

Accessibility in the Public Right-of-Way: Legal Foundations for Engineers

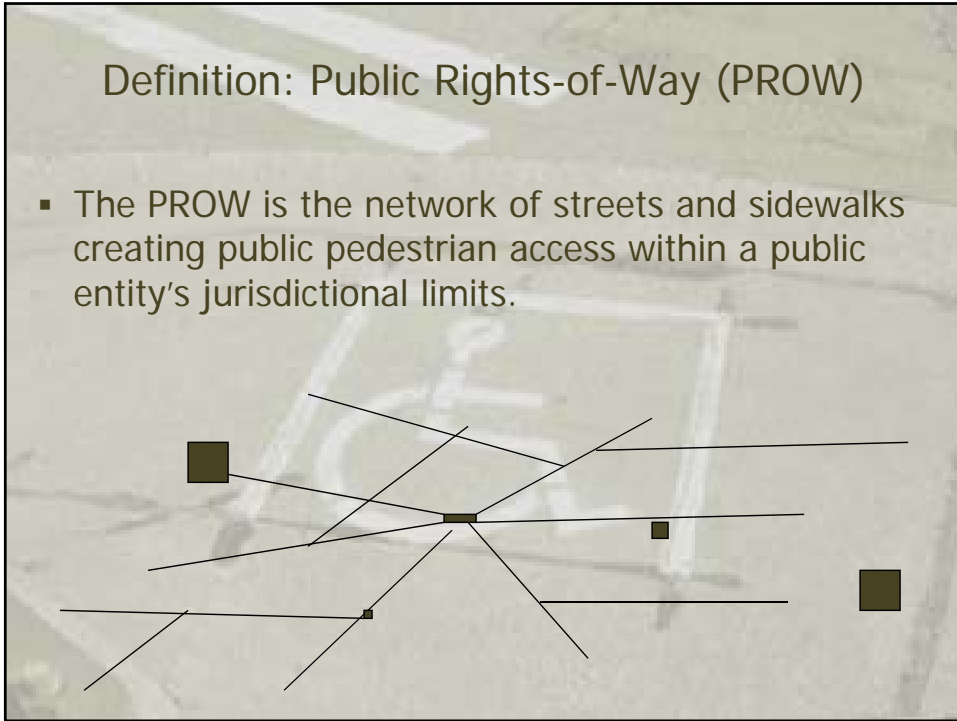
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The Americans with Disability Act (ADA) & the Rehabilitation Act Section 504 (Section 504)

- Legal Context of ADA and Section 504
- Contractors' obligations
- Public Entities' obligations to provide program access through:
 - Transition plans
 - Ensuring access on new and altered projects

Definition: Public Rights-of-Way (PROW)

- The PROW is the network of streets and sidewalks creating public pedestrian access within a public entity's jurisdictional limits.



Definition: Authority

Statutes: U.S.C.: United States Code:

find text through www.gpo.gov and www.gpoaccess.gov/uscode

Regulations: C.F.R.: Code of Federal Regulations:

www.gpoaccess.gov/cfr/index.html; www.ada.gov;

