IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Michael Lowrey,)	Case No.: 06-13408-NGE-MKM
)	
Plaintiff)	Judge NANCY G. EDMUNDS
)	
)	Magistrate MONA MAZOUB
Beztak Properties, Inc., *et al*)	
)	
Defendants .)	

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PLAINTIFFS MIKE AND MARILYN LOWREY'S MOTION FOR PRELIMINARY INJUNCTION PURSUANT TO TITLE III OF THE ADA, AND MEMORANDUM IN SUPPORT

Plaintiffs respectfully move this Court to Order Defendants to immediately correct Uptown's Rental offices and Uptown's public use sidewalks to meet the minimum construction standards set forth in the Americans With Disabilities Act Accessibility Guidelines—the ADAAG—set forth at 28 C.F.R. Part 36, App. A.

Plaintiffs state in support:

1. Defendants have built their new rental office without any disability accessible parking, and without an accessible route into the rental office. As a result, Mike Lowrey, Marilyn Lowrey, and every other person with a disability is unable to access Uptown's rental offices;

2. Uptown's rental offices are not readily accessible to and usable by Plaintiffs and others with mobility impairments. This violates Title III of the Americans with Disabilities Act and Plaintiffs demand that the rental office be made accessible immediately;

3. Plaintiffs intend to use the rental office as soon as it is made accessible;

4. Two weeks ago, Defendants served two written threats on the Plaintiffs Lowrey. One document threatened to institute legal action to remove Mike Lowrey's medically necessary companion animal from Uptown Apartments. The other document threatened to ticket and tow immediately Marilyn Lowrey's car if she continues to park directly adjacent to Mike Lowrey's apartment, as she has done for the last two years. Plaintiffs need to access Uptown's Rental office to discuss these issues with Uptown Management, but are currently unable to do so, because the rental office is inaccessible;

5. Defendants have built public use parking lots sidewalks in the Southwest portion of the Uptown site serving several retail establishments. These parking lots and sidewalks are not readily accessible to and usable by Plaintiffs. Plaintiffs plan to use these sidewalks as soon as they are made accessible;

6. According to Title III of the Americans with Disabilities Act:

> "(2) Injunctive Relief. In the case of violations of section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by [Title III]".

42 U.S.C. § 12188(a)(2). Plaintiffs are seeking just such an order from the Court.

7. The Court should order Defendants to install at least one van accessible parking space on the shortest accessible route into Uptown's rental office;

8. The Court should Order Defendants to provide immediately into Uptown's rental offices an accessible route where no portion of the route has a running slope in excess of 5%, and no cross slope in excess of 2%, and complies in all other ways fully with the ADAAG;

9. The Court should Order Defendants to immediately bring the public use sidewalks and curb ramps into full compliance with the ADAAG;

Respectfully submitted

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MEMORANDUM IN SUPPORT

FACTS RELEVANT TO MOTION

The facts relevant to this motion are verified in sworn declarations of Plaintiffs Mike Lowery and Marilyn Lowrey, and witness Megan Buffington. These declarations are attached hereto.[1]

Uptown Apartments is a brand new complex near Canton Michigan. It is only half completed, but already it has approximately 300 multifamily residential apartments, a clubhouse and pool, exercise gym, meeting hall, and a central park. These facilities are connected by sidewalks, streets and parking lots owned and maintained by Uptown. Buffington Dec. at ¶ 11. Uptown also has at the complex retail space rented to several public accommodations—a coffee store, a bank, a theater, and other businesses. *Id.* Uptown maintains several parking lots open to the general public serving these retail establishments. *Id.*

[1] Plaintiffs present their evidence through sworn written Declarations. "Affidavits are appropriate on a preliminary injunction motion and typically will be offered by both parties". *See* 11 A.C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure*, § 2949 at 214-15 (1995), and numerous cases collected therein. Indeed, a preliminary injunction may issue entirely based on affidavits. *See*, *e.g.*, *Ross-Whitney Corp. v. Smith, Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953). Pursuant to federal statute, written sworn declarations are properly substituted for notarized affidavits in federal court proceedings. 28 C.F.R. Section 1746(2)(2006).

Uptown also has a rental office open full time to the public, where tenants also conduct business with Uptown Management. Marilyn Lowery Dec. at ¶ 6; Mike Lowery Dec. at ¶ 9.

