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

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

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**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AGAINST CANTON TOWNSHIP, WITH MEMORANDUM AND EXHIBITS IN SUPPORT**

1. Plaintiffs Michael and Marilyn Lowrey (the "Lowrey Plaintiffs")—with the full concurrence of intervener Plaintiff Fair Housing Center—respectfully move this Court to enter a preliminary injunction enjoining Defendant Canton Township[1] to immediately cease discriminating against Plaintiffs, and to Order Defendant Canton Township immediately to:

(a) Bring into compliance with the ADAAG or UFAS any of the Retail and Theater District's (the District's) sidewalks, curb ramps, parking and any other "facilities" (defined at 28 C.F.R. § 35.104) that were altered or

[1] This motion is solely against Canton Township, because it is the only Defendant covered by Title II of the ADA and under Section 504 of the Rehabilitation Act. Settlement discussions have failed with Canton Township. Settlement discussions are still ongoing with the remaining (non-governemental) Defendants—Uptown Investors LLC; Beztak Properties, Inc.; Beztak Companies, Inc.; Monogram Homes; Warner, Cantrell and Padmos, Inc.; Biltmore Properties Companies, Inc.; and Looney, Ricks, Kiss. If these discussions fail, then Plaintiffs will file a request for a separate preliminary injunction—pursuant to Title III of the ADA—against each of those defendants. That motion will seek relief for some, but not all, of the same facilities at issue in the instant motion against Canton Township.

constructed after January 26, 1992 "by, on behalf of , or for the use of" Canton Township. A map showing the district and its facilities is attached hereto as Exhibit "A";

(b) Meet with the Lowrey Plaintiffs to arrange methods successfully to make accessible by law to them any of the District's side walks, curb ramps, parking and any other facilities that were altered or constructed before—but not after—January 26, 1992 by, on behalf of, or for the use of Canton Township;

(c) Construct on the site containing the Canton Farmers' Market legally sufficient ADAAG/UFAS-compliant parking spaces on ADAAG/UFAS-compliant accessible routes connecting into the barn, into the Bartlett-Travis House, to accessible port a johns, and to any booths or other conveyances that may operate at the site during farmer market days or any other days. Cease and desist from operating the Canton Farmers' Market until this is achieved, or until a Court or Plaintiff— approved temporary accessible route (e.g., metal plates, or wooden flooring, etc) from accessible parking to each of these facilities is installed;

(d) Cease and desist from conducting the theater district's "Historical Hike" until constructing sufficient ADAAG/UFAS-compliant parking spaces on ADAAG/UFAS-compliant accessible routes connecting into each of the buildings and into any other conveyances that may operate at any of these sites during the History Hike, or until a Court or Plaintiff approved temporary accessible route (e.g., metal plates, or wooden flooring, etc)

from sufficient ADAAG/UFAS compliant parking to each of these facilities is installed

(e) Cease and desist booking new events into the Village Theater, and from renewing recurring events until constructing legally sufficient ADAAG/UFAS-compliant parking spaces on ADAAG/UFAS-compliant accessible routes connecting into the Village Theater;

(f) Cease and desist from providing valet parking for events at the Village Theater until Defendant complies with the ADAAG at sections 4.1.2(5)(e) and 4.6.6;

(g) Complete fully each of these accessibility upgrades no later than October 31, 2008, with any Court or Plaintiff approved temporary measures occurring within two week from entry of this injunction; and to

(h) Meet and otherwise communicate with the Lowreys and/or their Counsel as often and as long as it takes to achieve these items within the ordered time frames;

2. Canton Township touts and heavily promotes as a tourist destination its "Village Center" and its "Retail and Theater District" including its "state-of-the-art" Village Theater. Each Sunday from April through October Defendant operates in the retail and theater district the Canton Farmers' Market, and on the first Sunday of each of those months conducts a "historic hike" including eleven buildings, many of which the Township rents to the public for events. In addition, the Township holds numerous festivals in the district, involving many of its employees and serving many hundreds of patrons. But the Village Center, its

retail and theater district, Village Theater, Canton Farmers' Market, Historic Hike and the eleven buildings on the hike are each utterly off-limits to the Lowreys—and to any other mobility impaired persons;

