposed Capital Budget for the next Fiscal Year and 12 year Capital Program is available to the public.<sup>4</sup> Burnfield Affidavit, **Exhibit "32"** at ¶ 13. Members of the public can ask questions regarding the Capital Budget and Capital Program, and express their opinions on the record or in writing. *Id.* at ¶ 14.

78. Neither Gold nor DIA's Executive Director attended the public hearings on the Capital Budget and Capital Program for Fiscal Years 2001, 2002 and 2003. Excerpts from transcripts of SEPTA public hearings, **Exhibit "33,"** SEP9138-9140; 9436-9446; 9497; 9906-9915; 10308-10318.

79. After the public hearings, the Board votes on the proposed budget at a meeting open to the public. Burnfield Affidavit, **Exhibit "32"** at ¶ 15. No action can be taken or funds

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<sup>4</sup> SEPTA's fiscal year begins on July 1<sup>st</sup> and ends on June 30<sup>th</sup>. Burnfield Affidavit, **Exhibit "32"** at ¶ 6. For example, Fiscal Year 2001 began on July 1, 2000 and ended on June 30, 2001. *Id.*

committed for the budget unless the Board approves it first. *Id.* at ¶ 5; 74 Pa.C.S.A. § 1719(6).

80. The Board-approved Capital Budget and Capital Program is available from the Office of Public Affairs, and has been on SEPTA's website, [www.septa.org](http://www.septa.org), for the past eight years. Burnfield Affidavit, **Exhibit "32"** at ¶ 16.

81. DIA's Executive Director testified that she reviews SEPTA's Capital Budget every year. Salandra Deposition, 11/4/05, **Exhibit "28"** at 30-31.

82. The City Hall Station Rehabilitation Project, which would include the elevators, was one of the Capital Projects for Fiscal Year 2001, with funding for design only of \$4,000,000 for Fiscal Year 2001. Excerpts from SEPTA's Capital Budget for Fiscal Year 2001, **Exhibit "16"** at SEP 2039; Burnfield Affidavit, **Exhibit "32"** at ¶ 17.

83. SEPTA's Capital Budget for Fiscal Year 2002, approved by the Board on June 21, 2001, did *not* include the City Hall Station Rehabilitation Project among SEPTA's Capital Projects for Fiscal Years 2002-2005. Excerpts from SEPTA's Capital Budget for Fiscal Year 2002, **Exhibit "16"** at SEP 2147-2149.

84. At no time was the City Hall Rehabilitation Project funded for construction by SEPTA. Burnfield Affidavit, **Exhibit "32"** at ¶ 17. DIA could have ascertained the status of that project and its elevators by reviewing SEPTA's publicly available Capital Budgets and/or by attending SEPTA's Public Hearings. Salandra Deposition, **Exhibit "28"** at 30-31.

#### **City Hall Escalator**

85. DIA's claim that SEPTA impermissibly altered an escalator in the southeast portion of City Hall Courtyard without providing an elevator is also barred by the two year statute of limitations. DIA raised this issue for the first time in its Amended Complaint, filed

over three and one-half years after DIA was on notice that SEPTA would be replacing the escalator without building an elevator.

86. On or about June 1, 2001, SEPTA contractors placed signs on the barriers that were erected around the southeast escalator which described the project as “Escalator Replacement at Erie Avenue, Spring Garden, City Hall and 30<sup>th</sup> Street Stations,” and which were visible to the public and remained in that location until the project was completed. Brooke Deposition, **Exhibit “34”** at 3, 17, 20; Brooke Affidavit, **Exhibit “35”** at ¶¶ 12-13. A photograph taken on August 17, 2001 demonstrates that the signs were visible to the public. **Exhibit “36.”** SEP 5728. When shown the photograph, DIA’s Executive Director agreed that it accurately depicted the sign and site in August 2001. Salandra Deposition, 11/4/05, **Exhibit “28”** at 64.

87. Although DIA became aware of the construction in the southeast portion of City Hall Courtyard when the barricades went up on June 1, 2001, it took no steps to ascertain whether an elevator would be included. *Id.* at 61-63.

88. The escalator replacement program was also identified in SEPTA’s Capital Budget in Fiscal Year 2001, and was discussed at the public hearings on the Capital Budget for that Fiscal Year. Excerpts from SEPTA’s Capital Budget for Fiscal Year 2001, **Exhibit “16”** at SEP 2047; Excerpts from transcripts of SEPTA public hearings, **Exhibit “33”** at SEP 9069-9070; Burnfield Affidavit, **Exhibit “32”** at ¶¶ 19, 20.

89. The cost of installing an elevator in the City Hall Courtyard at the location of the southeast escalator is presently \$2 million. Brooke Affidavit, **Exhibit “35”** at ¶ 36.

