

## Summary

This document addresses only the accessibility issues for the Traffic Signal Modification – Central at Riverside project. Although some of the items indicated herein may be the result of substandard construction practices, no conclusion regarding quality or completeness of the contractor's responsibilities is implied.

The staff report for this item indicates that the project is compliant with the requirements for accessibility except for items that are "technically infeasible". And that those affected items have been made accessible to the maximum extent possible. Unfortunately, that is not the case. None of the four corners of the intersection are fully compliant. All have violations of the California Building Code (CBC), the Americans with Disabilities Act (ADA), or the ADA Standards for Accessible Design (ADA Standards). Please note that the ADA is civil rights legislation, and by definition, any violation of the Act or its Standards constitutes discrimination against disabled persons. The CBC incorporates the ADA and its Standards and adds additional restrictions. A violation of an ADA requirement is also a violation of the CBC, the California Disabled Persons Act, the Unruh Civil Rights Act, and, if any federal funds are involved, a violation of Section 504 of the Rehabilitation Act of 1973.

The claim made that the conditions at the southeast corner make compliance "technically infeasible" is weak at best. Technically infeasible applies when something is virtually impossible, typically a structural component or a terrain issue. As in the proximity to a bridge support, or the precipice of a canyon. A lack of Right-of-Way is not technically infeasible when there are available options for acquiring it, or alternate designs to accommodate it. Nor does the City Engineer have the authority to determine a condition of technically infeasible.

**The accessibility components of this project are not complete. The Council should reject acceptance of the project until it does comply with all the applicable access requirements.**

## Access Compliance

### **Southeast Corner**

On page 2 of the staff report, under the heading "ISSUES/ANALYSIS", it states, in part:

*"The City Engineer and the City's A.D.A. [sic]<sup>1</sup> consultant have reviewed the project for A.D.A. [sic]<sup>1</sup> compliance. On the southeast corner, the A.D.A. [sic]<sup>1</sup> improvements have been implemented to the maximum extent feasible due to right-of-way constraints and the inability to obtain an easement or right-of-way from the property owner. ..."*

However, just a casual examination of the alterations at the southeast corner reveal multiple violations of ADA Standards and the California Building Code. All of the issues in the list below are easily discernable by simple visual or tactile observation. No tools, no measuring, no equipment. Just by looking at and traversing over the street corner. All except #3 can be ascertained while driving by at 35 miles per hour. Yet, not one of these items was noticed by the "City Engineer and the City's A.D.A. [sic]<sup>1</sup> consultant"? Furthermore, **not one of these items relates in any way to a lack of Right-of-Way.**

1. The dimensions of the maneuvering space at the ramp do not comply with the requirements of CBC 11B-406.5.9<sup>1</sup> or ADA Standard 406.6<sup>2</sup>. **Note: This area is in the street, completely within the Public Right-of-Way.**

<sup>1</sup> **11B-406.5.9 Clear Space at Diagonal Curb Ramps.** The bottom of diagonal curb ramps shall have a clear space 48 inches minimum outside active traffic lanes of the roadway. Diagonal curb ramps provided at marked crossings shall provide the 48 inches minimum clear space within the markings.

<sup>2</sup> **406.6 Diagonal Curb Ramps.** Diagonal or corner type Curb Ramps with returned curbs or other well-defined edges shall have the edges parallel to the direction of pedestrian flow. The bottom of diagonal Curb Ramps shall have a clear space 48 inches

2. The driveways interrupting the sidewalk to the east and the south of the corner were partially removed and replaced as part of this planned alteration. The reconstructed slopes and cross-slopes of both do not comply with the current ADA Standards or CBC requirements. Per CBC 11B-202.3<sup>3</sup> and 11B-202.3.1<sup>4</sup>, when an element is altered, it must be made to comply with the current requirements for new construction. **Note: This is a lack of appropriate planning and design, and has nothing to do with a lack of Right-of-Way.**
3. In the Riverside half, the surface of the ramp contains grade breaks. Deviations from the planar surface of a ramp run are not allowed per CBC 11B-406.5.6<sup>5</sup>, and ADA Standards 405.4<sup>6</sup> and 406.1<sup>7</sup>. **Note: This is the result of substandard construction, design, or quality control. But it has nothing to do with a constrained Right-of-Way.**
4. There are no step-off curb segments located within the crosswalk markings as required by CBC 11B-406.5.10<sup>8</sup> and ADA Standard 406.6<sup>2</sup>. **Note: Once again, this is inadequate design or quality control, and the curb is well inside the existing Public Right-of-Way.**

These are not the only non-compliance issues at the southeast corner. However, they easily serve to disprove the statement that the accessibility improvements are compliant to the maximum extent feasible. The statement is simply not true. And therefore, this project is neither compliant nor complete.