3. By its wholesale failure to meet any provisions of applicable federal and Michigan accessibility construction codes, Defendant has created an entire Village Center and Retail and Theater District that excludes and segregates the Lowreys. Defendant should not be allowed to continue profiting in its operation of the District and its adjacent Village Center while segregating the Lowreys—and all other persons with mobility disabilities—from the enjoyment of the multiple benefits of the Village Center and its retail and theater district;

4. Title II of the ADA, Section 504 of the Rehabilitation Act, and Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), each expressly authorize the injunction requested here, which is identical to the relief granted by the Honorable David A Katz against the municipality of Toledo, Ohio, as well as by the Honorable Victoria Roberts recently in a lawsuit against Edward Rose & Sons—another huge Michigan-based real-estate developer;

5. Three years have passed since Plaintiff Mike Lowrey moved into an apartment one block from the Township's retail and theater district. During his first year of negotiating, even with help of the intervener Plaintiff Fair Housing Center, the Township refused to correct even one of the numerous barriers to access, forcing the Lowreys to file suit. Now, two full years after he filed suit, and one full year after the Court appointed a special master to facilitate two separate day-long facilitated settlement discussions, the Township has failed to correct

even one access barrier in the district, and even continues to create new events and services in the district, while ignoring Plaintiffs' repeated requests for access to the district. The Court must act to impress upon Defendant that further delay is unacceptable, and will cost the Township significantly until it stops delaying and rebuilds its sidewalks, curb ramps and "barrier free" [12] parking to be accessible to the Lowrey Plaintiffs and others like them;

6. A map is attached showing Canton Township's Retail and Theater District (the "District"). See Plaintiffs' Exhibit A.

7. Relevant facts are verified in the sworn declarations of Plaintiffs Mike and Marilyn Lowrey, and summary fact witness paralegal Marguerite Claire Finnegan, attached hereto as Plaintiffs' Exhibits B, C, and D, and photographs attached to Ms. Finnegan's Declaration.[2]

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[12] Although many still refer to these as "handicap" parking spaces, Congress and many others have stopped using that term. As the Third Circuit recognized, Congress in the late 1980s stopped using the term "handicapped" because "individuals with disabilities find the term 'handicapped' objectionable." *Helen L. v. Didario*, 46 F.3d 325, 333 n8 (3rd Cir. 1995). Michigan's legislature adopted this trend several years ago when it renamed its "Handicapper's Act", which is now the "Persons with Disabilities" Act. A good friend of mine who uses a wheelchair tells me that when a person asks him "Do you need a handicapped parking space [or hotel room]", he responds affably "Well, I don't know—what's wrong with it?" He then tells the person that he would prefer an "accessible", or "barrier free" parking space. Old habits die hard, but the better usage is to avoid using the word "handicapped" whenever possible.

[2] 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 CFR Section 1746(2)(2006).

8. **Statement Pursuant to Local Rule 7.1 . Intervener Plaintiff.** The Intervener Plaintiff Fair Housing Center of Southeast Michigan concurs fully in this motion. **The Eight Defendants.** I held a conference with Defendant Canton Township, and it refuses to concur in this motion. The are seven "private" Defendants in the lawsuit—Upton Investors LLC; Beztak Properties, Inc.; Beztak Companies, Inc.; Monogram Homes; Warner, Cantrell and Padmos, Inc.; Biltmore Properties Companies, Inc.; and Looney, Ricks, Kiss. On Tuesday, June 24, 2008 I sent by email to all counsel in the case a detailed writing explaining the nature of this preliminary injunction motion and all legal citations in support. I also attached a copy of the proposed preliminary injunction. In the email I asked all Defense Counsel to concur or at least to contact me to discuss the matter before 3:00 PM Thursday, June 26, 2008. I gave each the number of my cell phone, which I keep with me at all times. Defendants Biltmore Properties and Looney, Ricks, Kiss failed to respond to me in any way, even though one month has passed. I also met with counsel for the other five private Defendants, but each of those Defendants does not concur.

Respectfully submitted

/s/ J. Mark Finnegan
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## CONCISE STATEMENT OF ISSUES

1. Is Defendant Canton Township segregating and otherwise discriminating against the Lowrey Plaintiffs by operating Township "facilities, programs and services" while each of these violate mandatory federal and Michigan accessibility codes?

2. Do the three laws at issue here direct the Court to issue emergency injunctive relief to halt this discrimination, and to correct local governments' inaccessible facilities, programs and services?