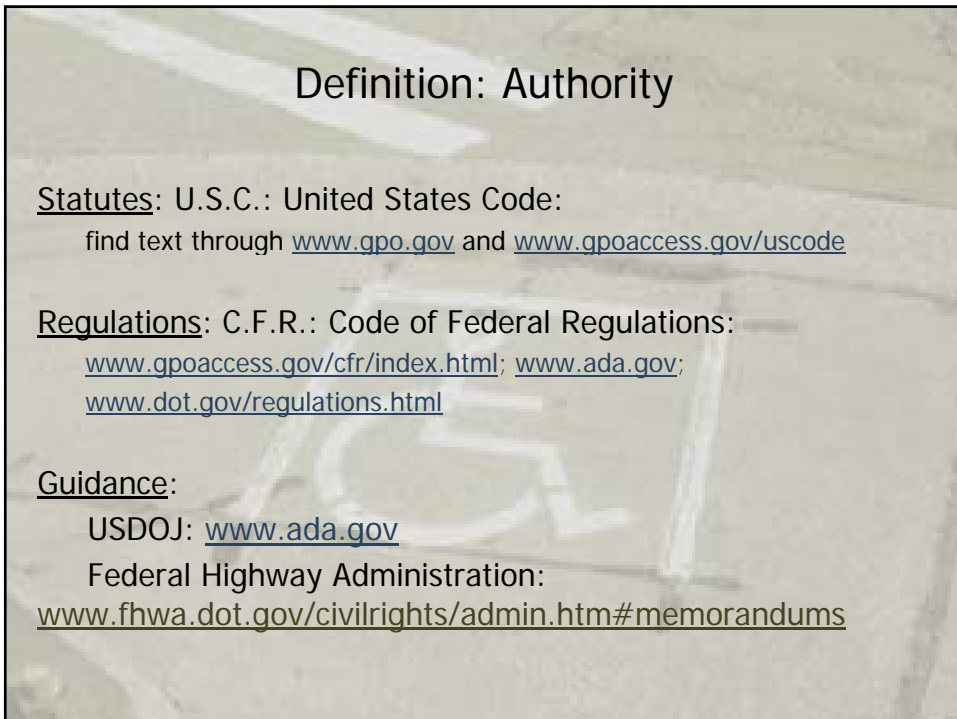
www.dot.gov/regulations.html

Guidance:

USDOJ: www.ada.gov

Federal Highway Administration:

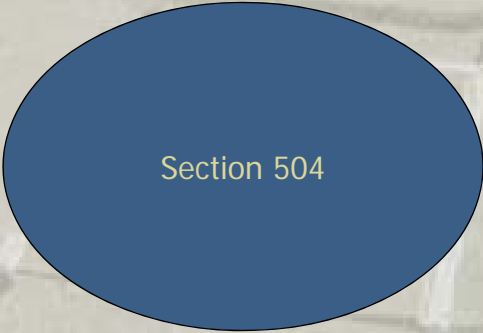
www.fhwa.dot.gov/civilrights/admin.htm#memorandums



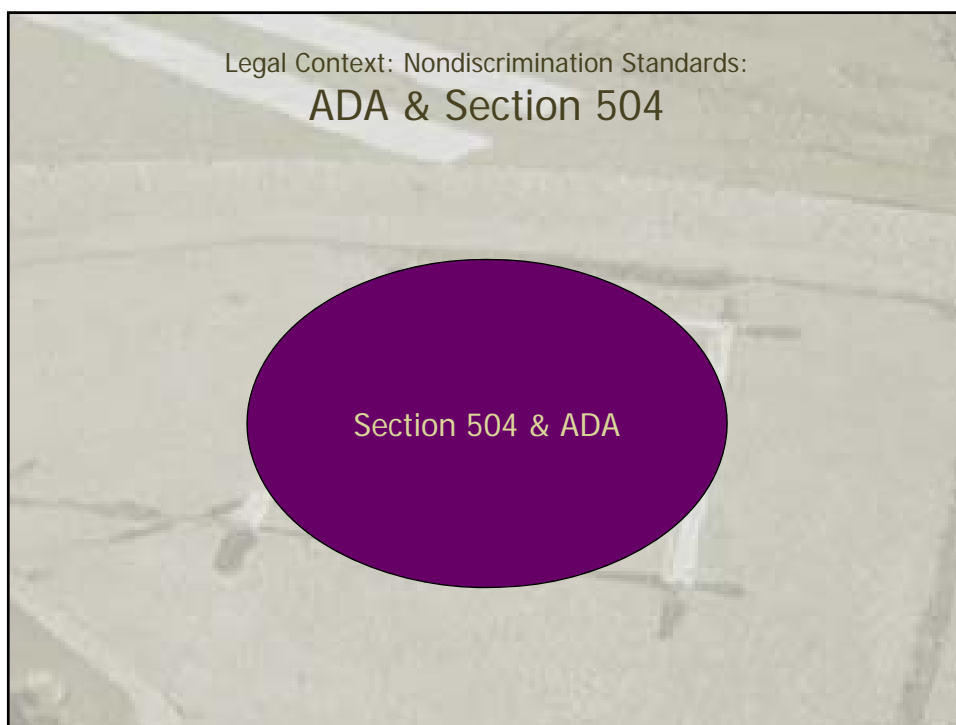
Legal Context:
Statutory language

Section 504: 29 USC § 794	ADA: 42 USC 12111 et seq: Title II, Part A:
"No otherwise qualified individual with a disability in the United States . . . Shall solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial Assistance or under any program or activity conducted by any Executive agency . . ." 29 USC § 794 (a)	" . . . no qualified individual with a disability shall , by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity , or be subjected to discrimination by any such entity." 42 USC § 12132

