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CENTER FOR COMMUNITY ACCESS, and MICHIGAN PARALYZED VETERANS,
OF AMERICA, Plaintiffs, v. CITY OF DETROIT, MICHIGAN, Defendants.

Case No. 05-CV-73475

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, DETROIT DIVISION

2005 U.S. Dist. Ct. Motions 73475; 2008 U.S. Dist. Ct. Motions LEXIS 43753

August 13, 2008

Motion for Temporary Restraining Order

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COUNSEL: [*1] J. Mark Finnegan (P68050), Denise M. Heberle (P64145), Heberle & Finnegan, PLLC, Ann Arbor, MI, Attorneys for All Plaintiffs.

Andrew Jarvis (P59191), City of Detroit Law Department, Detroit, MI, Attorney for Defendant.

JUDGES: HON. GERALD E. ROSEN, MAG. JUDGE KOMIVES

TITLE: PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, AND MEMORANDUM IN SUPPORT

TEXT: All Plaintiffs, by undersigned Counsel, hereby move this Court for a Temporary Restraining Order, and state in support:

1. On August 31, 2006, the Court Ordered Detroit to correct the Bagley Avenue (Mexican Village) sidewalk project. Document 14, footnote 1. These corrections were required to meet all Americans with Disabilities Act Accessibility Guidelines (the "ADAAG"). Document 14, PP 1 and 2.
2. During years 2007 and 2008, Detroit modified the Bagley Avenue project pursuant to the Court's Order, but violated virtually every requirement of the ADAAG, and has instead created an extraordinarily dangerous situation throughout Mexican Village. This includes vertical drops of more than five inches in the middle of the sidewalks, slopes on the sidewalks four times steeper than maximums permitted under the ADAAG, one third [*2] of the required curb ramps remaining uninstalled, and the remaining newly installed curb ramps being placed far from the intersections they

serve, forcing pedestrians to cross the street into the oncoming traffic, and with no protection from the adjacent stops signs and stop bars.

3. As verified by Mike Harris, the Executive Director of Plaintiff Michigan Paralyzed Veterans of America, the Bagley Avenue project sidewalks are not usable by him, and his safety was seriously threatened when he tried to use Mexican Village recently.

4. The Court must act immediately to force Detroit to meet with Plaintiffs, and to take immediate emergency temporary steps to make things safer, and to take prompt, permanent corrections to the project to make it accessible by law.

Statement Pursuant to Local Rule 7.1.

On Wednesday, August 6, 2008, at 9:27AM, I emailed the following message to Detroit City Attorney Jarvis.

"Mr. Jarvis:

*My clients have authorized me to file a demand for a Temporary Restraining Order (TRO) regarding an extremely dangerous situation along Bagley Avenue in the Mexican Village area. Due to the City removing many of the previously existing curb [*3] ramps, there are very few opportunities to cross Bagley Avenue. In addition, the City placed what few curb ramps there are so far from the crosswalks, that wheelchair users are stranded on the sidewalks, and must attempt to dodge moving traffic to cross Bagley. Finally, there are defects in sidewalks and the curb ramps themselves, and their transitions with the street that are tipping hazards.*

PVA Executive Director Mike Harris visited Mexican Village recently, and was trapped on the sidewalk, and had to dodge traffic and risk his life to cross the street. He can not use Bagley Avenue and its sidewalks as they are. Also, he is afraid that somebody is going to be killed attempting to use these sidewalks.

*Plaintiffs are prepared right now to file for the TRO, but will wait a few days to meet with you and/or parties from the City to inspect the alleged defects and to agree upon an immediate course of actions. When can you meet with me at Mexican Village? I am available to meet anytime Thursday or Friday. I hope you and the City can meet to inspect and to review this matter. Time is of the essence. Plaintiffs will file for the TRO early next week, unless the parties resolve [*4] the issues before then.*

Please consider this Plaintiffs' proffer under Local Rule 7.1. If I do not hear from you, I will file immediately. Please contact me immediately. My cell phone is (734) 717-8883,

J. Mark Finnegan, HEBERLE & FINNEGAN, PLLC Attorneys for Plaintiffs Paralyzed Veterans of America"

Attorney Jarvis did not respond in any way for the next six days. Finally, at 4:23 p.m. on Monday, August 11, 2008, he sent an email. I telephoned him, and I emailed him this motion and supporting declarations and photographs. We spoke by telephone late Tuesday, August 12, 2008. The City has not concurred in this motion.