Plaintiff Mike Lowrey is middle aged and is paralyzed, and he uses a wheelchair. *Id.*, at ¶ 2. When Uptown first opened for residency, he rented a ground floor apartment and moved into Uptown. *Id.*, at ¶ 3. Plaintiff Marilyn Lowrey is his mother, and visits him often at Uptown. Marilyn Dec. at ¶¶ 2-3. She also suffers from a mobility disability, and Michigan has issued her a permanent disability parking placard. *Id.*, at ¶ 4. Both Plaintiffs are protected by the Fair Housing Act and the Americans with Disabilities Act.

Plaintiffs are unable to access Uptown's rental office and Uptown's retail establishments. Mike Lowery Dec. at ¶¶ 10-26; Marilyn Lowery Dec. at ¶¶ 6-19. This is because Uptown violated all applicable federal and Michigan accessibility construction standards when it built the Uptown Complex. Buffington Dec. at ¶¶ 4-14. Due to numerous architectural barriers, (*Id.*), Mike Lowery has been confined in his apartment and in its directly adjacent back parking lot, unable to use the sidewalks, the clubhouse, the rental office, and the retail establishments. Mike Lowery Dec. at ¶ 26. Numerous negotiations with Defendants over the last year have been unsuccessful and no architectural barriers have been remedied, so Plaintiffs file this motion for injunctive relief to correct the defects and to bring Uptown into compliance with mandatory federal accessibility standards.

APPLICABLE LAW

SCOPE OF THIS MOTION

The Uptown Complex is governed by two federal laws—the Fair Housing Act and the Americans with Dis abilities Act. The Americans with Disabilities Act does not cover multifamily residential hous ing, but it does regulate accessibility requirements at Uptown's rental office as well as at Uptown's retail establishments and their parkin g lots. Th is is becau se those facilities are open not only to tenants at Uptown, but are al so open to the general public, and so are "public accommodations" subject to Title III of the ADA. This motion relates only to the rental office, and to the parking lots and sidewalks serving the rental office and the retail businesses, and seeks relief pursuant to Title III of the ADA.

Under separate cover and when it is complete in a few days, Plaintiffs intend to file a motion under the Fair H ousing Act for injunctive relief conc erning Mike Lowrey's individual apart ment, and the sidewalks leading from his apartment to and from Uptown's pool, cl ubhouse, gym, central park and other amenities. These items are solely for the use of Uptown's tenants and their guests, and so are covered by the Fair Housing Act, and the separate motion will be pursuant to the FHA.

PLAINTIFFS' REQUESTED RELIEF PUSUANT TO TITLE III OF THE ADA

Uptown's rental office and public use parking lots and sidewalks serving the retail businesses at Uptown violate f ederally mandated access st andards. Title III of the ADA specifically vests the Court with authority to cure immediately these defects by entry of a preliminary injunction:

> "(2) Injunctive Relief. In the case of violations of section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by [Title III]".

42 U.S.C. § 12188(a)(2). Plaintiffs are seeking just such an order from the Court, essentially identical to the preliminary injunction granted by the Court in *Deck v. City of Toledo*, 29 F.Supp.2d 431 (N.D.Ohio 1998)(City ordered to immediately bring sidewalks and curb ramps into compliance with ADAAG standards) 2.

In the Sixth Circuit, when determining whether to issue a preliminary injunction, the court must typically consider four factors:

> (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and, (4) whether the public interest is advanced by the issuance of the injunction.

United States v. Edward Rose & Sons, 246 F.Supp.2d 744 (E.D.Mich. 2003), *aff'd* 384 F.3d 258 (6th Cir. 2004), citing *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir.1994). Considering these factors, the Court is to balance each factor against the other to arrive at its ultimate determination. *Leary v. Daeschner,* 228 F.3d 729, 736 (6th Cir.2000).

