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**Center on Property, Citizenship, and Social Entrepreneurism
(PCSE) (“Peace”)**



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

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Welcome to the 1st **PCSE NEWSLETTER**. The newsletter will be available each month at www.law.syr.edu/pcse.

The newsletter will examine cases and articles that deal with issues related to modern Real Estate Transactions and Finance; Community Development and Housing; Global Property Law Systems; and Access to Ownership for Inclusion of the Elderly, the Poor, and Persons with Disabilities. Each month the PCSE Newsletter will post updates - summaries of a recent case or other legal development.

We welcome your participation in the newsletter in the future and we should have a listserv up shortly.

BRENDA PICKERN v. PIER 1 IMPORTS, INC.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2006 U.S. App. LEXIS 18674

July 26, 2006, Filed

Appellant was a visually-impaired and mobility-impaired woman who depended on an electric wheelchair for transportation. The Appellee's store was separated from the street by a 10 foot strip of grass that was owned by the city. Appellant could not cross the grassy strip with her wheelchair. The issue was who, if anyone, was responsible under the ADA for designing and installing a route where one did not already exist. It was undisputed that Appellees did not own the grassy area and they did not operate the strip of grass between the street and the store. All the evidence supported the conclusion that the city, a public entity, operated the strip of land at issue. The shopper claimed that it was sufficient if Appellees could control or manage the grassy strip and she advanced multiple arguments designed to prove that Appellees could obtain control over the grassy strip.

The court did not have to determine whether Appellees could obtain such control. The shopper's insistence that the ADA required Appellees to seek permission from the city to build an accessible route over the city's land found no support in the law. The district court properly ruled that Appellees were not

required to build an access ramp across the grassy strip.

EDITOR'S NOTES: There was no evidence here that Appellees managed the strip of grass, mowed it, or maintained it in any way. Even the Appellant conceded in her reply brief that the Appellees did not control the grassy strip. Additionally, there is no legal support for Appellant's contention that the ADA requires Appellees to seek permission from the City to build an accessible route over the City's land. In fact, the Department of Justice has made it clear that private entities are not required to seek such permission.



COMMUNITY SERVICES, INC. v. HEIDELBERG TOWNSHIP

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 50758

July 25, 2006, Filed

This controversy lies at the intersection of local land use law and the Fair Housing Act ("FHA"). Plaintiff was a regional healthcare provider for individuals challenged with mental health issues, and it provided supervised care, maintenance, and training for these individuals in residential programs, day programs and employment

services, and in residential living facilities.

Plaintiff contended that Defendant [township] intentionally interpreted a zoning ordinance to prevent, and refused to grant a reasonable accommodation to permit eight disabled individuals from residing in a home in the Township, in violation of the Fair Housing Act. The instant motion requested that the court enjoin Defendants from interpreting and applying zoning ordinances in a manner that prohibited the prospective residents from moving onto the property, and direct Defendants to grant the permits necessary to perform planned renovations.

In this case, the court found that Plaintiff had a high probability of success on its intentional discrimination claim based upon discriminatory purpose. The court also found that there was a strong likelihood that Plaintiff could demonstrate intentional discrimination through Defendants' application of facially discriminatory zoning ordinances.

The FHA was drafted specifically to combat ordinances such as the ones at issue. Accordingly, Plaintiff is almost certain to demonstrate that these classifications serve as a "proxy" for those that are unable to care for themselves, and hence violate the FHA.

The FHA also requires that local land use boards make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [persons with

disabilities] equal opportunity to use and enjoy a dwelling."

Although it has long been recognized that local governments have a substantial interest in passing and enforcing ordinances to regulate land usage, it is presupposed that such ordinances will be fashioned in a nondiscriminatory manner. When they are not, federal and state interests transcend the deference normally afforded to local land use regulation. Accordingly, the public interest in this case weighs in favor of granting the requested injunctive relief.

EDITOR'S NOTES: This case points out the potential conflict that can arise between local land use and the Fair Housing Act. While local governments are generally given substantial deference with regard to zoning, ordinances that are designed to discriminate will be struck down by courts. In this case, it was quite clear in the findings of fact, based upon comments that were made at several town meetings, that there was an underlying discriminatory purpose.



SUFFOLK INDEPENDENT LIVING ORGANIZATION v. ROYAL ATLANTIC CORPORATION

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
2006 U.S. Dist. LEXIS 57775
August 15, 2006, Decided**

Plaintiff was a New York not-for-profit group which advocates for disabled individuals in Suffolk County, New York.