/s/ J. Mark Finnegan
J. Mark Finnegan (P68050)
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MEMORANDUM IN SUPPORT

Introduction: The "Bagley Avenue Project" in Mexican Village

During the summer of year 2006, Detroit was rebuilding the sidewalks throughout Mexican Village, along Bagley Avenue. Plaintiffs attempted to negotiate with the City about accessibility defects throughout the project, but Detroit was completely unresponsive. During June, 2006 Plaintiffs [*5] filed for a preliminary injunction concerning among other things, the access defects along Bagley Avenue. On August 31, 2006, the Court entered Document 14. At footnote 1 of the Order, the City was required to submit a corrective action plan. Throughout the remainder of year 2006 and 2007, Detroit missed various deadlines, and sporadically made changes to Bagley Avenue's sidewalks. These changes have made for even less accessibility in Mexican Village. Contrary to the Court's Order, none of Bagley's sidewalks and curb ramps meet the ADAAG standards, are not "accessible to and readily usable by" Plaintiffs or others similarly situated, and in fact are potentially deadly to persons in wheelchairs, and must be corrected at once.

I. HISTORY OF BAGLEY AVENUE PROJECT ENFORCEMENT.

1. June 29, 2006. Plaintiffs filed for a preliminary injunction to correct access defects in the Bagley Avenue project. Document 12.
2. August 31, 2006. The Court entered document 14. That Order required Detroit to file within forty-five days "a written corrective action plan" covering the Bagley project. See doc. 14, footnote 1.
3. October 16, 2006. Detroit filed its written [*6] corrective action plan. Document 19. According to the plan, Detroit claimed that Bagley Avenue Phase II would be fully completed and ADA compliant before November 15, 2006. Detroit claimed that Bagley Avenue Phase I was under survey, and that in a few months Detroit would "supplement" its report about Bagley Phase I.
4. April 24, 2007. Detroit filed document 24. That status report admitted that Bagley Phase II had not been completed by November 15, 2006, but would be completed "sometime in 2007". The report also stated that Bagley Phase I would be completed sometime in 2007.
5. July 2008. Mike Harris, Executive Director of Plaintiff Paralyzed Veterans of America, goes to Mexican Village and is completely blocked from safely using it due to Bagley Avenue's totally defective and inaccessible sidewalks and curb ramps.

Summary of Enforcement History: Thus, there is no doubt that that both Phase I and Phase II of Bagley Avenue were constructed or otherwise altered after entry of the Court's August 31, 2006 Order, and are governed by the Court's Order (document 14) mandating that those sidewalks and curb ramps must meet all ADAAG construction standards. Doc. 14, [*7] PP 1-2. But Bagley Phases I and II violate every requirement of ADAAG, are unusable by Plaintiff Mike Harris and everyone else similarly situated, and are life-threatening.

II. BAGLEY AVENUE VIOLATIONS OF THE COURT'S AUGUST 31, 2006 ORDER, AND OF THE AMERICANS WITH DISABILITIES ACCESSIBILITY GUIDELINES (THE "ADAAG")

According to the Court's August 31, 2006 Order, all sidewalk and resurfacing work performed by Detroit from that day forward must strictly meet mandates in the Americans With Disabilities Act Accessibility Guidelines, (the "ADAAG"), 28 U.S.C. part 36, Appendix A. See document 14, Court's Order at paragraphs 1 and 2. All of the work at

issue here along Bagley Avenue occurred after the entry of the August 31, 2006 Order. But all of the work violates the ADAAG, and violates paragraphs 1 and 2 of the Court's Order. Below are details of these accessibility violations.

A. Vertical Drop-offs. In several locations on the Bagley project sidewalks, Detroit interrupts the sidewalks with abrupt, five inch vertical drops from the brand new sidewalk onto the street below. Finnegan Declaration at P 2, photographs 01 and 02, showing wheelchair plunging [*8] off the Bagley Avenue project's brand new sidewalks. These drop-offs can easily seriously injure anyone who encounters them, and they can not be avoided on these sidewalks, because where they exist, they are on both sidewalks, so one can not avoid them by crossing the street. This clearly violates the August 31, 2006 Order at P 2.