3. Should the Court follow other courts in identical cases and enjoin Canton Township to retrofit immediately its facilities to make them meet the Americans with Disabilities Act Accessibility Guidelines (the ADAAG) and the ADAAG's detailed construction standards?

4. Should the Court follow Eastern District and Sixth Circuit precedent and enjoin Canton Township immediately to cease and desist from operating its discriminatory programs, services and facilities, until each is brought into full compliance with controlling accessibility standards, or until Court-approved temporary methods to provide accessibility are implemented?

## CONTROLLING AUTHORITIES

Federal law prohibits discrimination by public entities in "benefits of services, programs or activities". 42 U.S.C. § 12132; 28 C.F.R. § 35.104 All "facilities" built "by, on behalf of, or for the use of" Canton Township" must meet detailed, specific accessibility codes. 28 CFR § 35.151(a); 28 CFR § 35.151(c). . *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 1993 (2004).

All three acts in this lawsuit specifically provide for preliminary injunctive relief to remedy discrimination against plaintiffs. 42 U.S.C. § 12133 (Title II of the ADA); 29 U.S.C. § 794(a)(2)(Section 504 of the Rehabilitation Act); MCL § 37.1606(1)(Michigan's Persons with Disabilities Civil Rights Act).

Other Court's have issued the injunctive relief requested here—ordering local governments to rebuild curb ramps and sidewalks to meet detailed accessibility standards. *Deck v City of Toledo,* 29 F.Supp 2d at 431 (N.D.Ohio 1998)(preliminary injunction ordering city to immediately install ADAAG-compliant curb ramps); *Ability Center v. City of Sandusky*, 385 F.3d 901 at 904 (6th Cir. 2004)(same, but permanent injunction); *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (1993) *cert. denied sub nom Hoskins v. Kinney*, 114 SCt. 1545 (1994)(same as *Ability Center*).

Another Eastern District Court issued, and the Sixth Circuit upheld, a preliminary injunction to cease operating discriminatory inaccessible facilities until they are made accessible according to law. *United States v. Edward Rose & Sons*, 246 F.Supp.2d 744 (E.D.Mich. 2003), *aff'd* 384 F.3d 258 (6th Cir. 2004).

## MEMORANDUM IN SUPPORT

**I. Procedural Posture of this Motion.** Plaintiffs filed on May 7, 2007 to add Defendant Canton Township to the lawsuit.[3] The private Defendants refused to concur in the motion, and the Court scheduled a hearing on the matter.[4] Then, without any explanation for their about face, the private Defendants decided to concur, and Canton Township was added to the lawsuit on June 5, 2007.[5] It delayed filing its Answer until October 4, 2007.[6] Defendant Canton Township participated in the Court-ordered settlement discussions facilitated by Magistrate Morgan during July 2007 and on October 23, 2007.[7] The parties discussed the accessibility defects throughout the retail and theater district, but no agreement was reached with Canton Township, and now, more than one year after Canton Township was added to the lawsuit and participated in facilitated settlement conferences, nothing in the district has been corrected and made accessible according to law.

**II. Facts Relevant to Motion**

During year 2004 the Township's Village Theater was built by, on behalf of, or for the use of Canton Township. As a part of this project, the entire intersection of Cherry Hill Road with Ridge Road was reconstructed, including

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[3] Document 35.

[4] Document 41.

[5] Documents 49 and 52.

[6] Document 76.

[7] Documents 38, 56, 68, "Minute entry" October 23, 2007.

the sidewalks running along these roads. In addition, approximately thirteen public parking lots serving the Theater and it s retail district were constructed or otherwise altered by, on behalf of, or for t he use of Canton Township. As a part of this acti vity, a seri es of public sidew alks were constructed or were otherwise altered to connect this parking to the T ownship's theater and its retail dis trict. Each of these facilities is shown on the map attached hereto as Exhibit A.

Plaintiff Mike Lowrey uses a whee lchair, and he lives in the private Defendants' apartments.[8] Pla intiff Marilyn L owrey also has a mobility disability and visits Mike frequently. Bot h wish to use the Village Theat er and the retail districts' shops, parking and sidewalks, but they can not. T his is bec ause virtually every part of the retail district violates all ADAAG standards. There are literally hundreds of such violations.

