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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0012, William Charles Tinker v. Commissioner, NH Department of Transportation & a., the court on June 10, 2009, issued the following order:

Having considered the briefs of the parties and the amicus curiae, and the appellate record, we conclude that oral argument is unnecessary for the disposition of this appeal. See Sup. Ct. R. 18(1). Defendant Town of Tilton (town) appeals an order of the superior court, following our remand in Case Nos. 2007-0618 and 2007-0772 (Tinker I), granting a motion of the plaintiff, William Charles Tinker, to remove the case from the trial docket and for a final order. The town argues that the trial court erred by concluding that it is required under the Americans with Disabilities Act (ADA), see 42 U.S.C. §§ 12101 et seq. (2000), to remove snow, ice and debris from the sidewalk at issue, and by failing to assess the reasonableness of the town's snow removal program. Finding no error, we affirm.

At the outset, we note the limited nature of the trial court's ruling. The trial court did not, as the town contends, "promulgat[e] a rule that all post-1992 sidewalks must be kept clear of snow, ice and debris at all times." Rather, the plaintiff's motion, which the trial court granted for the reasons offered by the plaintiff in support of it, requested only a declaration "that the town of Tilton must maintain the subject sidewalk to keep it clear of snow, ice and debris." (Emphasis added.) Thus, we construe the trial court's order as declaring only that the town has an obligation under the ADA to keep the sidewalk that is at issue in the present dispute clear of snow, ice and debris.

Likewise, we note the limited nature of the issues that are properly before us. First, we observe that the plaintiff, in his motion and reply memorandum, asserted that the town waived its argument in Tinker I that the high cost of plowing the sidewalk poses an unreasonable burden for purposes of 28 C.F.R. § 35.150(a)(3) (2008). Inasmuch as the trial court granted the motion for the reasons offered by the plaintiff in support of it, and because the town does not challenge the plaintiff's assertion that it waived the unreasonable burden argument, we conclude that the town has waived any argument that the cost of removing snow, ice and debris from the sidewalk poses an undue financial burden. Cf. Koor Communication v. City of Lebanon, 148 N.H. 618, 624 (2002) (where trial court provides alternative grounds for its ruling, and appealing party challenges one, but not all, of the grounds on appeal, we uphold the trial court's decision without addressing the merits of the parties' arguments).

Second, the town "agree[s] that the sidewalk at issue is a 'facility' for ADA purposes," and characterizes its position as being "that while 28 C.F.R. § 35.133, which governs maintenance, requires that the sidewalk be kept in good repair, it is silent as to snow removal requirements." Because the town agrees that 28 C.F.R. § 35.133 imposes maintenance obligations upon it relative to the sidewalk at issue in this case, it necessarily concedes that the sidewalk constitutes a "featur[e] of [a] facilit[y] . . . that [is] required to be readily accessible to and usable by persons with disabilities by the [ADA]," 28 C.F.R. § 35.133(a) (2008), and disputes only that the scope of its obligations under this regulation includes snow removal.

With these limitations in mind, we address the arguments raised by the town in its brief. The town first argues that because its closure of the sidewalk impacts all citizens equally, the policy is nondiscriminatory and does not violate the ADA. This argument is foreclosed by our decision in Tinker I.

In Tinker I, the trial court granted the town's motion to dismiss on mootness grounds, reasoning that because the town's decision to close the sidewalk impacted individuals with disabilities and without disabilities alike, the plaintiff was not "isolated" for purposes of the ADA, and that the federal regulations implementing the ADA did not preclude the seasonal closure of the sidewalk. While we agreed with the town that it was premature to consider whether seasonal closure of the sidewalk constituted a per se violation of the ADA, we concluded that the trial court had erred by presuming that seasonal closure of the sidewalk complied with the ADA. Necessarily, the trial court's error included its reasoning that the closure did not have a disparate impact upon disabled persons. Accordingly, the town cannot now maintain that its "seasonal closure of the sidewalk affects all persons equally, and thus is reasonable and not discriminatory." See Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 201-02 (2005) (questions decided by this court on appeal are binding in later stages of the litigation).

We next address the town's argument that the trial court erred by concluding that the town's "maintenance" obligations under 28 C.F.R. § 35.133 include the removal of snow. For the reasons stated in our final order in Tinker I, we defer to the interpretations of the United States Department of Justice (DOJ) and the Federal Highway Administration (FHWA) relative to the scope of the town's maintenance obligations under 28 C.F.R. § 35.133.