But there's more. Lots more. To claim that accessibility features comply to the "maximum extent feasible" due to site constraints requires a finding of "technically infeasible". This phrase, and the condition of being technically infeasible, is defined in the California Building Code:

**11B-202.3 Alterations.**

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**Exception 2. Technically Infeasible.** *In alterations, where the enforcing authority determines compliance with applicable requirements is technically infeasible, the alteration shall provide equivalent facilitation or comply with the requirements to the maximum extent feasible. The details of the finding that full compliance with the requirements is technically infeasible shall be recorded and entered into the files of the enforcing agency.*

minimum outside active traffic lanes of the roadway. Diagonal *Curb Ramps* provided at *marked crossings* shall provide the 48 inches minimum clear *space* within the markings. Diagonal *Curb Ramps* with flared sides shall have a segment of curb 24 inches long minimum located on each side of the *Curb Ramp* and within the *marked crossing*.

<sup>3</sup> **11B-202.3 Alterations.** Where existing *elements* or *spaces* are altered, each altered *element* or *space* shall comply with the applicable requirements of Division 2, including 11B-202.4.

<sup>4</sup> **11B-202.3.1 Prohibited Reduction in Access.** An *alteration* that decreases or has the effect of decreasing the accessibility of a *building* or *facility* below the requirements for new construction at the time of the *alteration* is prohibited.

<sup>5</sup> **11B-406.5.6 Grade Breaks.** *Grade breaks at the top and bottom of curb ramp runs shall be perpendicular to the direction of the ramp run. Grade breaks shall not be permitted on the surface of ramp runs and turning spaces. Surface slopes that meet at grade breaks shall be flush.*

<sup>6</sup> **405.4 Floor or Ground Surfaces.** Floor or ground surfaces of ramp runs shall comply with 302. Changes in level other than the running slope and cross slope are not permitted on ramp runs.

<sup>7</sup> **406.1 General.** Curb ramps on accessible routes shall comply with 406, 405.2 through 405.5, and 405.10.

<sup>8</sup> **11B-406.5.10 Diagonal Curb Ramps.** Diagonal or corner type *Curb Ramps* with returned curbs or other well-defined edges shall have the edges parallel to the direction of pedestrian flow. Diagonal *Curb Ramps* with flared sides shall have a segment of curb 24 inches long minimum located on each side of the *Curb Ramp* and within the *marked crossing*.

This code requirement is very specific. First a determination of **technically infeasible** must be made by the **enforcing authority**. And who is the enforcing authority? That is specified in the Administration Chapter of the CBC:

**1.9.1 Division of the State Architect – Access Compliance.**

...

**1.9.1.4 Enforcing agency.**

**1.9.1.4.1** *The director of the Department of General Services where state funds are utilized for any project or where funds of counties, municipalities or other political subdivisions are utilized for the construction of elementary, secondary or community college projects.*

**1.9.1.4.2** *The governing bodies where funds of counties, municipalities or other political subdivisions are utilized except as otherwise provided above.*

**1.9.1.4.3** *The building department of every city, county, or city and county within the territorial area of its city, county, or city and county, where private funds are utilized. "Building department" means the department, bureau or officer charged with the enforcement of laws or ordinances regulating the erection or construction, or both the erection and construction, of buildings.*

CBC 1.9.1.4.2 above tells us that the enforcing authority for access compliance on public work in a California city would be the governing body of that city. In this case, that would be the City Council of the City of Chino. Therefore, it is the job of the Council to enforce accessibility (ADA and CBC) requirements on all public works, in contrast to private works, which are enforced by the City Building Official, as per 1.9.1.4.3. So this determination cannot be made by the City Engineer, or a consultant, or even the Building Official, as they lack the authority to do so.