**Suburban Station Renovation Project**

90. Suburban Station is a transit facility and a federal key station subject to the Transportation Facilities provisions of the Department of Transportation regulations, Subpart C § 37.53. Final ADA Key Station Plan and Schedule, **Exhibit “11;”** Settlement Agreement, **Exhibit “2”** at SEP3375.

91. Suburban Station has always been a mixed use transit facility combining retail, office, and transit operations in an integrated facility spanning from 15<sup>th</sup> Street to 18<sup>th</sup> Street, Market to Cuthbert Streets. Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶ 12; Gravel Affidavit, **Exhibit “37”** at Exhibit “1” at 18-21.

92. In February 1995, SEPTA and the City reached a general agreement concerning the framework for the renovation of Suburban Station, its retail spaces and its concourse (the “Suburban Station Renovation Project” or the “Project”). **Exhibit “38.”**

93. One of the objectives was to have SEPTA, the City and private ownership enter into cooperative agreements to implement the renovations without regard to property ownership. This is consistent with 49 C.F.R. §37.51 which identifies the “responsible parties” and their legal obligations in making key stations in commuter rail accessible. *Id.*; Maier Deposition, 9/1/05, **Exhibit “39”** at 14-20.

94. SEPTA issued a Request For Proposal that broadly outlined design requirements for renovations to below ground concourses, courtyards, station and train operations, corridors, retail spaces, entrances and included ADA accessibility requirements. Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶¶ 20-22; Request for Proposal, **Exhibit “40”** at 3, 6. In 1997, Bower, Lewis & Thrower (“BLT”) was awarded the design contract. Heiser Affidavit, 5/3/05, **Exhibit “29”** at

¶ 21.

95. The scope of the Project encompassed an area West to East from 18<sup>th</sup> Street to 15<sup>th</sup> Street and North to South from Cuthbert to Market Streets. Heiser Deposition, 10/6/05, **Exhibit “41”** at 19; Wolfson Deposition, 2/15/06, **Exhibit “42”** at 15.

96. From the inception of the Project, the 15<sup>th</sup> Street Courtyard was within the scope of the Suburban Station renovations. Heiser Deposition, 10/6/05, **Exhibit “41”** at 12-13, 90-91; Request for Proposal, **Exhibit “40”** at 3-4; Wolfson Deposition, 10/7/05, **Exhibit “43”** at 7-8; BLT Concourse Level Axonometric View, **Exhibit “44.”**

97. The Broad Street Subway, Market-Frankford Line (including the 15<sup>th</sup> Street Station), and Subway Surface Trolley Line are separate modes of mass transportation. They are not part of the commuter rail line, not within the scope of the Project, and not within the boundaries of the Suburban Station Transit Facility. Wolfson Deposition, 2/15/06, **Exhibit “42”** at 25-26; Kloehn Deposition, 2/14/06, **Exhibit “45”** at 37-39; Maier Deposition, 9/1/05, **Exhibit “39”** at 92-95, 98-100.

98. The design for the Suburban Station Renovation Project was separated into four phases: chilled water system improvements, asbestos abatement, platform ventilation, and main phase. The main phase included the construction/renovation of six elevators, renovations to the 15<sup>th</sup> Street corridor adjacent to the 15<sup>th</sup> Street Courtyard, and renovations to the 15<sup>th</sup> Street Courtyard. Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶¶ 23, 28-29.

99. Some renovations in the 15<sup>th</sup> Street corridor extend beyond the area of the 15<sup>th</sup> Street Courtyard but end before the steps to 15<sup>th</sup> Street Station. Heiser Deposition, 10/6/05, **Exhibit “41”** at 48. The steps are the southernmost boundary of the Project and are also the

property line of Suburban Station. Maier Deposition, 9/1/05, **Exhibit “39”** at 34, 98.

100. The ownership of the property within the scope of the Project is a combination of SEPTA, City and private ownership. Wolfson Deposition, 2/15/06, **Exhibit “42”** at 16-19, 32-44; Maier Deposition, 9/1/05, **Exhibit “39”** at 33-44.

101. SEPTA obtained the cooperation of the City and the private property owners necessary to carry out certain renovations within the scope of the Project. This included obtaining the right from the City to make renovations at the 15<sup>th</sup> Street Courtyard. Cooperation Documents, **Exhibit “46;”** City’s Authorization to Complete Work, **Exhibit “47.”**

102. Exemplifying this cooperative effort is the BLT Suburban Station Renovations Property Line Plan at the Concourse Level, which was presented to the Zoning Board of Philadelphia for approval and specifically identifies work that SEPTA would be performing on either City or privately owned property during the renovations. Suburban Station Renovations Property Line Plan at the Concourse Level, **Exhibit “48.”**

103. Consistent with this cooperation are several letters from the City, Liberty Property Trust, and Two Penn Center Associates that were sent to the Department of Licenses & Inspections and reflected that SEPTA received permission to proceed onto either City or private property to complete the main phase. Cooperation Documents, **Exhibit “46.”**

104. Attached as **Exhibit “49”** is an architectural schematic of Suburban Station at concourse level. The red line denotes boundary lines of the Project which reflect that the 15<sup>th</sup> Street Courtyard is within the Project boundaries and that the 15<sup>th</sup> Street Station is not.