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2 Undersigned Counsel J. Mark Finnegan litigated the *Deck* lawsuit. After granting the preliminary injunction, the Court subsequently ruled that Plaintiffs could challenge curb ramps and sidewalks installed at any time after January 26, 1992—the effective date of the ADA—that violated ADAAG standards (56 F.Supp.2d 886, 892-895 (N.D.Ohio 1999)); and granted Plaintiffs partial summary judgment as to 302 locations resurfaced after May 1996 where curb ramps and sidewalks violated the ADAAG (76 F.Supp.2d 816, 818-823 (N.D.Ohio 1999)). The Court also certified *Deck* as a class action in an unreported decision. The remainder of the *Deck* lawsuit ended in a comprehensive Consent Decree entered by the Court.

i. Plaintiffs Have a Very Strong Likelihood of Success on the Merits

Plaintiffs have a strong likelihood of success on the merits. Uptown's rental office and also Uptown's public use sidewalks leading to the retail businesses are not readily accessible to and usable by Mike and Marilyn Lowrey, because those facilities violate controlling ADA mandated minimum construction standards.

Congress' Strong Mandate Under the ADA

The Lowreys are unable to access the rental office and certain public use sidewalks at Uptown Apartments. Title III of the ADA requires Uptown to make these facilities accessible. 42 U.S.C. § 12183(a)(1). The office and the sidewalks were built after January 26, 1993, and so Defendants should have built them according to the construction standards set forth at 28 C.F.R. Part 36, App. A—the "ADAAG". 28 C.F.R § 36.406.

Congress' concern with physical barriers stopping full participation by the Lowreys and other persons with disabilities is apparent in both the history and the text of the ADA. For example, the "findings" section of the ADA states:

> "(2) historically, society has tended to isolate and segregate individuals with disabilities...such forms of discrimination against persons with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as ...housing, public accommodations…recreation...and access to public services;
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> *** *** *** ***
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including...the discriminatory effects of architectural barriers...segregation, and relegation to lesser services."

42 U.S.C. § 12101(a)(2), (3) and (5). Now, nearly 15 years after Congress passed the ADA, Defendants' failure to construct the rental office and public use sidewalks according to the ADAAG is just the sort of discrimination and architectural segregation Congress found above and passed the ADA to eradicate. The Court should immediately act as Plaintiffs demand.

The House Report for the legislation noted that "[t]he employment [Title I], transportation [Title II], and public accommodation [Title III] sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.Rep. No. 485, 101st Cong., 2d Sess., pt.2, at 84 (1990), *reprinted in* 1990 U.S.C.C. A.N. 267, 367. Defendants' failure to properly construct their facilities according to the ADAAG is denying Plaintiffs Mike Lowrey and Marilyn Lowrey the opportunity to travel on the sidewalks and streets of Uptown, and is denying the Lowreys access to sidewalks, businesses and other facilities adjacent to Uptown along Cherry Hill and Ridge Roads in Canton Township.

THE ADA'S REQUIRMENTS GOVERNING RENTAL OFFICES

Title III of the ADA governs Uptown's rental office. See 42 U.S.C. § 12181(7)(E)(2006)(providing that Title III's coverage includes "sales or rental establishment"). This includes rental offices serving private apartment communities. See *e.g.*, *Baltimore Neighborhoods Inc., v. Rommel Builders*, 40 F.Supp.2d 700, 706 (D.Md. 1999)(rental/sales offices for condo association governed by ADA)(*citing* ADA Title III Technical Assistance Manual, 28 C.F.R. Parts 36.102-36.10, III-1-2000: " Illustration 3: A private residence apartment

complex contains a rental office. The rental office is a place of public accommodation [governed by the ADA and its ADAAG]."; *also see U.S. v. Taigen & Sons, Inc.*, 303 F.Supp.2d 1129, 1149-50 (D.Idaho 2003)(same); *Sapp v. MHI Partnerships, Ltd.*, 199 F.Supp. 2d 578, 583-87 (N.D.Tex 2002)(same).

Uptown's Public Use Sidewalks Are Subject to the ADA

Uptown also provides parking lots, sidewalks and ramps that are for public use for customers of the theater, the bank, the coffee shop, etc., in addition to use by Uptown tenants and their guests. These facilities are located at the Southwest quadrant of the Uptown Apartments. See Buffington Declaration at ¶¶ 11-13 According to Title III of the ADA, these public sidewalks and ramps must meet ADAAG standards.3