Plaintiffs have now s pent nearly three years—including filing a motion for preliminary injunction more than one y ear ago and participating in three court-ordered settlement conference s facilitated by Mag istrate Morgan—to have Defendants make the district accessibl e under the ADAAG. But Defendant Canton Township has not corrected even one defective curb ramp or parking space in the District, much less brought t he District into full compliance wit h the ADAAG. Yet, Canton Township contin ues to oper ate the Village Theater, Farmers' Market, and its Historic Hike and to operate its public parking, while excluding the Lowreys and all other persons with disabilities.

[8] Mike Lowrey's apartment is shown on Exhibit A, and is only one block from the Canton Township's Village Theater and its parking and sidewalks.

## LEGAL ANALYSIS

### III. Legal Standard for Issuing Preliminary Injunction

In the Sixth Circuit, when determining whether to issue a preliminary injunction, a court must typically balance 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.[9]

But as to the four factors "none is a prerequisite" especially if Plaintiffs show the strong likelihood of success on the merits.[10]

#### (A). Plaintiffs Will Likely Succeed On The Merits

Title II of the ADA [11] prohibits discrimination by public entities[12] in "benefits of services, programs or activities". [13] Canton Township must comply with Title II's mandate that:

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[9] *United States v. Edward Rose & Sons*, 246 F.Supp.2d 744 (E.D.Mich. 2003), *aff'd* 384 F.3d 258 (6th Cir. 2004)(preliminary injunction ordering developers to rebuild entrances to many apartment buildings to make them accessible to all persons with disabilities, and to cease renting all ground floor units until the retrofits were completed).

[10] *Edward Rose*, 384 F3d at 264 ("any lack of irreparable harm" outweighed by "the other equitable factors, especially the strong likelihood of success on the merits").

[11] 42 U.S.C. § 12132.

[12] 28 C.F.R. § 35.104.

[13] 42 U.S.C. § 12132. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir.2002)(sidewalks are "services, programs or activities" under Title II)(*citing Johnson v. City of Saline, Michigan*, 151 F.3d 564, 569 (6th Cir.1998)(finding that

> "Each facility[14] of part of a facility construc ted by, on behalf of, or for the use of [Canton Township] shall be designed and c onstructed in such manner that the facility or part of the facility is readily accessible to and usable by[15] individuals with disabilities, if the construction was commenced after January 26, 1992."[16]

The same is true of any such fac ilities "altered" after that date.[17] Resurfacing of streets or sidewalks by a municipality triggers the AD A's requirement that the intersecting sidewalks and curb ramps must meet the ADAAG.

Canton must choose between m eeting the ADAAG and meeting the virtually identical UF AS.[18] The requirement s of the Americans with Disabilities

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"the [Title II] phrase 'services, programs, or activities' encompasses virtually everything a public entity does").

[14] "Facility" includes almost everything in the Defendants' retail and theater district, including among other things "roads, sidewalks and parking lots". 28 C.F.R. § 35.104.

[15] According to United States Department of Justice guid ance: "What is 'readily accessible and usable?' This means that the facility must be built in strict co mpliance with the Americans with Disab ilities Act Accessibility Guidelines (ADAAG). There is no co st defense to the new construction requirements." ADA Title III Tec hnical Assistance Manual, Section III-5.1000.

[16] 28 CFR § 35.151(a). *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 1993 (2004): "In the case of facilities built …after 1992, the [Title II ADA implementing] regulations require compliance with specific architectural accessibility standards." Those "specific architectural accessibility standards" are the ADAAG/UFAS. *See* 28 CFR § 35.151(c).

[17] 28 CFR § 35.151(b).

[18] 28 CFR § 35.151(c).

Act Accessibility Guidelines (ADAAG), and the Uniform Federal Accessibilit y Standards (UFAS), are virtually identical.[19]

Canton Township's failure to m eet the ADAAG/UFAS standards is an automatic violation of Title II o f the ADA. [20] Courts overwhelmingly agree. [21]

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[19] For example, compare 28 C.F.R. Part 36, Appendix A (ADAAG) Sections 4.1.2(5)(accessible parking spaces); 4.3 (accessible routes); and 4.7 and 4.8 (curb ramps and sidewalk ramps), to 41 C.F.R. part 101-19.6, Appendix A (UFAS) Sections 4.1.1(5)(accessible parking spaces); 4.3 (accessible routes); and 4.7 and 4.8 (curb ramps and sidewalk ramps). Each section contains identical language and identical drawings. This is true throughout these two codes, with minor exceptions not relevant here.