Defendant was a group of apartment units in buildings located on oceanfront property in Montauk, New York ["Resort"]. The Resort's units were less than 450 square feet, and the doorways to the units' bathrooms were too narrow to accommodate wheelchairs. Additionally, a wheelchair-bound guest had trouble navigating the gravel covered parking lots, and he was unable to use his wheelchair to enter the resorts' pool areas.

Based on expert testimony, the court found Plaintiffs did not establish the feasibility of creating accessible parking spaces or ADA compliant ramps in the parking lots. The court further found that construction of an ADA compliant ramp to allow access to the pool areas would interfere with the balconies in at least three units and that Plaintiffs' proposed plan failed to account for this factor or for shifting sands, fencing requirements, or the impact on the number of people allowed to enter the pool areas.

The cost of proposed unit modifications was approximately \$22,000 per unit, and Plaintiffs failed to name and serve the tenants

whose units they sought to be modified. The court found in favor of the resorts, concluding that Plaintiffs failed to establish that the modifications sought with respect to access to the facilities and rooms were readily achievable.

EDITOR'S NOTES: The Americans with Disabilities Act's barrier removal provision requires the removal of structural barriers in existing facilities when it is "readily achievable." The plaintiffs have the burden of establishing that the modifications are "readily achievable." In determining whether something is readily achievable, the court will consider the nature and cost of the action needed and the financial impact of the proposed modification on the facility involved.



MERCERSBURG COLLEGE v. REPUBLIC FRANKLIN INSURANCE CO.

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2006 U.S. App. LEXIS 20932
August 16, 2006, Filed**

This was an insurance coverage dispute arising out of a lightning strike and fire that damaged Keil Hall on the campus of Mercersburg Academy.

Mercersburg, the insured, is a private secondary and college preparatory boarding school located

in Mercersburg, Pennsylvania. Keil Hall is a building located on the Mercersburg campus that was constructed over a century ago.

The chimney of Keil Hall was struck by lightning on June 13, 1998, igniting a fire that caused extensive damage to the roof and fourth floor of the building, as well as smoke and water damage to the first, second, and third floors. Following the fire, Mercersburg submitted a timely claim to its property insurance carrier, Republic Franklin Insurance Company, for (1) the costs to repair the actual fire damage, (2) additional costs to repair the building that were made necessary to bring the building in compliance with applicable laws and various building codes, and (3) lost business income.

Republic Franklin's primary policy only provides coverage for those repairs necessary to return the property to its pre-fire condition. Accordingly, Mercersburg purchased a separate "Ordinance and Law Endorsement" to its policy. That Endorsement provides in relevant part:

1. Coverage A -- Coverage For Loss to the Undamaged Portion of the Building. If a Covered Cause of Loss occurs to covered Building property[,] . . . we will pay for loss to the undamaged portion of the building caused by enforcement of any ordinance or law that: (a) requires demolition of parts of the same property not damaged by a Covered Cause of Loss; (b) regulates the construction or repair of buildings, or establishes zoning or land use requirements at the

described premises; and (c) is in force at the time of loss.

The insurer's failure to reimburse the Academy for all of its costs incurred as a result of the fire prompted it to file a complaint in United States District Court for the Middle District of Pennsylvania alleging breach of contract and bad faith. Specifically, Mercersburg contended that the Ordinance and Law Endorsement required Republic Franklin to pay for repair and renovation costs required by the Americans with Disabilities Act.

The District Court held that the ADA did not apply because the dormitory space in Keil Hall was not a "public accommodation" within the meaning of that statute.

The Court of Appeals reversed this part of the District Court's holding. It stated, "Beyond the plain language of the ADA implementing regulations, there is an additional reason to rule that it applies to private-school dormitories: student housing--an integral part of boarding school experience—it is one of the facilities, privileges, advantages, and accommodations of a place of education covered by Title III of the ADA. As a private secondary school, Mercersburg itself is a 'public accommodation' that is required to comply with the ADA."

EDITOR'S NOTES: In reaching its determination, the Court of Appeals followed a three-part test: 1) whether Mercersburg Academy is a "public accommodation; 2) whether the repairs and renovations made to Keil Hall are "alterations,"; and 3) whether Keil Hall is a "facility" that is

"used as, or designed for use as," either "a place of public accommodation" or "a commercial facility."

The District Court held that Mercersburg Academy satisfied the first two requirements but failed on the third. Interestingly, the District Court held that dormitories are more like residential units such as apartments and condominiums--which are not covered by the ADA--than transient lodging like inns, hotels, and motels--which are covered under the ADA.

The Court of Appeals disagreed and stated that dormitory housing, which by its very nature is temporary, is covered under the ADA.