Legal Context: Nondiscrimination Standards:
Section 504



Section 504



Legal Context: ADA & Section 504:

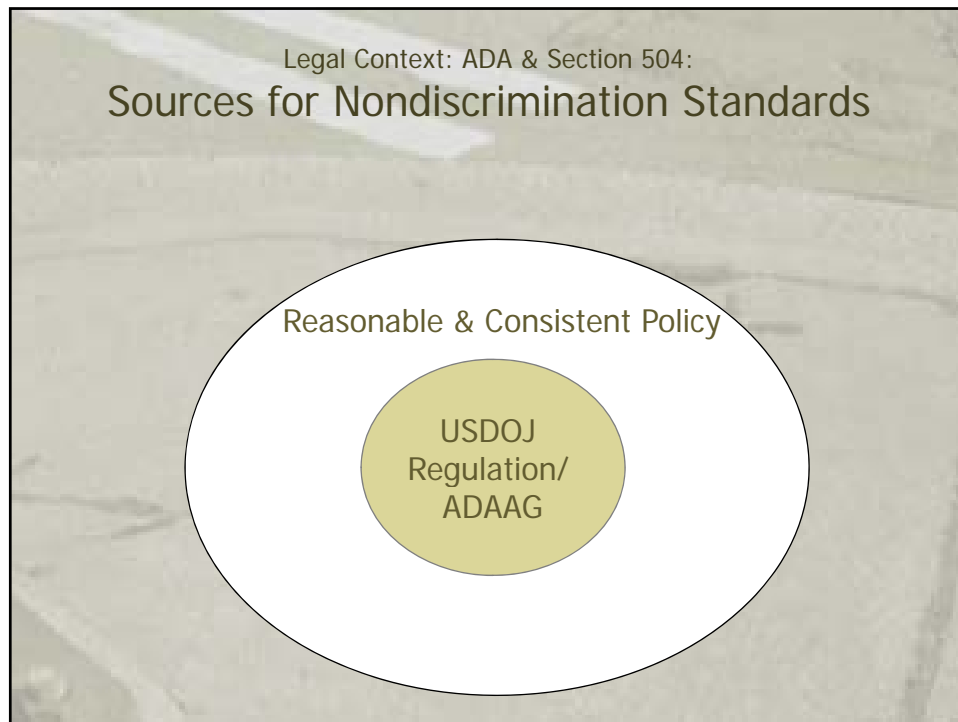
"Nondiscrimination" General Rules

- In PROW, each public entity must ensure that pedestrian facilities meet Uniform Federal Accessibility Standards (UFAS) or ADA Accessibility Guidelines (ADAAG) standards: FHWA encourages ADAAG. 28 CFR 35.151(c); USDOJ Technical Assistance II-6.2100.
- Parallel requirements for accessibility. USDOJ Technical Assistance II-1.4100

