

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LINDA KACAVICH,
SANDRA KACAVICH and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 06-BPR 01442

HALCYON HILL CONDOMINIUM
TRUST and CUTLER REAL ESTATE
MANAGEMENT CORP.,

Respondents

Appearances: Caitlin A. Sheehan, Esq. for Complainant;
Christopher Uhl, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 15, 2006, Linda and Sandra Kacavich (“Complainants”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) against Halcyon Hill Condominium Trust and Cutler Real Estate Management Corporation (“Respondents”). Complainants allege that Respondents discriminated against them in housing on the basis of handicap in violation of G.L. c. 151B, section 4(7) and (7A). Specifically, Complainants assert that Respondents failed to

accommodate Sandra Kacavich's disabilities by failing to install and pay for a ramp so that she could access the building entrance to her condominium.

On August 10, 2006, the Commission issued a Probable Cause determination with respect to Complainants' claim and the case was subsequently certified to public hearing. A public hearing was conducted on January 22, 2008. The parties submitted eight (8) joint exhibits. Complainant submitted fifteen (15) additional exhibits. Linda Kacavich and Diana Golshinrazian testified on behalf of Complainants. Suzanne Sinclair, Peter Smith, and Lucy Rybacki testified on behalf of Respondents.

Respondent Cutler Real Estate Management did not comply with orders from the Commission nor did it attend the public hearing. Accordingly, a default judgment is entered against it.

Complainant was ordered to produce certified medical records pertaining to Sandra Kacavich's handicap and certified docket entries of a small claims matter against Regal Seal Asphalt Service, Inc. within thirty days of the January 22, 2008 public hearing. On March 5, 2008, Complainant moved for an extension of time to submit the records. The motion was granted by the Hearing Officer. The court records were produced on March 10, 2008, but Complainants' counsel was unable to obtain a certified copy of the medical records because of lack of cooperation from healthcare providers. Complainant's counsel asked the Commission to accept an uncertified copy of said medical records. The Hearing Officer granted Complainants' motion.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings, they are rejected. To the extent the testimony of the witnesses is not in accord with or irrelevant to my findings, the testimony is rejected. Based on all the relevant,

credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Halcyon Hill is a condominium complex consisting of 51 residential units in six buildings on a 7.86 acre parcel of land in Worcester, MA. Each of the units is individually owned and each owner has a percentage of beneficial interest of the common areas.
2. Complainants Linda and Sandra Kacavich are sisters who have lived together at 6201 Halcyon Drive at Halcyon Hill since 2000. Complainant Linda Kacavich is the legal guardian of her sister, Sandra Kacavich, who has Down syndrome. Linda Kacavich pays condominium fees on behalf of herself and her sister. Their unit is on the first floor of Building #6.
3. Respondent Halcyon Hill Condominium Trust is an organization through which the unit owners manage and regulate Halcyon Hill. The areas which it manages include common areas such as lawns, parking lots, exits, and entrances. The Trust acts through a property manager on behalf of the unit owners.
4. Respondent Cutler Real Estate Management Corp. managed Halcyon Hill in 2005-2007. Cutler employed Suzanne Sinclair as property manager for Halcyon Hill.
5. All requests for changes to common areas of the condominium complex must first be made to the property manager. The property manager transmits the requests to the complex's Board of Trustees which decides, on behalf of all the unit owners, whether to grant or deny permission for the work.

6. In 2005, Building #6 had an exterior entrance with five steps. On December 15, 2005, Sandra Kacavich fell on the ice by the entrance to Building #6. She was diagnosed with a dislocated knee. Prior to falling, Sandra Kacavich was able to walk up and down the exterior stairs, but after the fall, she was unable to do so. Her physical therapist suggested that the Kacavichs have a ramp installed to their building so that Sandra could use a walker in order to enter and leave Building #6.
7. Linda Kacavich took a family medical leave of absence from her job in order to care for her sister following her fall. Joint Exhibit 2. Sandra Kacavich was forced to remain in her condominium unit for several months because she was not able to exit the complex without a ramp.
8. In late December of 2005 or early January of 2006, Linda wrote to the property manager Suzanne Sinclair to request the installation of a ramp. Joint Exhibit 2. The property manager presented Linda Kacavich's letter to the Board of Trustees. On or about January 25, 2006, Linda Kacavich received a reply from Sinclair on behalf of the Halcyon Hill Condominium Trust. Sinclair informed Linda Kacavich that the Board of Trustees had approved the installation of a ramp by Kacavich at her own expense. Joint Exhibit 3. Attached to Sinclair's letter was a price quote from Regal Seal Asphalt Service, Inc. for the installation of the ramp at a cost of \$1,950.00. The letter states that Kacavich should feel free to contact other companies "for competitive rates." Joint Exhibit 3.
9. Linda Kacavich contacted Regal Seal about the installation of the ramp. She also contacted other companies. but they were not interested in performing the work. Kacavich decided to use Regal Seal.