But these public use parking lots, designated accessible parking spaces, and their sidewalks suffer from cross slopes in excess of 2%, running slopes in excess of 8.33%, and ramps lacking required level landings and handrails. See Buffington Declaration at ¶¶ 10-13. These facilities are not readily accessible to and usable by the Lowreys and others with disabilities, and violate the ADA and its ADAAG, as well as the applicable Michigan laws. This has stopped Mike Lowrey from using these facilities to travel from his apartment to the facilities

3 The USDOJ illustrates this principal in its Title III Technical Assistance Manual, III-1.2000, "places of public accommodation within residential facilities". "Thus, areas within multifamily residential facilities that qualify as places of public accommodation are covered by the ADA if use of the areas is not limited exclusively to owners, residents and their guests." Uptown's public use sidewalks are also for the routine daily use of the public patronizing the retail shops, in addition to the tenants of Uptown and their guests, and are "public accommodations" subject to the ADA.

along Cherry Hill Road and Ridge Road, directly adjacent to Uptown Apartments. *See* Mike Lowrey Declaration at ¶¶ 22-26. *See* Marilyn Lowrey Declaration at ¶¶ 16-20.

"Readily Accessible to and Usable by Persons with Disabilities" Defined

Title III of the ADA requires Uptown's rental office and the public use sidewalks to be "readily accessible to and usable by persons with disabilities". 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.401(a)(1). Legally binding implementing regulations and statutory guidance define what is "readily accessible to and usable" by the Lowreys and other persons with disabilities. According to the USDOJ:

> "What is 'readily accessible and usable?' This means that the facility[4] must be built in strict compliance with the Americans with Disabilities Act Accessibility Guidelines (ADAAG). There is no cost defense to the new construction requirements."

United States Department of Justice ADA Title III Technical Assistance Manual, Section III-5.1000. USDOJ's Technical Assistance Manual is entitled to "substantial deference". *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998). Thus, only when Uptown's business offices "strictly comply" with the ADAAG is it "readily accessible to and usable" by the Plaintiffs Lowrey. *See e.g.*, *Ability Center v. City of Sandusky*, 385 F.3d 901 at 904 (6th Cir. 2004), where the Sixth Circuit found that sidewalks and curb ramps that violate slope and access requirements of the ADAAG must be corrected. The *City of Sandusky* panel

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4 The ADAAG defines "facilities" as including, among other things, "site improvements…roads, walks, passageways, [and] parking lots". ADAAG, 28 C.F.R. Part 36, App. A, Section 3.5.

cited *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 1993 (2004), which holds: "In the case of facilities built …after 1992, the [ADA implementing] regulations require compliance with specific architectural accessibility standards." Those "specific architectural accessibility standards" are the ADAAG. *See* 28 C.F.R. 36.406. *Also see Deck v. City of Toledo*, 29 F.Supp. 2d 431 (same).

THE ADA'S IMPLEMENTING REGULATIONS ARE CONTROLLING

Title III of the ADA does not include accessibility design standards. Instead, Congress delegated the Attorney General the authority to promulgate legally binding Title III regulations. 42 U.S.C. §§ 12186(b), (c) and (d)(1) (as to Title III). *See Yeskey v. Commonwealth of Pennsylvania Dept. of Corrections*, 118 F.3d 168 (3rd Cir. 1997). The Department of Justice adopted "Standards for Accessible Design" that are codified at 28 C.F.R. Part 36, App. A—the "ADAAG"—and these constitute legally binding regulation for Title III of the ADA.

"[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed. 2d 694 (1984). In fact, such regulations are entitled to "controlling weight" unless they are "arbitrary, capricious or manifestly contrary to the statute." *Id.*, at 844, 104 S.Ct. at 2782.

This directive holds true for regulations promulgated by the United States Department of Justice under Title III of the ADA--including the ADAAG--: "Because [the ADA] was enacted with broad language and directed to the Department of Justice to promulgate regulations [thereunder], the regulations

which the Department [of Justice] promulgated are entitled to substantial deference." *Niece v. Fitzner*, 941 F.Supp. 1497, 1507 (E.D.Mich. 1996) *citing Helen L. v. DiDario,* 46 F.3d 325, 331 (3d Cir.), *cert. denied*, 116 S.Ct. 64 (1995). *Accord, Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998), citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504. 512 (1994). Thus, because Uptown's rental office and its public use sidewalks violate the ADAAG, they violate the ADA, and must be corrected immediately.