Next, the code requires that *"The details of the finding that full compliance with the requirements is technically infeasible shall be recorded and entered into the files of the enforcing agency."* Under the Ralph M. Brown Act, the Council must conduct all of its business in an open public forum, properly noticed on an agenda. So the action by the Council (*enforcing authority*) in determining a finding of *"technically infeasible"* requires an informed formal vote just like any other action; presumably backed by supporting documentation. The supporting documentation in this case must include all of the *"details of the finding"*, which must be entered into the record (*"recorded"*), and kept as part of the City's permanent *"files"*. As an agenda item, the public has the right to examine, comment upon, and challenge these details/documents, which must be included in the backup documentation (packet). In addition, under CBC 1.9.1.5<sup>9</sup>, an affected disabled person, or persons, has the right to appeal a decision by the Council involving access compliance.

So, as no finding of technically infeasible has been made in this instance, the alterations must fully comply with all accessibility requirements of the CBC and the ADA Standards. Anything less would be a violation of the California Building Code, the Americans with

<sup>9</sup> **1.9.1.5** *Special conditions for persons with disabilities requiring appeals action ratification. Whenever reference is made in these regulations to this section, the findings and determinations required to be rendered by the local enforcing agency shall be subject to ratification through an appeals process.*

Disabilities Act, the Unruh Civil Rights Act, the California Disabled Persons Act, and possibly Section 504 of the Rehabilitation Act of 1973.

Please note that the justification of Right-of-Way constraints is a weak argument in this case. The City has not exhausted all of its available remedies, which includes eminent domain, to purchase or acquire the additional PROW that the City Engineer feels is necessary. The City Engineer has an obligation under CBC 11B-101.1<sup>10</sup> to apply all of the necessary accessibility requirements during the design of a project. Had this been done, additional PROW would have been acquired prior to construction. Or an alternate design produced using the current PROW boundaries. There are multiple solutions to this project that can be made within the current PROW. Some alternates which are obvious and simple include Automatic Pedestrian Signal Phasing, use of a Passive Pedestrian Detection system, installation of a blended transition, a bulbed-out curb line, and encroachment or elimination of Lane 3 on Central (which is only about 150' long anyway).

#### Northwest, Southwest, and Northeast Corners

On page 2 of the staff report, under the heading "ISSUES/ANALYSIS", it states, in part:

*"... All other corners of the intersection are in full compliance with the current A.D.A. [sic] regulations."*

Again, this is not true. A cursory examination of the other three corners of the intersection was also performed. All three have obvious violations, and a comprehensive survey will be necessary to confirm slope, cross-slope, and surfaces. Here are the easily observable deficiencies:

5. At the northeast and southwest corners, the maneuvering space at the ramp lacks the depth required by CBC 11B-406.5.9<sup>11</sup> or ADA Standard 406.6<sup>12</sup>.
6. Both north corners lack the curb step-off segment required by CBC 11B-406.5.10<sup>13</sup> and ADA Standard 406.6<sup>12</sup>.
7. Both north corners lack the clear floor space requirements at pedestrian pushbuttons per CBC 11B-309.2<sup>14</sup>. One location at the west corner, and both locations at the east corner.

**So, despite the staff report statement regarding full access compliance, none of the corners of the intersection are actually in full compliance with the requirements for accessibility. And a more comprehensive survey may yield additional violations.**

<sup>10</sup> **11B-101.1 General.** This chapter contains scoping and technical requirements for accessibility to sites, facilities, buildings, and elements by individuals with disabilities. The requirements are to be applied during the design, construction, additions to, and alteration of sites, facilities, buildings, and elements to the extent required by Chapter 1, Section 1.9.

<sup>11</sup> **11B-406.5.9 Clear Space at Diagonal Curb Ramps.** The bottom of diagonal curb ramps shall have a clear space 48 inches minimum outside active traffic lanes of the roadway. Diagonal curb ramps provided at marked crossings shall provide the 48 inches minimum clear space within the markings.