10. Regal Seal increased the price to \$3,000.00 on the basis that the company needed to rent a jackhammer to perform the work. Linda Kacavich paid for the ramp at the increased price. The ramp was installed in late March/early April of 2006.
11. Following installation of the ramp, Sandra Kacavich began to use it with a two-wheeled walker in order to enter and to leave the condominium complex. Because of the angle of the ramp, Sandra Kacavich has to be accompanied by someone standing behind her as she enters the building and in front of her as she leaves the building.
12. Linda Kacavich first learned that the ramp was incorrectly constructed when a physical therapist told her that it was too steep. Linda Kacavich contacted the Architectural Access Board for confirmation and reported the error to Regal Seal.
13. Regal Seal attempted unsuccessfully to fix the ramp. Linda Kacavich filed a claim against Regal Seal in small claims court on or about August 8, 2006. She sued for \$2,000.00 even though the cost of the ramp was \$3,000.00 because of financial filing limits in small claims court. A hearing was held before a magistrate. On October 13, 2006, the court found in favor of Kacavich for a judgment of \$2,083.40. Regal Seal appealed the judgment and the parties were ordered to trial. Linda Kacavich hired an attorney for the trial and paid him \$700.00. The second trial was held in front of a jury, which found for Linda Kacavich in the amount of \$2,182.68. Regal Seal paid Linda Kacavich the amount of the judgment.
14. Linda Kacavich tried to find another company to fix the ramp. One company wrote her that it had already provided several estimates to build the ramp at the

- request of Cutler Real Estate Management Corp. and that its estimates ranged from \$8,295.00 to \$11,650.00.
15. As of the date of public hearing, the ramp has not been fixed. Linda Kacavich, on or about April 25, 2007, wrote a letter to the Board of Trustees regarding the ramp and its inadequate construction. The Trustees never responded to the letter.
 16. On September 14, 2007, Sandra Kacavich's physician wrote that Sandra finds walking to be "extremely difficult" and is unable to climb stairs due to Down syndrome, the dislocation of her left knee, and other abnormalities. Dr. Driscoll opined that his patient would not be able to climb stairs "at anytime in the future given her multiple impairment." Complainant's Exhibit 13.
 17. On or about December 27, 2007, Halcyon Hill's new management company, Crowninshield Management Corp., notified all home owners within the condominium complex that the Board of Trustees had authorized a supplemental condominium fee increase of \$300,000.00 to cover the costs of repairs identified by a professional engineer as Phase 1 of a condition study describing necessary structural improvements. The repairs included in Phase 1 are: replacement of roofs, ventilation improvements, replacement of decks, replacement of patios, upgrading of lighting controls, and re-grading of rear areas. Complainant's Exhibit 14. Additional work, identified as Phase II, was deferred in order to limit the financial impact on condominium owners. Included in Phase II is the redesign and reconstruction of the ramp. See Complainant's Exhibit 14, pp. 3-4 "Entrance Platforms." According to the study, the ramp must be redesigned and reconstructed to meet existing conditions of floor level, grade, sidewalk and street

elevations and should include railings.

18. Linda Kacavich testified about the stress she experienced relative to the ramp situation. She described feeling sad that her neighbors were not supportive and fearful that she would lose her job as a result of having to take time off to care for her sister.

III. CONCLUSIONS OF LAW

The Halcyon Hill Condominium Trust is Correctly Named as Respondent¹

M.G.L. c.151B, sections 4, paragraphs (7) and (7A) prohibit discrimination in housing on the basis of handicap. See Buckley v. Wolfinger, 18 MDLR 158 (1996). Condominium complexes, their boards of trustees, and their managing agents are expressly covered by the statute and implementing regulations. Under G.L.c.151B, section 4(7), it is unlawful “[f]or the owner ... or any organization of unit owners in a condominium or housing cooperative” to discriminate on the basis of handicap. This statutory coverage is affirmed by 804 CMR 2.01(2)(e), which states that “[a]ny organization of unit owners in a condominium or housing cooperative is covered by M.G.L.c.151B, section 4.”

Under section 4 (7A), discrimination on the basis of handicap includes the refusal to allow the reasonable modifications of premises, if such modification is necessary to afford a resident the full enjoyment of the premises. In identifying which individuals and entities are required to pay for the modifications, section 4 (7A) states that “reasonable modification shall be at the expense of the owner”

The modification at issue in this case involves a ramp over steps leading to the

¹ Since Cutler Management defaulted, it is not necessary to make substantive rulings against it even though under M.G.L.c.151B, section 4(7), managing agents are subject to housing discrimination provisions.

front entrance of Building #6 of the Halcyon Hill Condominium Complex. Because the ramp provides entry to multiple units rather than just an individual unit, the ramp is situated in a common area of the condominium complex. See Joint Exhibit 5, Master Deed at Article IV (including entrances as a “common element”). Common areas belong to each and every condominium unit owner on a percentage, undivided basis. See Joint Exhibit 1 and 5.