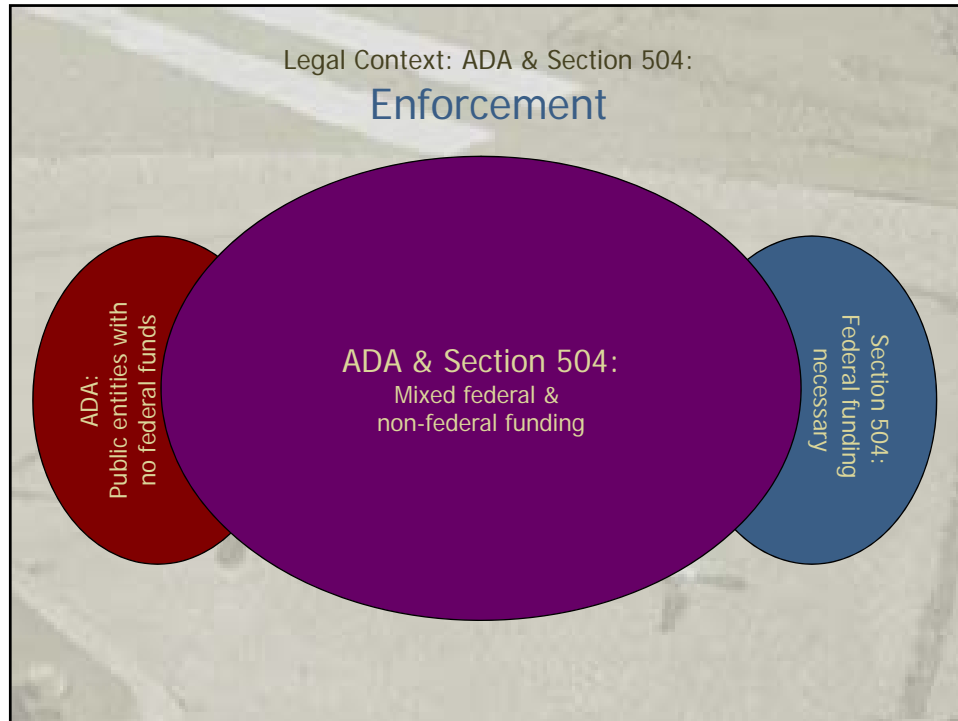
Legal Context: ADA & Section 504:

"Nondiscrimination" Corollary

- Compliance requires that where public agencies provide pedestrian facilities, those facilities are to be accessible to persons with disabilities. 28 CFR 35.149 – 35.151
- Pedestrian curb ramps required in facility where it is legal to walk. USDOJ Toolkit, Chapter 6, §3, ¶4
- Therefore, review local law & remember:
 - Compliance does not require analysis of pedestrian need for placement of facilities.
 - Compliance does not require that public agencies provide sidewalks and curb ramps everywhere.



- Legal Context: ADA & Section 504:
Enforcement
- Overlapping enforcement powers over public agencies:
 - (1) Section 504 covers public agencies spending federal funds.
 - (2) ADA Title II covers public agencies with power over PROW.



- Legal Context: ADA & Section 504: Enforcement:
Ultimate Remedies
- Where noncompliance exists:
 - For Federal-aid recipient: FHWA can withhold federal money, after enforcement process required at 49 C.F.R. §§ 27.121 – 27.129. (Section 504)
 - For State or local government, regardless of federal funds: FHWA shall seek voluntary compliance agreement with public agency, and if voluntary negotiations are unsuccessful, shall send case to the Attorney General for appropriate action. 28 C.F.R. §§ 35.173 – 35.174. (ADA)

ADA & Section 504:
Contractors' Obligations:

- Ensure new and alterations projects provide minimum required accessibility under ADAAG, 28 C.F.R. Part 36, App. A.
- Look to public facility program access plans to identify projects planned to include access.
- Minimum access considerations on street with pedestrian "facility"/legal access:
 - Curb ramp with detectable warnings, ADAAG § 4.7, 4.29
 - Consider sidewalks
 - Consider accessible pedestrian signals

ADA & Section 504:
Contractors' Obligations:

- Work zone accessibility requirements:
 - Provide "temporary safe pedestrian passageways around a construction site", ADAAG §4.1.1(1994) at 28 C.F.R. Part 36, Appendix A.
 - Safe passage does NOT include "structures, sites and equipment directly associated with the actual processes of construction, such as scaffolding, bridging, materials hoists, or construction trailers. . ." ADAAG §4.1.1(1994) at 28 C.F.R. Part 36, Appendix A.

