

which is inaccessible. Its customary and previous use has been as a retail shop, and when again occupied, will be inaccessible to Plaintiffs and other wheelchair users. It is being marketed for rent. The simple solution to this deprivation is to complete the Phenix Hall renovation in a manner that is accessible as is required by the ADA.

PARTIES

3. Plaintiff Dean Davis resides at 19 Old Suncook Road, Apt. 1105, Concord, NH 03301.

4. Plaintiff Gina Colantuoni resides at 1a Rosewood Drive, Bow, NH 03304.

5. Plaintiff James Piet resides at 1 Matthew Street, #8, Concord, NH 03301.

6. Defendant Jacob Ciborowski Trust is a New Hampshire trust and has a principal office at 18 N. Main Street, Concord, New Hampshire 03301. The Jacob Ciborowski Trust owns Phenix Hall.

7. Defendant Rowley Associates is a New Hampshire professional corporation with a principal place of business at 6A Hills Avenue, Concord, New Hampshire 03301. It owns and operates the League of New Hampshire Craftsmen (“The League”) which leases space at Phenix Hall.

8. Defendant Bagel Works is a New Hampshire corporation with offices located at 120 Main Street, Keene New Hampshire 03431. The Works Bakery Café (“TheWorks”) is a registered trademark of Defendant Bagel Works. The Works is a tenant at Phenix Hall.

JURISDICTION AND VENUE

9. This action arises under the ADA, 42 U.S.C. 12181-12189. Thus, the Court has jurisdiction over this controversy pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(4), and 42 U.S.C. § 12188.

10. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) in that all the defendants reside in the district of New Hampshire. It is also proper pursuant to 28 U.S.C. §1391(b)(2) in that a substantial part of the events or omissions giving rise to the claim occurred in this district.

STATEMENT OF FACTS

The Plaintiffs

11. Gina Colantuoni is a twenty-seven (27) year-old woman who lives in Bow, New Hampshire. James Piet is a forty-nine (49) year-old man who lives in Concord, New Hampshire. Dean Davis is a forty-nine (49) year-old man who also lives in Concord, New Hampshire. All three of them have Cerebral Palsy. Cerebral Palsy has significantly limited them in the major life activity of walking and, as such, they each use an electric wheelchair for mobility.

12. The plaintiffs all support the shops and restaurants that comprise Concord's Main Street. They all use Concord's Main Street as one way to shop, to socialize with people, and to generally become part of the fabric of the Concord community. Concord has assisted with this important means of integration by installing curb cuts to assist wheelchair users. The opportunity to access shops and restaurants on Concord's Main Street allows the exact type of integration that was one of the driving forces underlying the ADA.

13. Both Mr. Piet and Mr. Davis are married and travel along Concord's Main Street with their significant others. They both would, as part of their support for Concord's Main Street, like to be able to stop in at The Works, an extremely popular social gathering place on Concord's Main Street, for something to eat or drink. They would also like to go to The League to see the work of local artisans.

14. Ms. Colantuoni is an artistic person. She is a writer and enjoys creating jewelry at a store on Concord's Main Street. She would greatly enjoy being able to visit The League on

Main Street to enjoy the creative efforts of others. She would also, like Mr. Piet and Mr. Davis, enjoy joining the social scene at The Works and partake in its food offerings.

15. These are the types of activities that many residents of Concord and its visitors enjoy. The plaintiffs simply would like the opportunity to join all the other individuals who already enjoy what Phenix Hall has to offer. This is currently impossible as they are physically completely unable to even enter either shop or prospectively the third shop when it becomes occupied.

Phenix Hall

16. The Jacob Ciborowski Trust owns Phenix Hall which is located at 40 North Main Street. The building is divided into three floors and has a full height basement. The first floor includes three storefronts (The Works, The League and one empty storefront) and a small lobby that houses an elevator that only provides access to the second and third floors. Each entrance to the three storefronts and the lobby contains two steps. The elevator is accessible to individuals in wheelchairs from the rear of the building. The second floor contains offices and the third a theatre.

17. Phenix Hall was renovated in the summer/fall of 2010. The building's first floor storefront entrances and each storefront facade was completely removed save for two decorative columns. The renovation was so substantial that it resulted in an approximate five-foot encroachment into the retail spaces and the necessity to have particleboard installed to protect the interiors.

18. The entrances that were replaced included two slate covered steps and a glass / metal door. The old steps were removed and two granite steps were installed. The glass/metal doors were replaced by new glass/wood doors. The fixtures on the entrances and windows were

also all replaced. The entrance at each storefront was, with the exception of the two decorative columns, completely removed, discarded and replaced.

19. By letter dated May 27, 2010, prior to the above-described renovation, the Jacob Ciborowski Trust was notified by the Disabilities Rights Center, Inc. (“DRC”) of the existence of the ADA. The DRC offered to meet with the Trust to discuss the issue of access. The DRC received no response to that letter.

20. Upon observing in late September 2010 that the entire façade and storefront entrances were in the process of being replaced, the DRC notified the Jacob Ciborowski Trust in an October 4, 2010 letter that such a change to the entrance would trigger the alteration standards in the ADA and that the work needed to be done consistent with the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”). The letter noted that there is only a narrow exception to providing access that is fully compliant with ADAAG standards of accessibility. The letter went on to state that the entrances “must be altered consistent with the ADAAGs.” The Works and the League were provided copies of this letter which also stated that tenants are equally responsible for ensuring compliance with the ADA.