[20] *Deck v City of Toledo,* 29 F.Supp 2d at 431 (N.D.Ohio 1998)(preliminary injunction ordering Toledo to retrofit imm ediately recently constructed curb ramps throughout the City to meet the ADAAG); *Ability Center v. City of Sandusky*, 385 F.3d 901 at 904 (6 th Cir. 2004)(local gov ernments must build ADAAG-compliant curb ramps on public sidewalks); *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (1993) *cert. denied sub nom Hoskins v. Kinney*, 114 SCt. 1545 (1994)(same but against City of Philadelphia); *Independent Living Resource s v. Oregon Arena Cor p.* 1 F.Supp.2d 1124, 1151 (D. Or. 1998)(order ing sports arena to install ADAAG-complaint curb ramps at transit st ops and along walk up to and through the arena); and, *Coalition of Montanans Conc erned with Disabilities, Inc. v. Gal latin Airport Auth.*, 957 F.Supp. 1166, 1171 (D.Mont. 1997)(enjoining defendants to install wheelchair lifts in an a irport terminal to bring it into compliance with the ADAAG).

[21] "Failure to abide by the [ADAAG] Gu idelines in new c onstruction evidences intentional discrimination against disabled persons." *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.20 01); "The ADAAG "constitutes the regulations for compliance with Titles II an d 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 v iolated because municipal airport failed to meet ADAAG); *Coalition of Montanans Concer ned With Dis abilities, Inc. v. Gallatin Airport Authority*, 957 F.Supp. 1166 (D.Mont.1997)(same); *Duprees v. West* , 988 F.Supp. 1390 (D.Kan. 1997)("ADAAG is th e standard for measuring compliance with ADA"); "The US DOJ considers any e lement 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; Cooper *v. Weltner*, 16 NDL R P 268

Among other things, the ADAAG and the UFAS require that when Defendants provide spaces for "self-parking by employees or visitors, or both" then Defendants must also provide in each such lot accessible parking spaces complying with the ADAAG.[22] In addition, these accessible parking spaces must be on an ADAAG or UFAS-compliant "accessible route" from the parking spaces to "an accessible entrance to the buildings they serve" and to "public streets or sidewalks" and to "public transportation".[23] Because the private Defendants have failed to do this, the Lowreys and others similarly situated can not even park in the District nor access any of its benefits.[24]

**(A)(1). No Cost Defense Available to Defendants**

The United States Department of Justice has determined that facilities constructed for first use after January 26, 1992 (Title II) must meet the ADAAG or the UFAS, and that there is no "cost defense" to this requirement.[25] The United

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(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).

[22] 28 C.F.R. Part 36, Appendix A (the ADAAG), § 4.1.2(5); 41 C.F.R. part 101-19.6, Appendix A (UFAS) Sections 4.1.1(5).

[23] 28 C.F.R. Part 36, Appendix A (the ADAAG), §§ 4.1.2(1), (2) and (4); 41 C.F.R. part 101-19.6, Appendix A (UFAS) §§ 4.1.1(1), (2) and (4).

[24] Marilyn Lowrey Declaration; Mike Lowrey Declaration.

[25] *Deck v. Toledo*, 29 F.Supp.2d 431 (N.D.Ohio 1998) citing *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (1993) *cert. denied sub nom Hoskins v. Kinney*, 114 SCt.

States Department of Justice's regulations and interpretations under the ADA are entitled to "substantial deference".[26]

**(A)(2). The Rehabilitation Act Has Been Violated By Defendants.**

During the time period relevant to this lawsuit, Canton Township has received millions of dollars from the federal government.[27] Hence, Section 504 of the Rehabilitation Act applies to the Township's Village Theater and its retail and theater district.[28] The analysis under the Rehabilitation Act is virtually identical to the analysis under Title II of the ADA, except that the Rehabilitation Act requires that Canton Township receive federal funds, and that the Township's facilities meet the UFAS, which is identical to the ADAAG in all

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1545 (1994)("undue financial burden" no defense to injunctions to retrofit sidewalks under new construction and alteration sections of the ADA). *Accord* 28 C.F.R. Part 36, Appendix B, ' 36.402(c)(USDOJ statutory guidance); *accord* United States Department of Justice Title III Technical Assistance Manual, Section III-6.0000, "Technically Infeasible" Illustration 1.

[26] 42 U.S.C. §§ 12186(b), (c) and (d)(1). "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).

[27] Finnegan Declaration.