105. BLT’s proposed design included ADA compliant elevator entrances from the street to the Suburban Station Concourse located at 17<sup>th</sup> and JFK Boulevard and at 16<sup>th</sup> Street

midway between Market and JFK Boulevard. Both are presently operational. Kloehn Affidavit, **Exhibit “50”** at Exhibit “1” at 2-5; Wolfson Affidavit, **Exhibit “51”** at Exhibit “1” at 1-2.

106. **Exhibit “44”** is an Axonometric View of the Suburban Station Transit Facility which graphically depicts that wheelchair accessibility is available to all aspects of the Suburban Station Concourse and that, from either street level elevator, a disabled person can access: (1) all train platforms using four additional concourse level elevators; (2) all transportation functions; (3) all retail spaces, courtyards and public places. Wolfson Affidavit, **Exhibit “51”** at Exhibit “1” at 1-2; Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶¶ 43-45; Wolfson Deposition, 2/15/06, **Exhibit “42”** at 62-63.

107. The 15<sup>th</sup> Street Courtyard is accessible from the 17<sup>th</sup> Street elevator and from the 16<sup>th</sup> Street elevator. Kloehn Affidavit, **Exhibit “50”** at Exhibit “1” at 4; Wolfson Affidavit, **Exhibit “51”** at Exhibit “1” at 1-2; Kloehn Deposition, **Exhibit “45”** at 78. The distance from the 16<sup>th</sup> Street elevator to the 15<sup>th</sup> Street Courtyard at concourse level is approximately *340 feet*. Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶ 10.

108. At street level of the 15<sup>th</sup> Street Courtyard there is signage that directs disabled persons to the 16<sup>th</sup> Street accessible elevator. Wolfson Affidavit, **Exhibit “51”** at Exhibit “1” at 2; Kloehn Affidavit, **Exhibit “50”** at Exhibit “1” at 3-4.

109. SEPTA and the City became aware that there was Economic Development Assistance (“EDA”) grant money available for application to the 15<sup>th</sup> Street Courtyard portion of the Project. Burnfield Deposition, 9/6/05, **Exhibit “52”** at 22; **Exhibit “53”** at COP 333-34, 336, 1542-43, 1544-45.

110. A grant was applied for and awarded to SEPTA and the City in the amount of



\$750,000.00. **Exhibit “54”** (COP 246, 247-254, 287-288; COP 292). The 15<sup>th</sup> Street Courtyard was then taken out of the main phase and put into an Accelerated Phase. **Exhibit “55,”** SEPTA 0551-0552, COP 3687.

111. Work on the 15<sup>th</sup> Street Courtyard began in February, 2001 and included replacing a concrete stairway that was unsafe and in disrepair, renovating the head house at 15<sup>th</sup> Street and replacing planters, but no work was done to the escalators. Wolfson Deposition, 2/15/06, **Exhibit “42”** at 12; Wolfson Affidavit, **Exhibit “51”** at Exhibit “1” at 2; Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶¶ 56-59; Heiser Deposition, 10/6/05, **Exhibit “41”** at 88.

112. The replacement of the stairway at the 15<sup>th</sup> Street Courtyard did not require any major structural modifications. **Exhibit “29”** at ¶ 58.

113. The new stairway at the 15<sup>th</sup> Street Courtyard brings an ambulatory person from street level to the same point within the Suburban Station Transit Facility as the old stairway. *Id.* at ¶ 59; Wolfson Deposition, 2/15/06, **Exhibit “42”** at 12. The replacement of the stairway did not change the access from the street level to the Suburban Station concourse in any way. *Id.*, 5/3/05, **Exhibit “29”** at ¶ 60.

114. To renovate the 15<sup>th</sup> Street Courtyard, SEPTA obtained the City’s cooperation and authorization to obtain a permit to complete that work without an elevator. **Exhibit “47”** at COP 156-158.

115. On or about October 17, 2000, SEPTA obtained permission from the City Department of Licenses & Inspections to perform the work at the 15<sup>th</sup> Street Courtyard, which was not conditioned on installing an elevator. Wolfson Deposition, 10/7/05, **Exhibit “43”** at 20; **Exhibit “56”** at COP 170-171.

