

## MEMORANDUM

**To:** Robert W. Healy, City Manager  
**From:** Jill Herold  
**Re:** Proposed Amendment to Cambridge Human Rights Ordinance  
**Date:** November 17, 2003

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On July 30, 2003, the Ordinance Committee held a hearing regarding a proposed amendment to the Cambridge Human Rights Ordinance, which if passed, would require certain businesses to remove physical barriers to access for people with disabilities (the "Amendment"). During the course of the hearing, Committee members raised several questions. We have drafted this memorandum, in consultation with the Law Department, to respond to questions raised by Ordinance Committee members.

### Background

On April 4, 2002, the Cambridge Commission for Persons with Disabilities and the Cambridge Human Rights Commission conducted their first-ever joint meeting. During the meeting, the two commissions recognized that people with disabilities are often unable to obtain the goods and services offered by Cambridge businesses because of physical barriers to access. The two commissions expressed concern that the failure of some businesses to remove barriers to access might violate Title III of the Americans with Disabilities Act of 1990 ("ADA"),<sup>1</sup> which requires public accommodations to remove physical barriers to access whenever it is readily achievable to do so.

At the same time, the two commissions recognized that there is a real enforcement problem with Title III of the ADA. To obtain enforcement, an individual with a disability may either file a complaint with the United States Department of Justice (the "Justice Department") or bring a lawsuit in federal court. Unfortunately, the Justice Department receives many more complaints than it has the resources to investigate, and filing a federal lawsuit can be costly and time-consuming. Simply finding a lawyer willing to file such a lawsuit is becoming increasingly difficult since Title III does not allow for punitive damages and a recent Supreme Court ruling has made the recovery of attorneys' fees much more difficult to obtain. See, Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001).

Recognizing both the significance of the ADA in providing protection from discrimination to individuals with disabilities and the difficulty in enforcing those protections, the two commissions unanimously voted to recommend an amendment to Section 2.76.120 of the Cambridge Municipal Code (the "Human Rights Ordinance"). The proposed Amendment incorporates the ADA's "readily achievable" requirement into the Human Rights Ordinance, thus taking advantage of the existing local civil rights enforcement mechanism afforded by the

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<sup>1</sup> 28 C.F.R. § 36.304(a)

Cambridge Human Rights Commission. On June 2, 2003, the City Manager transmitted the proposed Amendment to the City Council.

#### **Definition of Disability**

One of the questions posed at the hearing was whether the proposed Amendment pertains only to securing access for people with physical disabilities, or whether people with "non-physical" disabilities would also be covered by the amendment. The City's Human Rights Ordinance currently defines "disability" as "any actual or supposed physical or mental handicap of an individual, other than the state of being presently legally incompetent." Individuals with a "disability" as defined in the Ordinance are among 13 categories of individuals protected from civil rights discrimination<sup>2</sup>. Therefore, people with mental disabilities, or "non-physical" disabilities, are currently protected from discrimination under the existing ordinance and the Human Rights Commission has a history of enforcing the Ordinance on behalf of individuals with mental disabilities and will continue to do so. The proposed Amendment does not change this in any way; however, it specifically addresses the removal of physical barriers in accordance with Title III of the ADA, an area not already covered under the existing Ordinance.

#### **Definition of Public Accommodation**

During the hearing, questions were also posed about which business entities would be covered by the proposed Amendment. In order to be considered a public accommodation with Title III obligations, an entity must be private and it must: own; lease; lease to; or operate a place of public accommodation. A place of public accommodation is a facility whose operations affect commerce; and fall within at least one of the following 12 categories:

- (1) Places of lodging (e.g., inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);
- (2) Establishments serving food or drink (e.g., restaurants and bars);
- (3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
- (4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
- (5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
- (6) Service establishments (e.g., Laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
- (7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
- (8) Places of public display or collection (e.g., museums, libraries, galleries);
- (9) Places of recreation (e.g., parks, zoos, amusement parks);
- (10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);

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<sup>2</sup> The other twelve categories are: race, color, sex, age, religious creed, national origin or ancestry, sexual orientation, gender, marital status, family status, military status or source of income. Cambridge Municipal Code § 2.76.120(M)(1)

- (11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
- (12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

#### **Definition of Readily Achievable**

Finally, questions were raised concerning the definition of “readily achievable” barrier removal and how “readily achievable” barrier removal will be determined on an individual basis. The proposed amendment defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.” This definition is identical to that found in Title III of the ADA<sup>3</sup>.

The proposed amendment sets forth certain factors to be taken into consideration in determining whether a particular barrier removal action is readily achievable. These factors include—

- i. the nature and cost of the action needed under this section;
- ii. the overall financial resources of the public accommodation involved in the action; the number of persons employed at such public accommodation; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the public accommodation;
- iii. the overall financial resources of the public accommodation; the overall size of the business of a public accommodation with respect to the number of its employees; the number, type, and location of its facilities; and
- iv. the type of operation or operations of the public accommodation, including the composition, structure, and functions of the workforce of such public accommodation; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the public accommodation.

These factors do not go further than the federal standard as set forth in Title III of the ADA.<sup>4</sup> Pursuant to this standard, a public accommodation is not required to undertake any action that would result in a significant difficulty or expense.

#### **Examples of Readily Achievable Barrier Removal**

Examples of barrier removal actions that would be readily achievable under the proposed ordinance amendment were provided at the hearing. Additional examples are set forth in ADA regulations for Title III as follows:<sup>5</sup>

- (1) First,...provide access to a place of public accommodation from public sidewalks, parking, or public transportation...[by], for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

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<sup>3</sup> 28 C.F.R. § 36.304(a)

<sup>4</sup> 28 C.F.R. § 36.104

<sup>5</sup> 28 C.F.R. § 36.304(c)

- (2) Second,...provide access to those areas...where goods and services are made available to the public...[by], for example, adjusting the layout of display racks, rearranging tables, providing Brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.
- (3) Third,...provide access to restroom facilities...[by], for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.
- (4) Fourth,...take any other measures necessary to provide access to the...public accommodation.

In cases where a public accommodation can demonstrate that barrier removal action is not readily achievable, the proposed amendment requires, that alternative (non-structural) methods be employed to provide its goods and services to people with disabilities, if such methods are readily achievable. Again, the ADA regulations for Title III describe some examples of such alternative methods:<sup>6</sup>

- (1) Providing curb service or home delivery;
- (2) Retrieving merchandise from inaccessible shelves or racks;
- (3) Relocating activities to accessible locations.

Even these modest alternative methods would not be required in cases where the public accommodation could demonstrate that such methods would result in a significant difficulty or expense.

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<sup>6</sup>28 C.F.R. § 36.305(b)