



THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

NOV 28 1980

Mr. Mike Burton  
Metropolitan Service District  
District 12  
527 S.W. Hall St.  
Portland, Oregon 97201

Dear Mike:

Thank you for your recent letter, cosigned by members of the Metropolitan Service District, expressing your support for the Cleveland Amendment to pending mass transit legislation. I am sorry for the delay in getting back to you.

The Cleveland Amendment would permit localities to develop methods of providing transportation to disabled citizens other than through the provision of accessible fixed-route services, as required by the Department's section 504 regulation. The transit legislation is scheduled for House floor consideration early next week.

As you may know, the Congress has now enacted a form of "local option", in section 324 of the Department's fiscal year 1981 Appropriations Act. Enclosed is an opinion of the Department's General Counsel setting forth the effect of section 324.

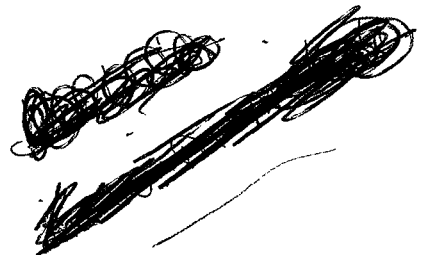
I hope the above information will be helpful to you in implementing the requirements of section 504.

Sincerely,

A handwritten signature in dark ink, appearing to read "Neil Goldschmidt", is written over the typed name.

Neil Goldschmidt

Enclosure



# memorandum

Subject: Impact of DOT Appropriations Act on the  
Bus Lift Requirement of the 504 Regulation

Date: OCT 27 1980

From: Thomas G. Allison  
General Counsel



Reply to  
Attn. of:

To: Neil Goldschmidt  
Secretary

On October 9, 1980, the President signed the Department of Transportation and Related Agencies Appropriation Act, 1981. Section 324 of the Act contains the following limitation on the use of appropriated funds:

Section 324. None of the funds in this Act may be used for planning or execution of programs to compel local transit authorities to purchase wheelchair lifts to comply with Section 504 of the Rehabilitation Act of 1973 except--

- (1) to the extent which would be required under the amendment contained in Section 118 of S.2720 (96th Congress, Federal Public Transportation Act of 1980) as passed by the Senate on June 25, 1980, or
- (2) where such authorities have elected to purchase such lifts.

This section shall be effective only until modified by subsequent legislation. Pub. L. No. 96-400, §324, 94 Stat. 1681 (1980).

In light of this provision, you have asked for an opinion on the extent to which the Department may plan and execute programs to carry out the bus accessibility requirements of its regulations implementing section 504 of the Rehabilitation Act of 1973. Section 27.85 of the regulation requires recipients to make their fixed route bus systems "program accessible" to handicapped persons, including wheelchair users, in up to 10 years. 49 C.F.R. §27.85. The regulation requires that all new buses for which a procurement solicitation is issued after July 2, 1979 be accessible. Since wheelchair lifts are the only currently available technology for making buses accessible, lifts are required.



It's a law we  
can live with.

The plain language of Section 324 indicates that subject to two exceptions Congress ordered the Department to refrain from using funds appropriated under the Act to compel the purchase of bus lifts. The second exception requires little explanation since it simply states that the Department may use appropriated funds to plan and execute programs to compel lift purchases in the event a recipient has itself elected to purchase lifts.

The first exception, however, does require explanation since it incorporates by reference section 118 of the Senate-passed Federal Public Transportation Act of 1980, and states that the limitation on the Department's use of appropriated funds does not apply to the extent lifts "would be required" under that section. See S.2720, 96th Cong., 2d Sess. §118, Cong. Rec. S8150 (daily ed. June 25, 1980) (Amendment offered by Sen. Zorinsky). Under Senator Zorinsky's Amendment, each recipient would be required to comply with the Department's 504 regulation, including the requirement that all new buses be accessible, until the recipient had submitted and the Secretary had approved an alternative program meeting the requirements of the Amendment. 1/ After program approval, the recipient would be authorized to reduce its purchase of accessible buses to the levels provided for in its approved program. For communities from 50,000 to 750,000 population, alternative programs under the Zorinsky Amendment must provide for the purchase of at least 50 percent accessible buses unless the Secretary determines that a different percentage is consistent with the area's program; for communities over 750,000, the percentage of new buses required to be accessible is 100 percent, also subject to the Secretary's determination of a different percentage. There is no stated bus accessibility requirement in the Zorinsky Amendment for communities below 50,000 population.

Some recipients may argue that section 324 was intended to have the effect of immediately requiring the Department to stop using funds to compel lift purchases beyond the stated requirements which would apply under the Zorinsky Amendment after alternative transportation programs are submitted and approved. This would presumably mean that, effective now, the Department could not

1/ In addition to other requirements, the alternative program must be approved by the metropolitan planning organization after considering and soliciting the views of handicapped persons, must provide for the expenditure of at least five percent of funds received under the Urban Mass Transportation Act, must meet comparability criteria spelled out in the statute, and must be concurred in by the Architectural and Transportation Barriers Compliance Board.

require lifts on any buses purchased by a community with less than 50,000 population, and could only require 50 percent of new buses to be accessible in communities with populations of 50,000 to 750,000, regardless of whether a recipient had obtained the Secretary's approval of an alternative program.