ADA & Section 504:
Contractors' Obligations:

- Before accepting contract:
 - Review proposal for facility accessibility obligations that must be built, determine who is responsible.
 - Can check public entities' program access plan.
 - Review proposal for work zone accessibility requirements, include costs in project estimate

Legal Context: ADA & Section 504:
Public Entity Responsibilities

- Primary method: Planning for Program Access:
 - Use planning processes, including program access plans, to ensure ADAAG compliant access for persons with disabilities to the public right-of-way. 28 C.F.R. §§ 35.105, 13.150; USDOJ Toolkit, Chapter 6, §4.
 - Planning processes: including pedestrian planning aspects of new planning rule for MPOs. 23 CFR Part 450 (effective 3/16/07).
 - Provide responsible employee and grievance procedures. 28 C.F.R. § 35.107.

Legal Context:

ADA & Section 504: Public Entity Responsibilities

- Secondary method: Projects:
 - New and alteration projects with pedestrian facilities in the scope of the project must meet ADAAG standards to the maximum extent feasible. 28 C.F.R. § 35.151.

ADA & Section 504: Planning:

Why require Program Access Plans

- To provide a method for a public entity to schedule and implement ADA-required improvements to existing streets and sidewalks in the PROW. 28 C.F.R. § 150(d).
- Required for curb ramp schedules (28 C.F.R. § 35.150(d)(2)), but may be used for the sidewalks and detectable warnings aspects for ADAAG compliance.

ADA & Section 504: Planning:

Plan General Requirements

- **Who:** Required for public entities with more than 50 employees. 28 C.F.R. § 35.105(c).
- **What:** Schedules construction of curb ramps with detectable warnings for pedestrian access to existing PROW sidewalks and street access points. 28 C.F.R. § 35.150(d)(2).
- **Where:** Public right-of-way pedestrian facilities, with priority given to government buildings, transportation areas, etc. (EX: courthouse). 28 C.F.R. § 35.150(d)(2).

ADA & Section 504: Program Access/Transition Plans:

How

The Program Access Plan schedule should:

- Identify existing facilities that limit access for persons with disabilities.
- Describe in detail methods to be used to make facilities accessible.
- Specify schedule for improving facilities by prioritizing needs of persons with disabilities in existing facilities.
- Indicate official responsible for implementation of plan.

28 C.F.R. § 35.150(d)(3).

ADA & Section 504: Program Access/Transition Plans:

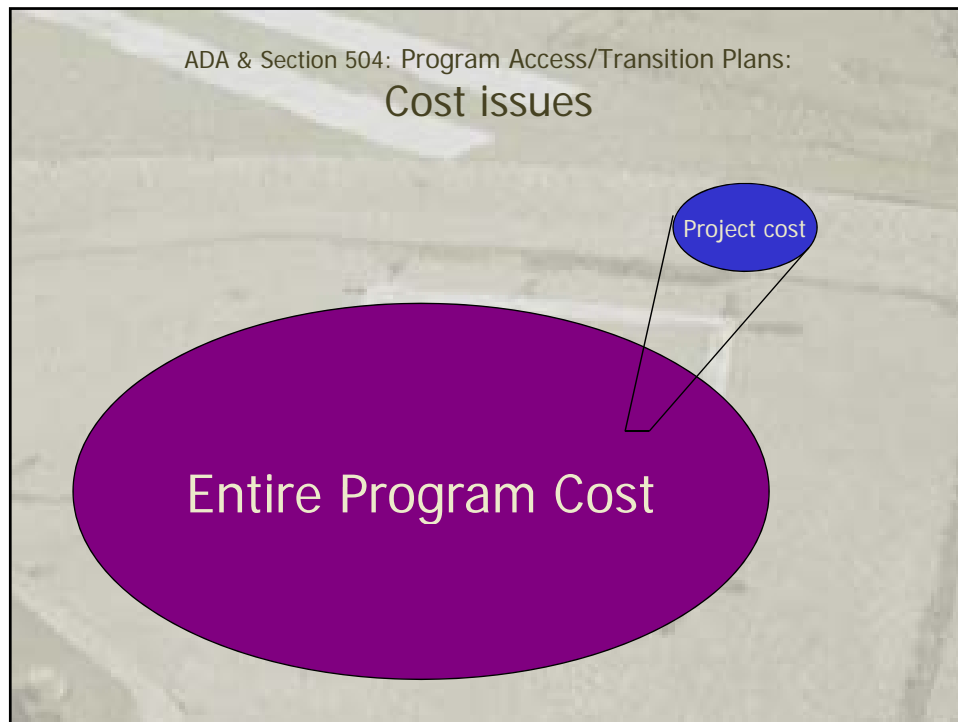
Specific requirements

- Provide opportunity to interested persons and groups to participate in self-evaluation leading to the plan. 28 C.F.R. § 35.105(b).
- Make self-evaluation and plan available for public inspection:
 - Specific time frames and information required. 28 C.F.R. § 35.105(c) .

