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*A CENTER FOR ADVANCED PROPERTY STUDIES
AT THE BURTON BLATT INSTITUTE (BBI)*

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**NEIGHBORHOOD ASSOCIATION OF
THE BACK BAY v. FTA**

US COURT OF APPEALS FOR THE
FIRST CIRCUIT

2006 U.S. App. LEXIS 23394

September 14, 2006, Decided

This case primarily presents questions as to whether the Federal Transit Authority ("FTA"), in providing funding to the Massachusetts Bay Transit Authority ("MBTA") to make the Copley Square station compliant with the Americans with Disabilities Act, has violated various federal statutes designed to preserve historic properties.

Under Title II of the ADA, public transit authorities receiving federal funds are required to identify "key stations" and then make those stations accessible to wheelchair users.

In 1992 the Copley Square station was identified by the MBTA as a key station, and plans were made to modify the station to make it wheelchair accessible. To make the station wheelchair accessible would require installation of new inbound and outbound elevators to transport wheelchair users.

The FTA provides federal funds to state entities such as the MBTA to assist them in achieving compliance with the ADA. However, in providing funding, the FTA, like other federal agencies, must ensure that the funded projects comply with various federal statutes dealing with historic preservation.

The problem with the planned modifications to the Copley Square station lies in the fact that the station is adjacent to the Boston Public Library and the Old South Church, both of

which are designated as National Landmarks and are listed on the National Register of Historic Places. The Library and Church are located within the Back Bay Historic District, which is itself on the National Register of Historic Places, as is the existing inbound entrance headhouse to Copley station. The proposed modifications to the station would require use of part of the Library steps for the inbound elevator and construction of an outbound elevator adjacent to the Church.

To comply with the statutes, the FTA must find that the state entity complies with each statute before disbursing federal funds for any transportation project, including an ADA accessibility project. But the FTA need not undertake separate reviews under each statute. Furthermore, in determining compliance with these statutes a federal agency such as the FTA can rely on state agencies such as the MBTA, and on consultants. Here, the FTA, in concluding that the Copley Station project complied with all these statutes, relied on "information, analyses and recommendations" prepared by the MBTA. The MBTA, in turn, relied on consultants.

Plaintiffs Neighborhood Association of the Back Bay and Boston Preservation Alliance filed suit on June 9, 2005, alleging that the FTA and MBTA violated the National Historic Preservation Act and the Department of Transportation Act in approving the project.

Following a hearing, the district court denied plaintiffs' request for injunctive relief. The Court of Appeals stated that in order to comply with the National Historic Preservation Act and

the Department of Transportation Act, the FTA must find that the state entity complies with each statute before disbursing federal funds for any transportation project, including an ADA accessibility project. However, the FTA need not undertake separate reviews under each statute. Also, a federal agency such as the FTA can rely on state agencies such as the MBTA, and on consultants.

In conclusion, the Court of Appeals determined that neither the FTA nor MBTA acted unlawfully and concluded that the district court properly denied preliminary and final injunctive relief.

Editor's Comments: This was an interesting case in that it placed federal laws designed to protect persons with disabilities into conflict with federal laws designed to protect historic properties.

According to the website of the Neighborhood Association of the Back Bay:

"The mission of the Neighborhood Association of the Back Bay, as defined in its Articles of Organization, is 'To combat community deterioration in the Back Bay; to preserve and protect the architectural beauty of the Back Bay; and to further the residential character of the Back Bay.'"



WISCONSIN COMMUNITY SERVICES v. CITY OF MILWAUKEE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September 26, 2006, Decided

The legal question here is whether, and to what extent, a city must modify its zoning standards to prevent it from discriminating against persons with disabilities.

Wisconsin Community Services was experiencing a shortage in space available for employee parking, client treatment, group therapy sessions and other services. Faced with the shortage, WCS at first considered remodeling, but finally concluded that such a project would be too costly and would interfere with client care. WCS then began searching for a new building. Despite having a limited budget, WCS needed a facility that was located in a safe neighborhood and had adequate floor space, parking and access to public transit. After searching for three years, WCS was able to find two buildings that met its criteria. Neither property, unfortunately, was located in a neighborhood zoned for health clinics. Both were in areas where health clinics are permitted only as "special uses" that require issuance of a permit by the Milwaukee zoning authorities.

Under Wisconsin law, in deciding whether to issue a special use permit, the City's zoning officials are guided by four statutory considerations: (1) protection of public health, safety and welfare; (2) protection of the use, value and enjoyment of other property in the neighborhood; (3) traffic and

pedestrian safety; and (4) consistency with the City's comprehensive plan. After reviewing WCS' plan, the zoning officials concluded that these criteria had not been met. Specifically, they expressed concern over the second factor, protection of neighboring property value. It stated that use of the property as a mental health clinic would jeopardize the commercial revitalization that the neighborhood currently was undergoing. Eventually, WCS brought this action in federal district court.

WCS brought this action under Title II of the ADA, and §504 of the Rehabilitation Act of 1973. The district court concluded that the proposed facility would ameliorate some of the effects of WCS' patients' disabilities. Also, the court rejected the City's argument that WCS could have moved its clinic to another location where a mental health clinic would not have required a special use permit. Under the court's view of the evidence, this option was too costly for WCS. Although recognizing that WCS perhaps could have searched for available properties more effectively, the court held that necessity may be established simply by evidence of a good-faith, albeit failed, attempt to find an alternative to the accommodation requested.

According to the Court of Appeals, the district court assumed that the proposed modification could be deemed "necessary" even if the disabilities suffered by WCS' patients were not the cause-in-fact of its inability to find a larger building. The district court failed to apply a "but for" causation standard in determining the necessity element of WCS' accommodation claim. Choosing this course was error in light of the

prevailing standards under prevailing case law. As a result, the Court of Appeals remanded to the district court to afford the parties the opportunity to develop the question of whether WCS has been prevented, *because of its clients' disabilities*, from locating a satisfactory new facility. In conclusion, the Court of Appeals reversed the district court.