Similar Court Decisions Finding Violation of the ADAAG Violates ADA

Courts uniformly find that violation of the ADAAG construction standards violates the ADA. "The USDOJ considers any element of a facility that does not meet or exceed the ADAAG Guidelines to be a barrier to access." *Parr v. L & L. Drive Inn Restaurant*, 96 F.Supp. 2d 1065, 1086 (D.Hawai'i 2000)(failure to meet ADAAG held *prima facie* violation of ADA). "Failure to abide by the [ADAAG] Guidelines in new construction evidences intentional discrimination against disabled person." *Access Now, Inc., v. South Florida Stadium Corp.*, 161 F.Supp.2d 1357, 1363 (S.D.Fla.2001), citing *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F.Supp.2d 1353, 1362 n.5 (S.D.Fla.2001). Other examples abound.[5] Thus it is clear that as a matter of law, facilities that violate the strict standards of the ADAAG violate the ADA.

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5 "The ADAAG "constitutes the regulations for compliance with Titles II and III of the ADA." *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.* 950 F.Supp. 389, 390 (D.D.C 1996)(ADA violated because municipal airport failed to meet ADAAG); *Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Authority*, 957 F.Supp. 1166 (D.Mont.1997)(same); *Duprees v. West*, 988 F.Supp. 1390 (D.Kan.

HOW THE UPTOWN RENTAL OFFICE VIOLATES TITLE III OF THE ADA

The Rental office lacks any designated accessible parking spaces complying with 28 C.F.R. Part 36, App. A, § 4.6, even though parking spaces are provided for self parking by employees and visitors. *See* Buffington Declaration at ¶ 5. This violates 28 C.F.R. Part 36, App. A, § 4.1.2(5)(a). Plaintiffs are unable to park anywhere near the rental office. *See* Mike Lowrey Declaration at ¶¶ 20-21; Marilyn Lowrey Declaration at ¶¶ 7-9.

The Rental office lacks at least one accessible route complying with ADAAG Section 4.3 within the boundary of the site from public transportation stops, from accessible parking spaces, from passenger loading zones, and from public streets and sidewalks to an accessible entrance of the Clubhouse and Rental Office. *See* Buffington Declaration at ¶ 6. This violates 28 C.F.R. Part 36, App. A, § 4.1.2.(1). Plaintiff Mike and Marilyn Lowrey are unable to access the rental office, neither by car nor by wheelchair. *See* Mike Lowrey Declaration at ¶¶ 16, 20-21; Marilyn Lowrey Declaration at ¶¶ 5-15.

There is a large concrete ramp leading toward the business office. *See* Buffington Declaration at ¶¶ 7-9. Defendants are required to build the ramp leading to the business office "with the least possible slope." 28 C.F.R. Part 36,

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1997)("ADAAG is the standard for measuring compliance with ADA"); Cooper *v. Weltner*, 16 NDLR P 268 (D.Kan. 1999)(Title II case holding City Jail violates the ADA because it fails to meet ADAAG standards). "The ADAAG are legally binding regulation." *Theatre Management Group, Inc., v. Dalgliesh*, 2001 WL 40403 (D.C.Cir 2001)(curb ramps that violate the ADAAG violate the ADA); *Independent Living Resources v. Oregon Arena Corp.*, 1 F.Supp.2d 1124, 1130 n. 2 (D.Or. 1998)(Public concert arena violating ADAAG standards violates the ADA); *Pascuiti v. New York Yankees*, 87 F.Supp. 2d 221 (S.D.N.Y. 1999)(New York City violated ADA because Yankee Stadium violates ADAAG standards).

App. A, § 4.8.2. It is possible to build the ramp leading to the entrance to the Rental Office with a running slope of 5.1%, the minimum slope for any ramp. *Id.* Indeed, because the entering sidewalk could be built at less than 5%, no ramp is necessary. *Id*. Instead, defendants have built a ramp with all running slopes exceeding 5% and some running slopes exceeding 9%, so it is not built "with the least possible slope". *Id*. This violates 28 C.F.R. Part 36, App. A, § 4.8.2. Portions of that ramp have cross slopes exceeding 4%, but no portion of the ramp's cross slope is permitted to exceed 2%, and the middle landing of the ramp has a cross slope exceeding 2%. *See* Buffington Declaration at ¶¶ 7-9. This violates 28 C.F.R. Part 36, App. A, § 4.8.6. As currently constructed, the ramp is not "readily accessible to nor usable by" either of the Lowreys. *See* Mike Lowrey Dec. at ¶ 16; *See* Marilyn Lowrey Dec. at ¶¶ 10, 11, 14 and 15.