B. Deadly Location of Curb Ramps. Bagley Avenue is very narrow, with areas of parallel parking, and it handles a large volume of traffic, especially during home Tigers, Red Wings and Lions games, and also during lunch hour and dinner hours. Harris Declaration at PP 4 and 7; Finnegan Declaration at P 6, photographs 08 and 09, showing lunch hour with a continuous stream of vehicular traffic along the Bagley Avenue project. At most intersections along the project, traffic is controlled only by Stop signs.

For some unfathomable reason, Detroit chose to move many of the curb ramps far from the painted cross walks, and to install the new curb ramps far from the intersections. Finnegan Declaration at P 3, photographs 03 and 04. Many of these newly installed curb ramps are actually now located *in front* of the stop signs and painted "stop bars". Finnegan [*9] Declaration at P 4, photographs 03 through 08, showing wheelchair sitting at logical crossing point inside of painted cross walk, but also showing Detroit's newly installed curb ramps far outside of logical crossing point, where no driver would expect a pedestrian in a wheelchair.

To compound the extreme danger for both driver and wheelchair pedestrian, Detroit has installed the new curb ramps where there are drainage grates and large pot holes blocking entry and exit of wheelchairs onto the curb ramps. n1 Finnegan Declaration at PP 8 and 9, photographs 16-19, showing drainage grates and large pot holes blocking the new curb ramps, which are already far from the intersection.

n1 Indeed, it is hard to imagine how Detroit could possibly create a more dangerous crossing for wheelchair users and local drivers.

These dangerously placed curb ramps abound throughout the Bagley Avenue project. Finnegan Declaration at P 5, photographs 07 and 08, showing yet another intersection where newly installed curb ramp is [*10] actually in front of the stop sign. This means that when a vehicle stops where it is supposed to-at the stop sign-that vehicle is actually blocking the curb ramp. Mind you, the vehicles are not acting improperly; when each pulls up to the stop sign, it will automatically block the curb ramp, because Detroit has placed the curb ramp in the wrong location.

C. Excessive Running Slopes. Running slope is the slope of the path of travel. The Bagley projects run east/west, so the running slopes also run east/west. In some locations on the Bagley project sidewalks, running slopes exceed ten percent. Finnegan Dec. P 10, photographs 20 and 21, showing 10.1% running slope. The ADAAG requires as to running slopes:

"Any part of an accessible route with a [running] slope greater than 1:20 [5%] shall be considered a ramp...The least possible slope shall be used for any ramp...The maximum slope or a ramp in new construction shall be 1:12 [8.33%].

ADAAG, Sections 4.8.1 and 4.8.2. Thus, this 10.1 percent running slope is one hundred percent steeper than the recommended running slope [5%], and is twenty percent steeper than the maximum running slope ever permitted under

[*11] emergency circumstances by the ADAAG (8.33 percent). Virtually every curb ramp in the Bagley project suffers from excessive running slopes.

D. Excessive Cross slopes.

Cross slope is the slope of a sidewalk perpendicular to the path of travel. For example, Bagley Avenue runs east/west, as do the two sidewalks running parallel to Bagley Avenue. Thus, the cross slope on these sidewalks runs perpendicular, or north/south. n2. According to the ADAAG and the Michigan Building Code: "Nowhere shall the cross slope of an accessible route exceed two percent." ADAAG Section 4.3.7; ICC/ANSI A117.1 1998, Section 403.3 ("The cross slope of a walking surface shall not be steeper than 1:48 [2.08%]").

n2 To visualize this, when rain falls on these sidewalks, there should be a slight slope away from the buildings and toward the street and gutter. This is the "cross slope" of the sidewalk

In several places along the Bagley project sidewalks, the cross slopes reach as high as nearly eight percent, four hundred [*12] percent steeper than the maximum ever permitted. Finnegan Declaration at P 11, photographs 22 and 23, showing 7.1% cross slope. Along the entire length of Bagley Phases I and II, the cross slopes exceed the maximum permitted 2%, and cross slopes exceeding 6% are common. Finnegan Declaration at P 11, showing cross slopes. These excessive cross slopes urge wheelchairs to lose control and to slide off the sidewalks sideways onto Bagley Avenue. They exhaust wheelchair users who must continuously correct their path of travel to fight off and overcome the cross slopes. And any rain, snow or ice on these sidewalks virtually guarantees loss of control of the wheelchair, plunging off the sidewalk and into the street. Detroit was well aware of these excessive cross slopes, but it chose to leave the defective sidewalks in place anyway. n3