<sup>12</sup> **406.6 Diagonal Curb Ramps.** Diagonal or corner type Curb Ramps with returned curbs or other well-defined edges shall have the edges parallel to the direction of pedestrian flow. The bottom of diagonal Curb Ramps shall have a clear space 48 inches minimum outside active traffic lanes of the roadway. Diagonal Curb Ramps provided at marked crossings shall provide the 48 inches minimum clear space within the markings. Diagonal Curb Ramps with flared sides shall have a segment of curb 24 inches long minimum located on each side of the Curb Ramp and within the marked crossing.

<sup>13</sup> **11B-406.5.10 Diagonal Curb Ramps.** Diagonal or corner type Curb Ramps with returned curbs or other well-defined edges shall have the edges parallel to the direction of pedestrian flow. Diagonal Curb Ramps with flared sides shall have a segment of curb 24 inches long minimum located on each side of the Curb Ramp and within the marked crossing.

<sup>14</sup> **11B-309.2 Clear Floor Space.** A clear floor or ground space complying with 11B-305 (Clear Floor or Ground Space) shall be provided.

### Undue Burden

To preemptively head off one rebuttal argument that staff will undoubtedly attempt to use; that complying with the law would be an "undue burden".

First, undue burden is a defense to, not an element of, the requirements of the ADA. Second, in Title II, it only applies to existing facilities, i.e., facilities that existed prior to January 26, 1992, and that remain unaltered. Once a facility is altered, it no longer qualifies as "existing". The federal regulations at 28 CFR § 35.150 Existing facilities contain an allowance for an undue burden, and specify that the burden of proof lies on the public entity. 28 CFR § 35.151 New construction and alterations covers exactly what the title says, and has no exception for an undue burden.

In 1993, the disabled community in Philadelphia successfully sued the Pennsylvania Department of Transportation for violating their civil rights under the ADA by not installing curb ramps and compliant sidewalks when doing alterations. (Pennsylvania appealed all the way to the Supreme Court, where it was denied certiorari.) In this case, *Kinney v Yerusolim*<sup>15</sup>, the Court wrote:

-excerpt-

"The City relies on § 35.150(3) which provides that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." This provision, however, is found under the section of the regulations governing "existing facilities," 28 C.F.R. § 35.150. It is separate and distinct from the provisions governing "new construction and alterations" under 28 C.F.R. § 35.151. There simply is no general "undue burden" defense in the ADA."

-and-

"The distinction between the requirements under the "existing facilities" and "alterations" provisions is logical. The "existing facilities" provisions mandate that public entities make all their services and programs as a whole accessible to the handicapped. The regulations do provide an undue burden defense in recognizing that, in some instances, the requirement to modify existing programs and facilities may impose extraordinary costs on the community. In contrast, new construction and alterations present an immediate opportunity to provide for accessibility. We can only conclude that Congress and the DOJ made the determination that when a public entity decides to engage in new construction or to make alterations, it is not an undue burden to require it to provide for accessibility at that time. Congress realized that these requirements might pose difficulties for financially strapped state and local governments, but determined that the overall long term benefit to society outweighed the costs. The House Judiciary Committee explained:

*While integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole. The general prohibitions set forth in the Section 504 regulations, are applicable to all programs and activities in Title II. The specific sections on employment and program access in existing facilities are subject to the 'undue hardship and undue burden' provisions of the regulations which are incorporated in Section 204. No other limitations should be implied in other areas.*

H.Rep. 485(III), 101st Cong., 2d Sess. 50 (1990) U.S.Code Cong. & Admin.News 1990, 473 (emphasis added).[4] "

- end excerpt-

<sup>15</sup> *Kinney v. Yerusolim*, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994)

<sup>1</sup> Please note that the Americans with Disabilities Act is properly referred to by its abbreviated initialism, i.e., "ADA". Using the unconventional form "A.D.A." may create confusion. American English style guides specify that periods are omitted in initialisms and acronyms unless the result would spell an unrelated word. Periods are used only in two-letter abbreviations, e.g., U.S., U.N., U.K. Use all capital letters, but no periods, in longer abbreviations, initialisms, and acronyms whenever the letters are pronounced individually.