As Plaintiffs have shown above, Uptown's Rental Offices are covered by Title III of the ADA, and must have accessible parking on an accessible entrance on an accessible route. Because the rental office and its accessible route violate the ADAAG, they violate Title III of the ADA, and must be brought into compliance with the ADAAG immediately.

HOW THE UPTOWN PUBLIC USE SIDEWALKS VIOLATE ADA TITLE III

The public use parking lots and sidewalks leading to the retail shops at Uptown violate the ADA and its ADAAG in the following ways. They suffer from cross slopes exceeding 2%. *See* Buffington Declaration at ¶¶ 11-14. This violates the ADAAG at Section 4.3.7. They suffer from running slopes in excess of 8.33%. *Id*. This violates the ADAAG at Section 4.8.2. They suffer from ramps

not built with the least possible slope. *Id.* They suffer from ramps lacking required level landings and handrails. *Id*. This violates the ADAAG at Section 4.8. These defects make these parking spaces, their sidewalks and ramps not readily accessible to and usable by Plaintiffs and others with disabilities. *See* Mike Lowrey Declaration at ¶¶ 22-25. *See* Marilyn Lowrey Declaration at ¶¶ 16-20. Plaintiffs plan to use these sidewalks and ramps as soon as they are made compliant. *Id.*, at ¶ 25; ¶ 19.

ii. Irreparable Harm

A. The Court Should Presume Irreparable Harm

Title III of the ADA specifically provides for the award of injunctive relief including "an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by [Title III]". 42 U.S.C. § 12188(a)(2). Now that Plaintiffs have shown that the rental office and the public use sidewalks violate the ADA/ADAAG minimum standards and that they are not "readily accessible to and usable" by Plaintiffs, the Court should presume irreparable harm and issue the requested injunctive relief.

When a plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, a showing of irreparable harm is not required. *United States v. Edward Rose & Sons* , 246 F.Supp.2d 744 (E.D.Mich. 2003), *aff'd* 384 F.3d 258 (6th Cir. 2004)(internal citations omitted). "Because Congress has seen fit to act in a given area by enacting a statute, irreparable injury must be presumed in a statutory enforcement action." *Id.*, quoting *U.S. v. Odessa Union Warehouse Co-op,* 833 F.2d 172, 176 (9th

Cir.1987). For cases using this analysis in granting injunctions under the ADA, *see*. *ReMed Recovery Care Centers v. Townsh ip of Willistown*, 36 F.Supp.2d 676, 687-88 (E.D.Pa. 1999); *Alexander v. Riga*, 208 F.3d 419, 427 (3rd Cir. 2000); *Pathways Pshcohsocial v. Leonardstown, Md.*, 133 F.Supp.2d 772, 784 (D.Md.2001).

B. Segregation of Plaintiffs Due to Disability is Irreparable Harm

Even without the legal presumption of irreparable harm, Plaintiffs here have shown irreparable harm. Unlike every other tenant at Uptown, Mike Lowrey is prohibited from conducting business at the rental offices and from using the public use sidewalks leading to the retail shops. At the same time, no additional persons with mobility impairments can enter the rental offices to consider moving into Uptown.

The defects on the public use sidewalks risk throwing Mike Lowrey out of his wheelchair. *See* Mike Lowrey Declaration at ¶¶ ??. As Judge Katz found in *Deck*:

> "Plaintiffs have established an irreparable and immediate harm to themselves and other handicapped individuals by showing that improperly constructed curb ramps prevent Plaintiffs from engaging in normal life activities such as crossing the street or accessing a sidewalk. At the hearing, Plaintiffs also testified as to the danger of "tipping" due to multiple inch lips on the curb ramp or the hazards of entering the street and being unable to re-enter the sidewalk area on the opposite side of the crosswalk due to curb ramps which are not in compliance with the ADA."

Deck, 29 F.Supp.2d at 434. The Plaintiffs Lowrey are making the identical showing of irreparable harm here.