The FHWA, as we noted in Tinker I, has expressly construed a public entity's maintenance obligations to include "insur[ing] that the day-to-day operations keep the path of travel on pedestrian facilities open and usable for persons with disabilities, throughout the year." Clarification of FHWA's Oversight Role in Accessibility (Sept. 12, 2006) (available at http://www.fhwa.dot.gov/civilrights/ada_memo_clarificationa.htm). This duty,

according to the FHWA, "includes snow and debris removal, maintenance of pedestrian traffic in work zones and correction of other disruptions." Id. The FHWA has more recently confirmed its interpretation of 28 C.F.R. § 35.133 that a public agency's maintenance obligation "includes reasonable snow removal efforts." Snow removal on Sidewalks Constructed with Federal Funding (Aug. 27, 2008) (available at http://www.fhwa.dot.gov/preservation/082708.cfm).

We reject the town's contention that these memoranda do not apply to it because they refer specifically to "public agencies," and not "public entities." Neither the ADA, nor the regulations implementing it, differentiate the maintenance obligations of a "public agency" from a "public entity." Rather, both define a "public entity" to include any state or local government, as well as any "department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1) (2000); 28 C.F.R. § 35.104 (2008). Moreover, in its September 12, 2006 memorandum, the FHWA expressly states that by using the term "public agencies," it means to refer to "all Federal, State, and local governmental agencies . . . that build and maintain highways and roadways, whether or not they use federal funds on a particular project." Clarification of FHWA's Oversight Role in Accessibility, supra. As the plaintiff contends, this necessarily would include any highway department to which the town has delegated its maintenance obligations relative to the sidewalk.

Nor do we agree with the town that the September 12, 2006 memorandum, because it does not expressly cite 28 C.F.R. § 35.133, was not intended to construe a public entity's obligations under that regulation. Rather, the September 12, 2006 memorandum is expressly cited by the FHWA for the proposition that maintenance under 28 C.F.R. § 35.133 "includes reasonable snow removal efforts" from walkways. Questions and Answers About ADA/Section 504 (modified May 26, 2009) (available at http://www.fhwa.dot.gov/civilrights/ada_qa.htm) (answer to question 31).

The town identifies no interpretations of 28 C.F.R. § 35.133 by the DOJ that are inconsistent with the interpretation of it by the FHWA. To the contrary, the town includes in its appendix an opinion letter from the DOJ, concluding that to the extent a sidewalk is "required by the ADA to be accessible and [is] within the control of [a] city," the city is required to maintain the accessibility of the sidewalk, and that an obstruction of the sidewalk by snow may become a violation of the ADA if it "persist[s] beyond a reasonable period of time." We note that it does not appear that this document was submitted to the trial court for its consideration relative to the plaintiff's motion for a final order or the town's motion for reconsideration. See Sup. Ct. R. 13 (defining the record). Even if it had been submitted, however, it supports the interpretation of 28 C.F.R. § 35.133 by the FHWA.

We conclude that, to the extent a sidewalk is deemed part of a "facility" that is "required to be readily accessible to and usable by persons with disabilities" under the ADA, the maintenance obligations of the public entity having control over the sidewalk include the reasonable removal of snow, ice or debris rendering the sidewalk inaccessible. Because, as noted above, the town concedes that 28 C.F.R. § 35.133 applies to the sidewalk at issue, the trial court did not err by concluding that the town's maintenance obligations relative to it include the removal of snow, ice and debris.

Finally, we address the town's argument that the trial court erred by failing to assess the reasonableness of its snow removal program. While the FHWA has construed a public entity's maintenance obligations to include only "reasonable snow removal efforts," and has indicated that "local agencies may have policies that reasonably limit removal of snow from their own roadways and adjoining pedestrian facilities," it is undisputed that the town removes no snow or ice from the subject sidewalk, no matter how inaccessible the sidewalk is rendered. The refusal to remove any snow is not a reasonable limit upon the removal of snow, but is an abdication by the town of its obligation altogether.

Affirmed.

Broderick, C.J., and Dalianis, Duggan and Hicks, JJ., concurred.

Eileen Fox,
Clerk

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