[28] Civil Rights Restoration Act, 29 U.S.C. § 794.

relevant aspects.[29] Thus, if the Court finds that Canton Township has violated Title II of the ADA, then Defendant has also violated the Rehabilitation Act.

**(A)(3). Michigan's PWDCRA Has Been Violated By Defendants.**

Michigan's Persons with Disabilities Civil Rights Act (PWDCRA) declares:

> "The opportunity to…full and equal utilization of public accommodations…without discrimination because of a disability is guaranteed by this act and is a civil right."[30]

The PWDCRA prohibits discrimination based upon disability at any:

> "business…refreshment [or] recreation…facility of any kind…whose…advantages…are…made available to the public." as well as any "public facility…owned, operated, or managed on or behalf of…a township."[31]

At all times relevant to this lawsuit, Michigan law required each of Canton Township's facilities to meet the accessibility standards set forth by the ICC/ANSI A117.1-1998 code.[32] Where Michigan accessibility design and construction

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[29] 42 U.S.C. § 12146 (violation of ADA Title II during new construction of facilities is automatically a violation of the Rehabilitation Act); 42 U.S.C. § 12147 (same is true with alterations of facilities).

[30] M.C.L. § 37.1102(1).

[31] M.C.L. § 37.1301(a) and (b).

[32] At all times beginning July 31, 2001 and up to February 28, 2004, Michigan's Building Code required Canton Township to follow the ICC/ANSI-A.117-1998 accessibility code. *See* Michigan Building Code 2000, Section 1101.2, incorporating the ICC/ANSI A117.1-1998. R 408.30427. Beginning March 2004, Michigan adopted the Michigan Building Code (MBC 2003), incorporating the 2003 edition of the International Building Code. According to Chapter 11 of the MBC 2003: "**Design.** Buildings and facilities shall be designed and constructed to be accessible in accordance with this code and ICC [ANSI] A117.1." MBC 2003 Section 1101.2. The authority for this section is R 408.30427. In the index of the MBC 2003, in the "Referenced Standards" the ICC/ANSI A117.1-1998 is identified as the code referenced in the MBC 2003 Sections 1101.2 and 1102.1. *See* MBC 2003, p. 588. Thus, without dispute, under Michigan state law at all

standards afford greater accessibility to persons with disabilities, the Michigan standards control over the ADAAG. [33] This is not as confusing as it may seem, because the United States Department of Justice modeled its ADAAG on the ANSI, so the two codes have very similar requirements.[34]

**(B). Irreparable Harm Will Occur Without This Injunction**

Both Title II of the ADA and the Rehabilitation Act expressly provide that when facilities fail to meet the ADAAG or the UFAS, the court should issue injunctive relief."[35] Likewise, Michigan's PWDCRA also expressly authorizes injunctive relief to correct accessibility violations. [36] Because each statute expressly authorizes preliminary injunctive relief, the Court should presume irreparable harm.[37] In addition, under the more traditional method of analyzing

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times relevant to this lawsuit, the ICC/ANSI A117.1-1998 governed what is accessible, and is the standard that Michigan required Canton Township to meet under Michigan's PWDCRA

[33] 42 U.S.C. § 12201(b); 28 C.F.R. § 36.103(c)("Nothing in this chapter shall be construed to invalidate or limit the... law of any State...that provides greater or equal protection for the rights of individuals with disabilities than are afforded by the chapter".) *See e.g.*, *Pinnock v. International House of Pancakes Franchisee*, 844 F.Supp. 574 (S.D.Cal. 1993).

[34] The ANSI's influence on the drafting of the ADAAG—as well as both codes' similarities—are set forth by the Department of Justice at Section 1 of the ADAAG.

[35] 42 U.S.C. § 12133; 29 U.S.C. § 794(a)(2).

[36] MCL § 37.1606(1).

[37] *United States v. Edward Rose & Sons*, 246 F.Supp.2d 744 (E.D.Mich. 2003) ("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.")(quoting *U.S. v. Odessa Union Warehouse Co-op,* 833 F.2d 172, 176 (9th Cir.1987)). Courts refer to this approach as the "statutory method" to analyze the irreparable

the irreparable harm factor, the Lowrey Plaintiffs have shown that Defendants' inaccessible side walks, curb ramps and parking prevent them from using these facilities. Such a showing establishes irreparable harm justifying a preliminary injunction to bring these facilities into compliance with the ADAAG.[38]

Either way the Court chooses to analyze irreparable harm, the most important consideration is Plaintiffs' strong likelihood of success on the merits.[39] .