C. Irreparable Harm Is Presumed to Flow from an ADA Violation.

Courts routinely find that a violation of the ADA provides irreparable harm, due to the nature of segregation of persons with disabilities. Indeed, Plaintiffs' research has not turned up a single example of a court finding a violation of the ADA but then not finding irreparable harm justifying an injunction. *See Doe v. Judicial Nominating Commission*, 906 F.Supp. 1534, 1545 (S.D.N.Y. 1995) ("[d]iscrimination on the basis of disability is the type of harm that warrants injunctive relief"); *D'Amico v. New York State Bd. of Bar Examiners*, 813 F.Supp. 217, 220 (W.D.N.Y. 1993) ("[t]he issuance of injunctive relief is appropriate when a disabled person loses the chance to engage in a normal life activity").6

Access to the business office and the sidewalks of Uptown's rental office and public use sidewalks provide the Lowreys with mental, social, and other benefits similar to those described above. Injunctive relief is warranted because

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6 *See Dennin v. Conn. Interscholastic Athletic*, 913 F.Supp. 663, 667 (D.Conn. 1996)(ADA preliminary injunction finding "immediate and irreparable harm" due to potential decrease in self esteem and social skills, and deprivation of "essential badges and indicia of full...membership and participation"); *Maczaczyj v. State of New York*, 956 F.Supp. 403, 407 (S.D.N.Y. 1997)(ADA preliminary injunction request wherein court finds irreparable harm due to "psychic harm."); *See Johnson v. Florida High School Activities Ass'n., Inc.*, 899 F.Supp. 579, 586 (M.D.Fla. 1995) (granting ADA preliminary injunction requiring assistance for a 19 year-old deaf football player because denial of preliminary relief would harm the quality of the young man's life); *Concerned Parents v. City of West Palm Beach*, 846 F.Supp. 986, 992 (S.D.Fla. 1994)(same); *Tugg v. Towey*, 864 F.Supp. 1201, 1210 (S.D.Fla. 1994)(same); *Innovative Health Systems v. City of White Plains*, 117 F.3d 37, 43-44 (2nd Cir. 1997)(same); *Thomas By And through Thomas v. Davidson Academy*, 846 F.Supp. 611, 619 (M.D.Tenn. 1994)(same); *also Civic Ass'n. of the Deaf of New York City v. Giuliani*, 970 F.Supp. 352 (S.D.N.Y. 1997)(finding "potential irreparable injury" without any discussion in lengthy detailed opinion); *See also Clarkson v. Coughlin*, 898 F.Supp. 1019, 1035 (S.D.N.Y. 1995)(same).

plaintiffs will not regain the opportunities lost to them by lack of access during the pendency of this litigation.

D. Courts Routinely Grant Injunctive Relief Ordering the Remediation of Accessible Routes

In addition to the above-cited cases where courts have ordered injunctive relief requiring cities to install curb ramps during resurfacing (*Deck; Ability Center*), many other courts have ordered entities to install curb ramps or take other measures to ensure access to persons with disabilities. *See Baltimore Neighborhoods, Inc., v.* L.O.B., 92 F.Supp. 2d 456, 467 (D.Md. 2000)(ordering installation of curb ramps to make condominium community accessible).7 The Court should order the identical relief requested by Plaintiffs here.

E. The Requested Relief is the Only Available Relief for These Violations

Title III of the ADA only provides for injunctive relief. It provides no damages for the Lowreys. *See Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 293 (6th Cir. 1999)(recognizing Title III enforcement statute 42 U.S.C. § 12188 does not include money damages). Because there is no remedy at law, the court

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7 *Also see Independent Living Resources v. Oregon Arena Corp.* 1 F.Supp.2d 1124, 1151 (D. Or. 1998)(ordering sports arena to install curb ramps at transit stop and along walk up to and through the arena); *Ramirez v. Dist. of Columbia*, No. 99-803, 1999 WL 986914, U.S.Dist. LEXIS 15964, at 16 (D.D.C. Oct. 14, 1999) (granting preliminary injunction which requires defendants to provide ramps and barrier-free access to mobility-impaired elementary school student); *Coalition of Montanans Concerned with Disabilities, Inc. v. Gallatin Airport Auth.*, 957 F.Supp. 1166, 1171 (D.Mont.1997) (enjoining defendants to install wheelchair lifts in an airport terminal to bring it into compliance with the ADA); and *Lieber v. Macy's West, Inc.,* 80 F.Supp.2d 1065, 1081 (N.D.Cal. 1999) (ordering defendants to remove barriers to the path of travel throughout their facilities). Each of these courts found access barriers in the path of travel, found violations of the ADA, and ordered injunctive relief to remedy promptly those violations. Plaintiffs in the case at bar deserve the same.