116. The scope of the renovations to the corridor adjacent to the 15<sup>th</sup> Street Courtyard did not extend beyond the property line of Suburban Station. Heiser Deposition, 10/6/05, **Exhibit “41”** at 45-49.

117. SEPTA did not perform any renovations to the underground connection from Suburban Station to the 15<sup>th</sup> Street Station. Id.

118. If an elevator were installed at street level in the 15<sup>th</sup> Street Courtyard, it would not bring an individual to the 15<sup>th</sup> Street Station but only to the 15<sup>th</sup> Street corridor of the Suburban Station Transit Facility which is already accessible from the 16<sup>th</sup> and 17<sup>th</sup> Street elevators. Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶¶ 53-54, 62-69; **Exhibit “57”** (COP 589).

119. In order to reach the 15<sup>th</sup> Street Station, an individual who enters the Suburban Station Transit Facility at the 15<sup>th</sup> Street Courtyard must travel south in the 15<sup>th</sup> Street corridor, exit Suburban Station, and travel over underground transit lines. Maier Deposition, **Exhibit “39”** at 67; Heiser Affidavit, 5/3/05, **Exhibit “29”** at ¶¶ 64, 66-67; BLT Structural Drawing - “Section Through 15<sup>th</sup> Street Corridor Looking East,” **Exhibit “58.”**

120. The property lines defining the scope of the Suburban Station renovations are the same as those established for Suburban Station and the Penn Center Complex (as it was then named) by the Pennsylvania Railroad in 1950. Putnam Affidavit, **Exhibit “59,”** at Exhibit “1” at 2-3.

121. Suburban Station’s mixed use components today are of the same nature as when the Suburban Station was conceived and developed by the Pennsylvania Railroad in the 1950s. Gravel Affidavit, **Exhibit “37”** at Exhibit “1” at 9-21.

122. Today, SEPTA has assumed general cleaning responsibilities for all corridors and

the Concourse within the Suburban Station Transit Facility. Maier Affidavit re Map of Cleaning Responsibilities, **Exhibit “60.”**

123. Coordination of the retail environment is implemented through a Master Lease Agreement between Metro-Market and SEPTA covering the majority of the retail locations, **Exhibit “61,”** SEPTA 11,326-11,461. The Master Lease standardizes tenant lease terms, location appearances and other rights and obligations of the retail tenants.

124. SEPTA initiated an Escalator Replacement Program in 1999 to replace the escalators within the SEPTA system that were not already being repaired or replaced as part of some other project. Brooke Deposition, **Exhibit “34”** at 13-15.

125. The purpose of the Escalator Replacement Program was to optimize escalator safety, operation, and maintenance throughout the SEPTA System. Id. at 14-15. Phase II of that program consisted of the replacement of six escalators with new escalators at four different locations, one of which was located in the southeast quadrant of the City Hall Courtyard. Id. at 15.

126. The existing escalator was located in an existing wellway connecting the City Hall Courtyard with the mezzanine level located directly below it. Id. at 21-22. A wellway is defined as the vertical shaft in which an escalator is located. It is customarily made of concrete, and is enclosed on all sides, top, and bottom. Id. at 145-146.

127. The existing wellway was extended at the top and bottom so that an ADA compliant escalator could be installed. Id. at 113-114.

128. The existing escalator was removed from the existing wellway, and the new escalator was installed in the existing wellway and made operational in August, 2003. Id. at 50,

145-146.

129. The southeast escalator operates as an exit only, leading from the mezzanine level below the City Hall Courtyard to the Courtyard level. *Id.* at 22. There is no down escalator or stairs at this location. Brooke Affidavit, **Exhibit “35”** at ¶ 20.

130. The replacement of the southeast escalator did not change the access that was provided at that location prior to the replacement. Brooke Deposition, **Exhibit “34”** at 101-102.

131. The Broad Street Subway platforms are not located on or below the mezzanine level at the location of the southeast escalator. There is nothing located below the mezzanine level at the location of the southeast escalator. Brooke Affidavit, **Exhibit “35”** at ¶ 23.

132. The Broad Street Subway platforms can only be accessed from the southeast escalator location by walking through the mezzanine to the ticket booth, entering the ticket booth, and descending separate sets of stairs to the northbound and southbound platforms of the Subway. *Id.* at ¶ 24.

133. It is not possible to install an elevator in the location of the southeast escalator that would lead to the platforms of either the Broad Street Subway or the Market Frankford Subway Elevated. *Id.* at ¶ 26; Brooke Deposition, **Exhibit “34”** at 114-116, 133.

WHEREFORE, SEPTA respectfully demands the entry of summary judgment in its favor, and against DIA, on Counts I and II of DIA’s Fourth Amended Complaint.

SHK5264

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