n3 And these cross slope violations are not accidental. On April 24, 2007, Detroit filed its document 24, Exhibit "C". At page two of document 24, Exhibit "C", Detroit admitted: "The sidewalks...constructed by our contractor had to meet the grades at the door level of the Mercado building..." So Detroit clearly knew before April 23, 2007 (when it wrote and filed the above sentence) that the sidewalk slopes along the Bagley Avenue project were defective at the door of the Mercado building. Yet now, more than one year after Detroit filed its admission of defective slopes, the cross slopes of the new sidewalk at the Mercado building door still exceed 4%, double the 2% maximum permitted by the ADAAG and by Michigan's building code. ADAAG Section 4.3.7; ICC/ANSI A.117 1998 Section 403.3.

[*13]

E. Defective Detectible Warnings. A curb ramp's detectible warnings are the red, raised dots one sees on new curb ramps. The ADAAG requires these detectible warnings on every curb ramp. On every curb ramp in the Bagley Avenue Project, the detectible warning is four feet wide by two feet deep. Finnegan Declaration at P 12, photographs 3-5, 7-8, 12-16, 18 and 20, showing Detroit's Bagley Avenue project's standard detectible warning. But the ADAAG clearly requires that "The detectible warning shall extend the full width and depth of the curb ramp." ADAAG Section 4.7.7. Detroit's detectible warnings stop well short of covering the entire curb ramp, violating the ADAAG and the August 31, 2006 Court Order. So Detroit has compounded its dangerous locations of curb ramps by only covering a small portion of the curb ramps with a detectible warning.

F. Omission of Curb Ramps. According to the Court's August 31, 2006 Order at paragraphs 1 and 2, Detroit should have installed 64 curb ramps on the Bagley Avenue project. But Detroit only installed forty-two curb ramps, and

failed to install twenty of the required ramps. n4 Because Detroit omitted these required curb ramps, [*14] it has created at best a "hop scotch" pattern of curb ramps throughout the Bagley Avenue project, and at worst has made it impossible to cross Bagley Avenue. Finnegan Declaration at P 7, photographs 12 through 15, showing new parking lot with "barrier free" parking spaces, but no way to cross Bagley to get to the building the parking lot is designed to serve.

n4 See Detroit's September 16, 2007 Status Report, Exhibit "C", showing twenty-two "no ramp" notations, indicating exact locations of omitted curb ramps.

CONCLUSION

The Court's August 31, 2006 Order mandated that Detroit rebuild the entire Bagley Avenue (Mexican Village) project to meet all ADAAG standards. Detroit violated that Order, and built the project to have:

1. Potentially deadly vertical drop-offs interrupting the sidewalks;
2. Curb ramps placed in *front* of stop signs and stop bars;
3. Pot holes blocking access to and from curb ramps;
4. Failed to install one-third of the required curb ramps;
5. Running [*15] slopes twice as steep as the maximum permitted;
6. Cross slopes four times as steep as the maximum permitted; and,
7. Defective, small detectible warnings.

These defects not only egregiously violate the Court's August 31, 2006 Order, they create a deadly situation all along the Bagley project. The Court must Order the City to meet with Plaintiffs today to:

- A. Put into place immediate, temporary warnings to drivers and pedestrians at each intersection in the Bagley Project; and,
- B. Negotiate permanent corrections to each defect, to be installed right away, but no later then the end of this year.

/s/ J. Mark Finnegan
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Certificate of Service

I hereby certify that I emailed this motion and its supporting declarations and photographs to Andrew Jarvis on August 11, 2008. Also, on this 13th day of August 2008, the foregoing Plaintiffs' Motion For Temporary Restraining Order was filed electronically. Parties will receive notice of the filing through the Court's electronic [*16] filing system. In addition, I served the foregoing by email and by hand delivery upon Counsel for Defendant at the following address:

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/s/ J. Mark Finnegan

[SEE DECLARATION OF PARALEGAL MARGUERITE CLAIRE FINNEGAN SUPPORTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER IN ORIGINAL]

[SEE DECLARATION OF MIKE HARRIS, EXECUTIVE DIRECTOR OF PLAINTIFF PARALYZED VETERANS, SUPPORTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER IN ORIGINAL]

[SEE ATTACHMENT IN ORIGINAL]