ADA & Section 504: Program Access/Transition Plans:

Cost Issues

- Cost analysis = Undue burden standard: only when improvement requires cost that, when compared to entire transportation program, would create an undue financial burden, may improvement be considered too costly.
 - Follow procedure at 28 C.F.R. § 35.150(a)(3).



- ADA & Section 504: Program Access/Transition Plans:
Planning Issues
- Integrate transition plan with the Statewide Transportation Improvement Plan (STIP) and Transportation Improvement Plan (TIP)
 - Incorporate improvement projects into transition plan as identified
 - Identify facilities needing to be added:
 - As alteration projects occur
 - As maintenance projects occur

ADA & Section 504: Program Access/Transition Plans:
Timing and Updates

- Originally transition plan projects were to be completed by January 26, 1995. 28 C.F.R. § 35.150 (c).
- All public entities were to have transition plans by July 26, 1992 (28 C.F.R. § 35.150(d)), with self-evaluations governed by 28 C.F.R. § 35.105.
- Update periodically, coordinate with STIP and TIP cycles.

ADA & Section 504:
New Projects

- Design and construct all new facilities to be readily accessible to and useable by individuals with disabilities. 28 C.F.R. § 35.151(a).
 - At minimum, in the public right-of-way, meet ADAAG standards, including:
 - Curb ramps with detectable warnings. ADAAG §§ 4.7, 4.29.
 - Unobstructed sidewalks with accessible slope, width. ADAAG §§ 4.3 – 4.5.
 - Consider accessibility aids such as: accessible pedestrian signals and signs to facilitate safe street crossings. 23 U.S.C. § 217(g)(2).

ADA & Section 504:
Alteration Projects

- In an alteration project, a public entity must make accessible, any pedestrian facilities changed within the scope of the project to the maximum extent feasible. 28 C.F.R. § 35.151(b).
 - Maximum extent feasible = technical feasibility, not cost. ADAAG § 4.1.6(1)(j); USDOJ Technical Assistance II-6.3100(4).
 - Not primary method of improving accessibility.

ADA & Section 504:
Alteration Projects

- Scope of the project: Each altered element or space within the limits of the project shall meet ADAAG standards to the maximum extent feasible. PROW Guidelines (2005 Draft) § 202.3.
- No path-of-travel obligation: PROW analogous to electrical systems alteration discussed at ADAAG § 4.1.6(i).
- See Scope Q&A examples from draft PROW Guidelines.

ADA & Section 504:
Alteration Projects

Scope Questions & Answers from Draft PROW Guidelines:

Question: One corner of an intersection is being altered by curb and gutter reconstruction and paired curb ramps are being installed as part of this project. The other three corners of the intersection are not being altered. Must curb ramps be provided at the unaltered corners as part of this work?

Answer: No. The scope of the project requires curb ramps only at the altered corner.

Question: A project will be undertaken to connect a series of sidewalk segments near a school. Must the existing segments of sidewalk be modified if they do not meet width or cross slope provisions?

Answer: Yes, to the maximum extent feasible within the scope of the project. Agencies are not required to expand a planned scope of work to include other items of accessibility.

Question: A new sidewalk is being built along an existing road that contains driveway access points. Must those driveways be modified if their cross slope exceeds 2%?

Answer: Yes, to the maximum extent feasible within the scope of the project.

ADA & Section 504:
Alteration Projects

Alteration Definition:

- A change to a facility in the public right-of-way that affects, or could affect, access or use of the facility, including changes to structure, grade, or use of the facility.
- Examples: reconstruction, major rehabilitation, widening, resurfacing (such as structural overlays and mill and fill), signal installation and upgrades.