NATIONAL FEDERATION OF THE BLIND v. TARGET

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

September 5, 2006, Decided

Plaintiff National Federation of the Blind filed this action against Target Corporation seeking declaratory, injunctive, and monetary relief. Plaintiffs claimed that Target.com is inaccessible to the blind, and thereby violates federal and state laws prohibiting discrimination against the disabled. Now before the court is defendant's motion to dismiss for failure to state a claim.

Plaintiffs allege that Target.com is not accessible to blind individuals. According to plaintiffs, designing a website to be accessible to the blind is technologically simple and not economically prohibitive. Protocols for designing an accessible internet site rely heavily on "alternative text": invisible code embedded beneath graphics. A blind individual can use screen reader software, which vocalizes the alternative text and

describes the content of the webpage. Similarly, if the screen reader can read the navigation links, then a blind individual can navigate the site with a keyboard instead of a mouse. Plaintiffs allege that Target.com lacks these features that would enable the blind to use Target.com. Since the blind cannot use Target.com, they are denied full and equal access to Target stores, according to plaintiffs.

Defendant contends that even if Target.com is the alleged service of Target stores, plaintiffs still do not state a claim because they fail to assert that they are denied physical access to Target stores. Although a plaintiff may allege an ADA violation based on unequal access to a "service" of a place of public accommodation, courts have held that a plaintiff must allege that there is a "nexus" between the challenged service and the place of public accommodation. Under Ninth Circuit law, a "place of public accommodation," within the meaning of Title III, is a physical place. The Ninth Circuit has declined to join those circuits which have suggested that a "place of public accommodation" may have a more expansive meaning.

The case law does not support defendant's attempt to draw a false dichotomy between those services which impede physical access to a public accommodation and those merely offered by the facility. Such an interpretation would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate to remove physical barriers to entry. The court finds unconvincing defendant's attempt to bootstrap the definition of accessibility to this determination, effectively reading out of the ADA the broader provisions enacted by Congress. Defendant's

argument is unpersuasive and the court declines to dismiss the action for failure to allege a denial of physical access to the Target stores.

In sum, the court finds that to the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied.

[Editor's Comments: Dr. Peter Blanck of the Burton Blatt Institute was involved in this matter on behalf of the claimants against Target and will continue to be involved in the future.](#)



September 29, 2006

Regulators issue final guidelines on exotic mortgages

On Friday, federal banking regulators issued new guidelines that warn lenders to take improved steps in determining whether borrowers will ever be able to pay off the debt. The Federal Reserve Board, the FDIC, the office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration stated on Friday that they remain worried about risks that are created by these loans.

Interest-only mortgages and payment-option adjustable rate loans played a significant role in the recent housing boom because they allowed borrowers to purchase homes that otherwise may have been too

expensive. However, regulators are concerned that rising interest rates and falling home prices could result in a huge increase in defaults.

"While similar products have been available for many years, the number of institutions offering them has expanded rapidly... At the same time, these products are offered to a wider spectrum of borrowers who may not otherwise qualify for more traditional mortgages." Regulators also stated, "The agencies believe that institutions should maintain qualification standards that include a credible analysis of a borrower's capacity to repay the full amount of credit that may be extended."

The guidelines can be accessed via the "Links of Interest to PCSE" found on the PCSE homepage at www.law.syr.edu/pcse.



**UNITED STATES OF AMERICA v.
EDWARD ROSE & SONS**
UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT
August 25, 2004, Decided

This housing discrimination case turns on what doors must be accessible to [persons with disabilities]. At issue are two sets of apartment complexes, designed with an inaccessible front door, but an accessible back patio door.

The district court granted the U.S. Justice Department a preliminary injunction halting the construction and occupancy of the buildings. The main defendant, the builder and owner,

Edward Rose & Sons appeals, arguing that court erred (1) by misconstruing the requirements of the Fair Housing Act, and (2) by incorrectly weighing the relative preliminary injunction interests and harms. We affirm the district court's grant of the preliminary injunction.

Defendant Rose constructed and owns the nineteen apartment buildings, located in Michigan and Ohio, at issue. These buildings are at various stages of construction, but all have the same basic design. The ground floor apartments at issue have two exterior entrances - a front door and rear patio door. The front door is closer to the parking lot, but is handicapped inaccessible because it can only be reached by descending stairs. At the bottom of the stairs is a landing shared by two front doors leading into two different apartments. The rear patio entrance is accessible, but is located farther from the parking lot.

The government alleged that the apartments violated the disability portions of the FHA. The district court granted a preliminary injunction, adopting the government's position that the front door was the "primary entrance" used by the public and guests, and as such, it was a "public" or "common area" that the FHA mandates be accessible. In reaching this conclusion, the court relied on the HUD regulations, guidelines, and design manual. The preliminary injunction halted construction on the "covered dwellings" and restrained the defendants from occupying "covered dwellings" not yet leased. In this case, "covered dwellings" means simply the ground floor. Rose appealed.

The court found that, in this particular case, the stair landing in front of the entrance was a common

area that the statute mandated be accessible. The fact that two apartment units shared the stair landing made the space a common area. The ruling here was narrow; the court simply held that because the two apartments shared the stair landing, the stair landing qualified as a "common area" that must be accessible. The court expressed no opinion on what the FHA would require if the stairs only led to one apartment unit entrance. The strong finding of a likelihood of success on the merits coupled with the public's interest in eradicating housing discrimination overcame any weakness in the irreparable injury and harm to others factors.