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harm factor. In addition to Judge Roberts, other Court's have used this approach to grant preliminary injunctions under the ADA. *See Lonberg v. City of Riverside,* 2000 WL 2005107 * 7-8 (C.D.Cal. 2007)(a case virtually identical to the case at bar); *ReMed Recovery Care Centers v. Township 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 Psycohsocial v. Leonardstown, Md.*, 133 F.Supp.2d 772, 784 (D.Md.2001).

[38] Courts call this the "traditional method" of analyzing the irreparable harm factor. In *Deck v. City of Toledo,* 29 F.Supp 2d 431, 434 (N.D.Ohio 1998), the Honorable David A. Katz held:

> "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."

[39] According to the Sixth Circuit:

> "We need not decide whether [the statutorily provided method] controls or whether a statute must mandate another showing that displaces the traditional equitable factors because we find it immaterial to the disposition of this case. We balance the equitable factors, and none is a prerequisite. [citation omitted]. The other equitable factors, particularly the strong likelihood of success on the merits, outweigh any lack of irreparable harm, with or without any presumption."

*U.S. v. Edward Rose & Sons*, 384 F.3d at 264.

**(C). The Balance of Harms Tips Decidedly Toward Plaintiffs.**

The balance of harm tips decidedly toward Plaintiffs. The Sixth Circuit analyzed the balance of harms factor in deciding to uphold Judge Victoria A. Roberts' grant of a preliminary injunction in *Edward Rose & Sons*. The panel found that ending discrimination against persons with disabilities outweighed even the hundreds of thousands dollars it was going to cost to rebuild the entrances to nineteen apartment buildings while being prohibited from renting all ground floor units. [40] The Court said this is especially true because Defendants "knew of the risk" of failing to meet strictly federally and Michigan mandated accessibility codes when it undertook construction. [41] Although the *Edward Rose* decision involved Congress' interest in eradicating disability discrimination under the Fair Housing Act Amendments, Congress expressed just as strong a policy in the ADA of eradicating the pervasive discrimination in public accommodations against persons with disabilities due to inaccessible parking and sidewalks.[42]

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[40] *Edward Rose*, 384 F3d at 264. The *Edward Rose* decisions issued before our Defendants built any of the facilities at issue here. Yet, our Defendants ignored those holdings.

[41] *Id.* The fact that Canton Township installed throughout its district numerous curb ramps and parking spaces designated with the blue wheelchair symbol shows that it understood that the three statutes at issue here required the district's facilities to meet accessibility codes. Unfortunately, Canton Township failed to assure that its facilities actually met the strict details of the codes, and so Plaintiffs and others like them are unable to use the district.

[42] *See* statement of policy and findings of pervasive discrimination in enacting the ADA. 42 USC § 12101(a) and (b).

**D. The Public Interest is Served by Eradicating Discrimination.**

The public interest factor favors Plaintiffs. "There is a significant public interest in eliminating discrimination against individuals with disabilities."[43]

## IV. CONCLUSION

Defendants violated the relevant accessibility codes hundreds of times throughout the District, leaving Plaintiffs and others similarly situated shut out and segregated from accessing the District and its facilities. Three years have passed, and Defendants have fixed nothing in the retail and theater District. The Court should immediately order the private Defendants to bring all of the District's facilities that were built "by, on behalf of, or for the use of" Canton Township after January 26, 1992 into compliance with the ADAAG/UFAS. The Court should also enjoin the Township from operating its segregated facilities, programs and services in the district until each is made accessible to the Lowreys according to law.

Respectfully submitted,

s/ J. Mark Finnegan

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[43] *Deck*, 29 F.Supp2d at 434, citing *Thomas by and through Thomas v. Davidson Academy*, 846 F.Supp. 611, 619 (M.D.Tenn1994). "On the public interest factor, the Supreme Court has found the FHA serves an overriding societal priority…eradicating housing discrimination serves 'the public interest'". *Edward* Rose, 384 F.3d at 264

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**Certificate of Service**

I hereby certify that on this 1st day of August, 2008 the foregoing was filed electronically. Parties will receive notice of the filing through the Court's electronic filing system and may access the document through the Court's electronic filing system.

/s/ J. Mark Finnegan