McGinty, Hitch, Housefield, Person,
Yeadon & Anderson, P.C.

MEMO

TO: CHARLOTTE CITY COUNCIL

FROM: THOMAS M. HITCH, CITY ATTORNEY

RE: WHETHER THE CITY OF CHARLOTTE IS OBLIGATED TO ADOPT AN ORDINANCE REQUIRING THAT ALL PROPERTY OWNERS REMOVE SNOW FROM THEIR ADJOINING SIDEWALKS BY THE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT.

DATE: February 20, 2014

The purpose of this memorandum is to address an issue that has recently arisen due to the significant snowfall which has occurred, as elsewhere in Michigan, within the City of Charlotte. An inquiry has been made to the City regarding whether the City is obligated to, under the Americans With Disabilities Act (ADA), mandate that there be snow removal throughout the City of Charlotte. It is clear that the City, with its resources, would be unable on its own to clear all of the sidewalks within the City. The question is whether the City is obligated to promulgate an ordinance requiring such snow removal by the property owners on which the sidewalks are located. In order to analyze this issue, it is necessary to look at the City's obligations under state law, and its obligations, if any, under the ADA.

In Michigan, cities have the right of reasonable control of its sidewalks. The Michigan Constitution, at *Const* 1963, Art 7, § 29, provides for the reasonable control of highways, streets, alleys and public places within the jurisdiction of cities. Sidewalks are included within that constitutional language. See *Jones v City of Ypsilanti*, 26 Mich App 574, 581 (1970). The Charlotte City Charter uses similar language, where, at Section 2.1(B)(3), it is provided that the City has the power to establish and reasonably control streets, alleys, bridges and public places. The City's authority also derives from the Home Rule Cities Act, MCL 117.48, which likewise provides for the City's control of its streets, alleys and public ways. Thus, the City has the authority to reasonably control the regulations as it pertains to the use and maintenance of sidewalks within the City of Charlotte.

Federal law regulates certain aspects of the operations of local governmental entities (such as cities), pursuant to Title II of the ADA. A public entity, for purposes of Title II of the ADA, is defined as any state or local government. See 42 USC § 12131(1)(A). A public entity cannot discriminate against a qualified individual (that is, a person with disabilities covered by the terms of the ADA) pursuant to 42 USC § 12132 which provides:

> "Subject to the provisions of this title, 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."

The phrase "services, programs, or activities" has been very broadly construed by the courts. In *Johnson v City of Seline*, 151 F3d 564, 569 (1998), the Sixth Circuit Court of Appeals stated: "We find that the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does." A federal court in Indiana has held that the maintenance of sidewalks is a covered activity under Title II. See *Culvahouse v City of LaPorte, Indiana*, 679 F Supp 2nd 931 (2009). Thus, a city is obligated to clear its sidewalks to the City Hall, or to other city owned buildings.

However, the federal regulations also provide that temporary or isolated interruptions do not constitute a violation of the ADA. In *Pack v Arkansas Valley Correctional Facility*, 894 P2d 34, 39 (Colo App, 1995), the court, in reviewing a claim that the failure to remove ice and snow was a violation of Title II, the Colorado Court of Appeals stated:

> To the extent that 28 C.F.R. § 35.133(a) (1994) provides that "a public entity shall maintain in operable working condition those features of facilities that are required to be readily accessible to and usable by persons with disabilities," this requirement does not appear to apply to isolated instances. See 28 C.F.R. § 35.133(b) (1994) ("This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.")
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> Although the obstruction here was caused not by repairs or maintenance, but by an alleged lack of maintenance, i.e., failure to remove snow and ice properly, we conclude nonetheless that an isolated instance of negligence regarding the failure to maintain access routes, without more, is not covered by the ADA.

The regulations interpreting the ADA recognize temporary obstructions are not a violation of the ADA.

Title II also makes provisions which limit its applicability to "existing facilities". In the Department of Justice Title II Regulations, § 35.150 provides in pertinent part:

> (a) *General.* A public entity shall 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 paragraph does not -

* * *

(3) Require a public entity 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. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens.

Under Title II, the City is required to make reasonable accommodations but it is not required to fundamentally alter an existing service, program, or activity, or to make a change that would create undue financial and administrative burdens.

In researching Title II of the ADA, I have found no cases in which the issue has been specifically litigated regarding whether the City was obligated to remove snow on a city wide basis or, in the alternative, to compel the City to adopt a city wide snow removal ordinance. I have found several administrative declarations indicating that the ADA does not require that a city provide a service to disabled persons where the service is not normally provided for the general population. As an example, it is stated in the ADA Title II Technical Assistance Manual that a city's street department is not required to clear snow and ice from driveways and sidewalks for homeowners with disabilities if the city does not provide the service for every resident of the city.

I have also obtained what appears to be an administrative response to a letter request for an opinion by the Department of Justice. In a letter to Senator Mitch McConnell, Deval L. Patrick, in his capacity as Assistant Attorney General for the Civil Rights Division, in a letter dated April 16, 1996, wrote in pertinent part as follows:

...To the extent that accessible sidewalks are required to be provided in order to satisfy that obligation, those required sidewalks must be maintained in operable condition. Temporary interruptions in accessibility, such as those caused by snow, generally do not constitute violations of Title II, however, unless they persist beyond a reasonable period of time. Notably, only those sidewalks that are required by the ADA to be accessible and that are within the control of the city will be required to be maintained by the city.

To the extent that a public entity provides snow removal services, Title II requires those services to be provided in a non-discriminatory manner. However, sidewalk snow removal by private property owners is private action not covered by the Title II absent some substantial involvement by the public entity. The ADA, therefore, does not generally require local governments to pass ordinances compelling property owners to remove snow from sidewalks.

The City of Charlotte is obligated, under the ADA, not to discriminate in the provision of its services. The City has adopted a snow removal ordinance of a very limited nature. The ordinance requires the clearing of sidewalks on Lawrence Avenue between Bostwick Street and Pleasant Street and on Lansing Road between Pleasant Street and Tully Brown Drive. Those properties are virtually all commercial properties, with the exception of what appears to be twelve residential units. No other residential units in the City are under any obligation to clear the sidewalks. The snow removal requirement as to those twelve houses that are on Lansing Road and Lawrence Avenue arises solely due to their location, which connects the principal commercial areas within the City. There are 2,974 residential parcels (residences, accessory buildings, and residential structures on leased land) in the City.

The City has not undertaken to require that all residential property owners remove snow, and the fact that twelve residences are required to do so given their location in between the two principal commercial areas is not legally significant. The City has undertaken to require snow removal in the principal commercial areas so as to further the objectives of Title III which is to provide access to public accommodations. It is my opinion that the fact that it has attempted to enhance access for all persons in its commercial districts does not compel the conclusion that the City must serve all of the properties (both residential and commercial) within the City.

It is my opinion the City has not violated the provisions of the ADA when it has provided for snow removal in commercial areas, and is not obligated to adopt a citywide ordinance covering all residential and commercial properties.

TMH:ddy