ADA & Section 504:

Alteration Projects

Maintenance is not an alteration.

Maintenance Definition:

- Activities intended to preserve the system, retard future deterioration, and maintain functional condition of the roadway without increasing structural capacity.
- Examples: Liquid applied sealing, thin surface treatments (nonstructural), joint repair, pavement patching (such as filling potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems.

ADA & Section 504:

Alteration Projects

- When resurfacing of a street alters the usability of a street, curb ramps within scope of the alteration project must be improved to the maximum extent feasible to meet ADAAG standards (including detectable warnings) at the same time that the project occurs.
Kinney v. Yerusalim, 9 F.3d 1067, 1070, 1072 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994); 28 C.F.R. § 35.151(b); ADAAG § 3.5 (alteration definition).

ADA & Section 504:

FHWA Responsibilities

- Regardless of funding source:
 - FHWA must investigate complaints and should investigate any cases where FHWA has reason to believe that accessibility problems exist.
- Training:
 - FHWA should provide and encourage accessibility training for Federal, State and local agencies.

ADA & Section 504:

FHWA Responsibilities

- FHWA is responsible for oversight of federal, state and locality planning, design and construction processes for PROW accessibility, including transition plans.
- Oversight example: FHWA Division's Actions:
 - Review State and local program access plans and projects
 - ADA/Section 504 complaint processing

ADA Enforcement: Lawsuits

- ADA allows individuals to enforce ADA obligations, including curb ramp obligations, through private action in federal district court against a public entity.

Lonberg v. City of Riverside

- 1997 - 2007: Ten years of litigation
- Reasoning: Exhibit A lists 189 curbs with multiple design flaws. Lack of accessibility violated precepts of 28 CFR §35.151, *Barden v. City of Sacramento*, & *Kinney v. Yerusalim*.
- Ruling: City of Riverside discriminated against plaintiff by failing to construct and alter compliant curb ramps and sidewalks.

Lonberg v. City of Riverside

- California Damage Award Calculations:
Total \$211,000.00
 - 181 locations of unsafe curb ramps/no curb ramps used once between Sept. 4, 1996 and February 12, 2007
x \$1,000.00 statutory minimum damages for one offense of denied or unsafe access = \$181,000.00
 - 8 locations of unsafe curb ramps/no curb ramps near plaintiff's home used at least one hundred times between Sept. 4, 1996 and February 12, 2007
x \$5,000.00 damages = \$40,000.00

Lonberg v. City of Riverside

- Damages awarded because City of Riverside's lack of curb ramp access harmed plaintiff's dignity and ability to become self-reliant member of society.

ADA & Section 504:

Access Board Draft Guidance

Recommended source for reasonable policies on issues not governed by ADAAG standards.

Notice of Availability (Nov. 23, 2005):

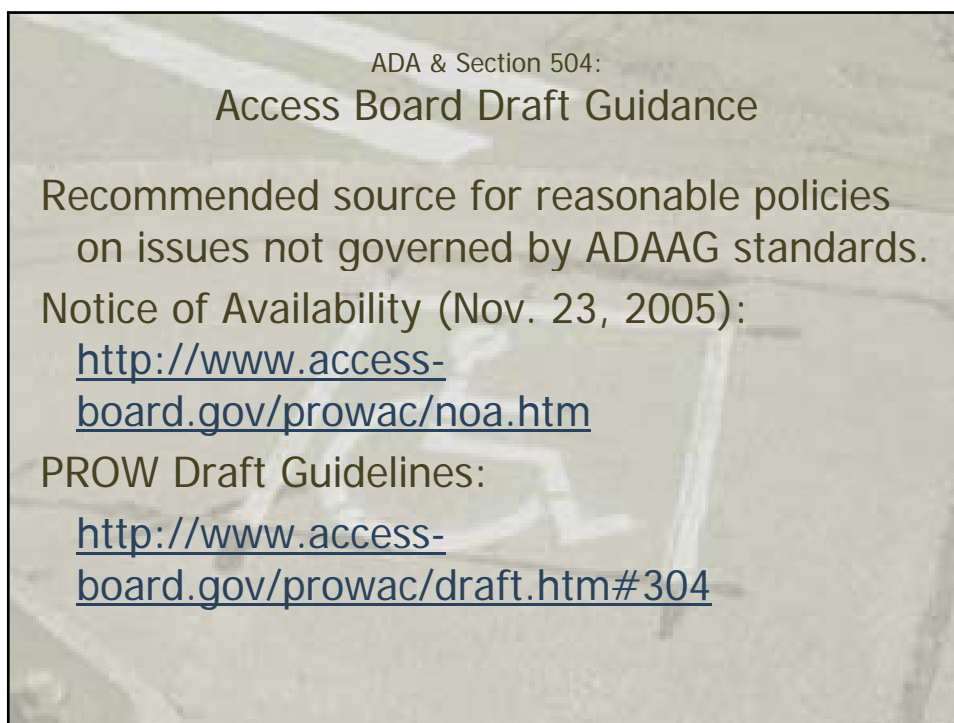
<http://www.access-board.gov/prowac/noa.htm>