This argument must, however, be rejected for several reasons. First, such an interpretation would conflict with the express language of the exception to the funding limitation which authorizes the Department to enforce the lift requirement "to the extent which would be required" under the Zorinsky Amendment. As noted earlier, the Zorinsky Amendment would require compliance with the 504 regulations unless and until an alternative program has been submitted and approved by the Secretary. In other words, a recipient is authorized under the Zorinsky Amendment to purchase fewer accessible buses than required by the Department's 504 regulation only in exchange for providing alternative services meeting the requirements set out in the Bill. Second, it is not possible to determine what level of bus access is required by the Zorinsky Amendment, at least for communities over 50,000, until alternative programs are submitted and approved by the Secretary. Finally, such an interpretation would mean that inaccessible buses could be purchased in communities that did not have alternative service meeting the requirements of the Zorinsky Amendment or even communities that had no alternative transportation at all. This result, as shown below, is plainly inconsistent with the language and history of section 324.

The language from which section 324 was developed originated in the Senate Committee on Appropriations. As reported by the Committee, section 323 of the Senate Bill stated that: "[N]one of the funds in this Act may be used for the planning and execution of programs to compel local transit authorities to purchase wheelchair lifts to comply with section 504 of the Rehabilitation Act of 1973." H.R. 7831, 96th Cong., 2d Sess. §323 (Sept. 9, 1980). <sup>2/</sup> Unlike the provision that was adopted, this language would have flatly prohibited the Department from using funds appropriated by the Act to compel the purchase of lifts.

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<sup>2/</sup> The same provision was offered as an Amendment on the floor of the House during debate on the House Appropriations Bill. However, the Amendment was not adopted. See Cong. Rec. H6876-83 (daily ed. July 31, 1980) (Amendment offered by Rep. Stenholm).

During floor consideration, Senator Dole offered an amendment to the provision reported out by the Appropriations Committee. Cong. Rec. S12838-40 (daily ed. Sept. 18, 1980). This amendment built upon the original Committee language by adding the two exceptions contained in the act as signed. This language as amended by Senator Dole was agreed to by both Houses after Conference. See Cong. Rec. H10048-63 (daily ed. Sept. 30, 1980); Cong. Rec. S13990-1400 (daily ed. Sept. 30, 1980).

In introducing this Amendment, Senator Dole expressly stated that his Amendment "would not prohibit funding for the next fiscal year for purposes of complying with section 504, but would permit local communities to exercise a degree of flexibility in their planning for transportation services to handicapped individuals." Cong. Rec. S12839 (daily ed. Sept. 18, 1980) (emphasis supplied). He stated that his intention was "to assure that criteria similar to that expressed in the Zorinsky Amendment be put into effect," and that "some form of transportation for the handicapped should be assured at the local level." Id. Finally, Senator Dole stated that his Amendment "would provide flexibility at the local level and would still assure that, in the event that the provisions of S.2720, which affect this issue are defeated, transportation services in compliance with section 504 will still be in effect." Id.

If Congress had intended section 324 to operate as an immediate bar to the enforcement of the lift requirement, it could have simply adopted the provision as reported out of the Senate Appropriations Committee. Instead, the language of the exception specifically authorizes enforcement of the lift requirement to the extent that "would be required" under the Zorinsky Amendment. Moreover, an interpretation of this language that resulted in the immediate purchase of inaccessible buses by communities without regard to the question of whether they provide alternative service meeting the Zorinsky Amendment requirements would be in direct conflict with Senator Dole's comments to the effect that his intention was to assure that criteria like those in Zorinsky "be put into effect," that "some form of transportation for the handicapped should be assured at the local level" and that even if the Zorinsky Amendment is defeated, "transportation services in compliance with section 504 will still be in effect." Cong. Rec. S12839 (daily ed. Sept. 18, 1980).

Therefore, it is my opinion that the Department is authorized to use funds under the 1981 Appropriations Act to plan and execute programs to compel the purchase of lifts in accordance with the Department's 504 regulation until a recipient has submitted and the Secretary has approved an alternative transportation program meeting the requirements of the Zorinsky Amendment. At that point, the Department would only be authorized to use appropriated funds to compel lifts at the levels provided for in a recipient's approved program. It should be noted, however, that even if the Department approved a recipient's alternative program under the Zorinsky Amendment, the recipient would face the risk of a court challenge to any purchases of inaccessible buses. Such a challenge would be based on the argument that section 324 was only intended to limit the expenditure of funds by the Department and did not overturn the Department's 504 regulation.

cc: Theodore C. Lutz, Administrator, Urban Mass Transportation  
Administration

John S. Hassell, Administrator, Federal Highway  
Administration