should grant injunctive relief immediately. "[A] plaintiff's harm is not irreparable if it is fully compensable by money damages. However, an injury is not fully compensable by money damages if the nature of the plaintiffs' loss would make damages difficult to calculate." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992) (*citing Roland Mach. Co. v Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir.1984). *See also* 11A Wright & Miller, *Federal Practice & Procedure,* § 2948.1, n. 21 (1995); *Moore's Federal Practice, 2d.*, at § 65.04[1], nn. 66, 68, 69 and 72, and the cases collected therein. In our case, injunctive relief is the only remedy available. There is no point in waiting for trial.

iii. Substantial Harm to Third Parties

This factor weighs in favor of Plaintiffs. Unless the Court orders the requested injunctive relief, the Defendants will continue to deny the Plaintiffs Lowrey and all other persons with mobility disabilities access to the rental offices and to the parking lots and sidewalks serving its retail shops. Defendants will continue to threaten to tow Mrs. Lowrey's car when she visits her son, and will continue to threaten to remove Mike Lowrey's dog from his apartment, and they will continue to be unable to access the rental offices.. On the other hand, the necessary injunctive relief will be substantially expensive, due to the fact that Defendants ignored accessibility codes when constructing the premises. But this is additional expense is not decisive, as the Honorable Victoria Roberts held in an identical case:

"The Court is not oblivious to the potential financial repercussions of its ruling. However, Defendants did not cite and the Court is unaware of any case in which a Court has held that the potential financial burden of correcting unlawful

discrimination outweighs the harm caused by allowing a party to actively engage in acts that Congress has identified as wrongful and injurious to an entire class of people. This Court is unwilling to make such a finding here. Absent other precedent, the Court looks to the legislative intent of the FHA. By enacting the statute and the provisions at issue here, Congress has indicated that obliterating discrimination against disabled individuals at all levels in housing is a priority. Had Congress wanted to limit the Court's authority when the potential financial burden would be great, it could have expressly done so. It did not. Accordingly, the Court finds, as to the covered units only, that the balance of harms weighs in favor of Plaintiff."

Edward Rose, 246 F.Supp.2d 744, 754-55. *Also see Edward Rose*, 384 F.3d at 264. Congress expressed just as strong a policy of eradicating the pervasive discrimination in public accommodations against persons with disabilities, due to inaccessible business offices. *See* statement of policy and findings of pervasive discrimination in enacting the ADA. 42 U.S.C. § 12101(a) and (b).

iv. Public Interest

Making Uptown's rental office accessible helps not only the Lowreys, but also makes it possible for others with disabilities to rent apartments at Uptown. "On the public interest factor, the Supreme Court has found the FHA serves and overriding societal priority…eradicating housing discrimination serves 'the public interest'". *Edward* Rose, 384 F.3d at 264. Likewise, under the ADA, the public interest is served. "There is a significant public interest in eliminating discrimination against individuals with disabilities." *Deck*, 29 F.Supp2d at 434, citing *Thomas by and Through Thomas v. Davidson Academy*, 846 F.Supp. 611, 619 (M.D.Tenn1994).

CONCLUSION

Defendants are denying Plaintiffs and all others with disabilities access to Uptown's rental offices and to Uptown's public use sidewalks. Defendants violated virtually every binding accessibility standard in constructing these facilities. These defects are segregating Plaintiffs from equal participation in life at Uptown. The Court should immediately grant the requested relief.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 24 th day of May, 2007 the foregoing Plaintiffs Mike And Marilyn Lowrey's Motion For Preliminary Injunction Pursuant To Title III Of The ADA, And Memorandum In Support was filed electronically. Parties will receive notice of the filing through the Court's electronic filing system. In addition, I served the foregoing by first class mail upon Counsel for all Defendants at the following addresses

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