21. The DRC subsequently met with Mark Ciborowski of the Jacob Ciborowski Trust in an effort to further explain that the ADAAGs needed to be complied with. Mr. Ciborowski explained that he did not have an architect for the project but that he had taken a “hard look” at access and then stated that he had determined it to be “technically infeasible” to provide access for individuals in wheelchairs.

22. The Jacob Ciborowski Trust has subsequently asserted that including accessibility for individuals with disabilities would also threaten the historical significance of Phenix Hall. The assertion is without merit. The United States government’s official guidelines for historic

preservation provide that whenever possible access to historic buildings should be through the primary public entrance. *See Department of the Interior, The Preservation of Historic Architecture, The U.S. Governments Official Guidelines for Preserving Historic Homes* (2004) For example, according to the DOI's guidance, a property can be regraded to provide a smooth entrance in instances when the steps and landscape features are not "highly significant." *Id.* at 378. As detailed below, this is one of several suggested solutions that have been provided to the defendants to bring Phenix Hall into compliance with the ADA. The DOI goes on to provide that if steps are historic masonry, they can be buried rather than removed. *Id.* Phenix Hall's façade was, in fact, completely replaced (including the steps) with little to no historical research or regard for design and materials. The goal, as stated in the building permit materials, was to mimic neighboring storefronts. The DOI guidance states that the "use of conjectural designs . . . is generally not recommended." *Id.* at 105. In this matter, notably the neighboring storefronts that the Jacob Ciborowski Trust intended to mimic do not even have steps. And mimicking of neighboring buildings is discouraged by the DOI guidelines. *Id.*

23. The Jacob Ciborowski Trust has lastly asserted that the City of Concord had approved the plans for the project. The City of Concord indicated that it would consider any plan for ADA access that was presented to it and would consider it in light of its obligations under of the ADA. Based upon its status as a public entity, Concord has an obligation to avoid acts that would result in discrimination against individuals with disabilities. 28 C.F.R. § 35.130. To date, the Trust has not submitted any proposed plans to the City of Concord with respect to accessibility.

24. The DRC subsequently engaged an engineering firm to review the access issues in light of the ADA. The firm developed several design solutions that would bring Phenix Hall into

full compliance with the ADAAGs. The suggested solutions included, but were not limited to, elevating a portion of the sidewalk in front of Phenix Hall by fourteen inches (total elevation difference between the current sidewalk elevation and front door elevation) so that the sidewalk would be level with the storefront entrances; and two solutions that would elevate the sidewalk seven inches and provide a 1:12 sloped ramp system to traverse the remaining seven inches elevation. These options and others provide full access with little to no encroachment into Phenix Halls' retail space. They are also options that are routinely used to overcome physical barriers to access. The DRC has provided its engineer's report to the Jacob Ciborowski Trust as part of several attempts to resolve the issues.

25. The defendants have failed to bring the first floor of Phenix Hall into compliance with the ADA accessibility standards.

VIOLATION OF THE ADA

26. The above paragraphs are incorporated by reference.

27. Title III of the ADA prohibits discrimination by public accommodations against persons with disabilities. 42 U.S.C. §§ 12101 *et seq.* 28.

28. ADA defines a disability as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2). The plaintiffs' Cerebral Palsy impairs their ability to walk to the point where it substantially limits the major life activity of walking.

29. A “place of public accommodation” means a facility, operated by a private entity, whose operations affect commerce and fall within one of a set of categories that include restaurants, bakeries and sales establishments. 28 C.F.R. § 36.104. “Both the landlord who

owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are subject to the requirements of [Title III of the ADA].” 28 C.F.R. § 36.201. The Jacob Ciborowski Trust as owner of Phenix Hall, Bagel Works as owner of the Works Bakery and Café and Rowley Associates as owner of the League of New Hampshire Craftsman are all public accommodations as to the subject access issue.

30. The new construction and alteration provisions of the regulation underlying Title III of the ADA provide that “[a]ny alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.” 28 C.F.R. § 36.402 (a); 42 U.S.C. § 12183 (a)(2). The alteration to Phenix Hall was made post January 26, 1992 as it was made in 2010.

31. An alteration “is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof.” 28 C.F.R. § 36.402 (b). Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.” 28 C.F.R. § 36.402 (b)(1).

32. The work at issue was the complete replacement of the entrances to the three Phenix Hall storefronts. This type of work affects the usability of Phenix Hall. It also qualifies

as “renovation,” “rehabilitation,” and/or “reconstruction.” It does not qualify as mere “normal maintenance.” Thus, it is an “alteration” under the ADA.

33. “The phrase ‘to the maximum extent feasible,’ as used in this section, applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).” 28 C.F.R. § 36.402 (c).

34. There are several design solutions that would make the three storefronts accessible for people with wheelchair users in a manner that is consistent with the alteration standards for accessibility that are detailed above.

35. The defendants have failed to ensure that, to the maximum extent feasible, that altered storefronts of Phenix Hall are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Thus, the defendants are in violation of the ADA’s new construction and alteration provisions.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that this honorable court:

- A. Declare that the actions of the defendants are in violation of the ADA;
- B. Order the defendants to alter the storefronts to make them readily accessible to and usable by individuals with disabilities, including individuals in wheelchairs;

- C. Award plaintiffs costs and attorneys fees; and
- D. Grant any other relief that the court deems just and appropriate.

Respectfully submitted this 14th day of September, 2011.

Dean Davis, Gina Colantuoni,
and James Piet.

By their attorneys

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