PROW Draft Guidelines:

<http://www.access-board.gov/prowac/draft.htm#304>

Accessibility in the Public Right-of-Way: Legal Update

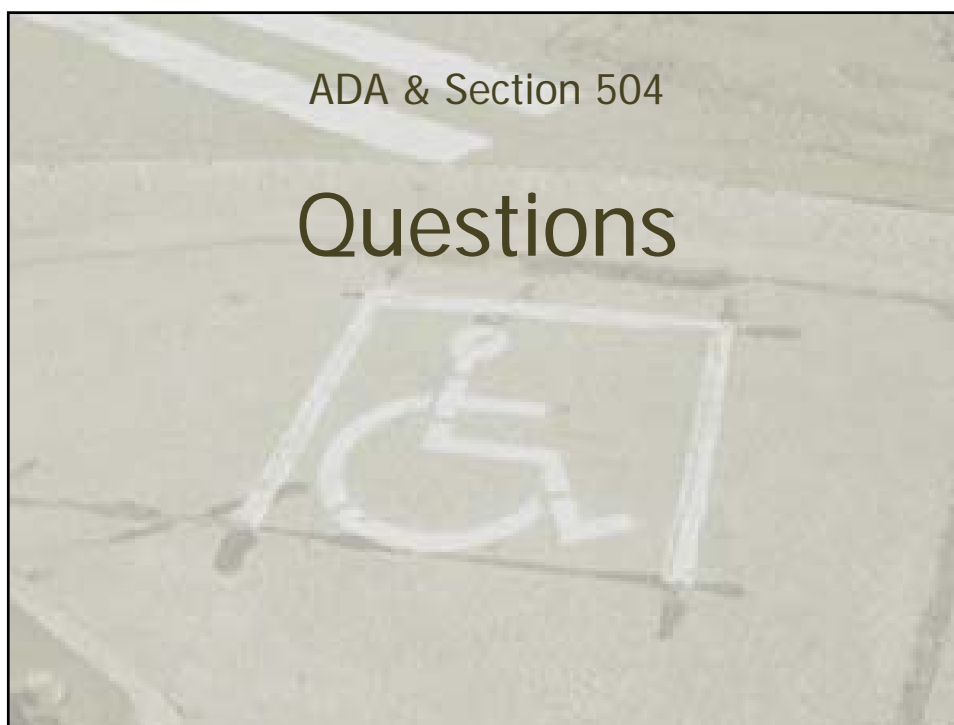
- USDOJ Toolkit:
www.usdoj.gov/crt/ada/pcatoolkit/chap6toolkit.htm
- FHWA Guidance:
www.fhwa.dot.gov/civilrights/ada_memo_clarifications.htm and
www.fhwa.dot.gov/civilrights/ada_qa.htm
- Lonberg v. City of Riverside summary:
<http://www.latimes.com/news/printedition/california/la-me-sidewalks17may17,1,4740830.story?coll=la-headlines-pe-california>



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ADA & Section 504

Questions

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