I conclude that the Board of Trustees constitutes the “owner or other person having right of ownership” of the condominium complex’s common areas under c.151B, section 4(7A). Definitions of “person” and “employer” in c.151B, section 1 make clear that entities as well as individuals may be legally responsible for discrimination. The Board of Trustees functions as the unit owners’ representative insofar as the common areas are concerned. The proportionate interest of each unit owner in the Trust corresponds to the unit owner’s undivided beneficial interest in the common elements. See Joint Exhibit 8, Article 1, section 1.2. No modification to the common areas can be made without the Board’s express permission. The Board is responsible for the operation, upkeep, and maintenance of the common areas; determination of the common expenses; the making of repairs, additions and improvements to, or alterations of, the common areas; and the enforcement of obligations of the unit owners. See Joint Exhibit 8 at Article IV, section 4.4. Accordingly, under c.151B, section 4 (7A), the Trust must be deemed the “owner” of the entrance to Building #6.

Halcyon Hill Condominium Trust is Liable for Handicap Discrimination

In order to set forth a prima facie case of housing discrimination on the basis of handicap, a complainant must show that he/she: 1) suffers from a handicap; 2)

Respondent was aware of the handicap or could reasonably have been aware of it; 3) the accommodation sought is reasonably necessary to afford complainant an equal opportunity to use and enjoy the premises; and 4) Respondent has refused to make the requested accommodation. See Buckley v. Wolfinger, 18 MDLR 158 (1996).

The evidence establishes that Sandra Kacavich became permanently impaired in 2005 as a result of falling on ice in front of her unit. The fall caused Sandra Kacavich to sustain a dislocated knee. Her recovery from the injury was impeded by Down syndrome which made it difficult for her to participate in physical therapy. Sandra Kacavich's prognosis indicates that she is expected to use a walker for the rest of her life. Dr. Driscoll determined that his patient would not be able to climb stairs "at anytime in the future given her multiple impairment." Complainant's Exhibit 13. Sandra Kacavich's limitations constitute a substantial impairment in the major life activity of walking and they render Sandra a handicapped individual within the meaning of c. 151B. See Guibault v. Bosquet, 22 MDLR 188 (2000) (Complainant with difficulty walking considered to be handicapped within meaning of c. 151B); Buckley v. Wolfinger, 18 MDLR 158 (1996) (Complainant who uses scooter for mobility due to cerebral palsy and dislocated hip determined to be handicapped within meaning of c. 151B).

Respondents were fully aware of Sandra Kacavich's disabilities at all times relevant to this case. Her sister, Complainant Linda Kacavich, promptly corresponded with Cutler Management Company and the Condominium Trust about Sandra's accident and the need for a ramp. Board of Trustee Lucy Rybacki testified that she has repeatedly seen Sandra Kacavich using her walker and being assisted by an aide or by her sister to enter and exit her unit. Respondents do not contest Sandra Kacavich's impairments.

Turning to the third element of a prima facie case of housing discrimination on the basis of handicap, the evidence demonstrates that the accommodation sought is reasonably necessary to afford Sandra Kacavich an equal opportunity to use and enjoy the premises. Non-disabled residents of the condominium complex can enter and exit their buildings by walking up and down the front steps. By contrast, Sandra is unable to do so without a properly constructed ramp. The accommodation requested is recognized as “reasonable” by the statute. See c. 151B, section 4(7A) (“[r]easonable modification shall include, but not be limited to ... ramping a front entrance of five or fewer vertical steps”).

Insofar as the fourth element of a prima facie case is concerned, the Respondent Trust has admittedly refused to provide the accommodations requested. The Trust informed Linda Kacavich by letter that she could arrange for and pay for the installation of a ramp for her sister but that the Halcyon Hill Condominium Trust would not accept responsibility for installation or payment of a ramp to the entrance of Building #6.

The Respondent attempts to rebut the prima facie case offered by Complainants by asserting that the statute does not apply to the Board of Trustees. However, as owner of the common entrance to Building #6, the Trust bears financial responsibility for making such reasonable modifications to it as are needed to afford residents such as Sandra Kacavich the full enjoyment of the premises. See Henry v. Willow Park Condominium Trust, 22 MDLR 393 (2000) (condominium trust, as manager of common areas, held liable for discrimination against complainants by other residents). The required modifications are spelled out in Phase II of a condition study identified by a professional engineer at the behest of the Board of Trustees. According to the study, the

ramp must be redesigned and reconstructed to meet existing conditions of floor level, grade, sidewalk and street elevations and should include railings. As the owner of the common areas of Halcyon Hill, the Board of Trustees violated c.151B, section 4(7A) when it refused to make and pay for the requested accommodation. Its failure to do so constitutes housing discrimination on the basis of handicap.

Damages

Linda Kacavich, by herself and as guardian of her sister Sandra, suffered emotional distress and out-of-pocket financial costs as a result of Respondents' failure to install and pay for a properly-constructed ramp over the steps to Building #6. She testified that Respondents' actions have been severely upsetting to her and that she feels very sad that her own neighbors have put her through this. Linda Kacavich described the stress of: needing a ramp for her sister, missing work in order to assist her sister when there was no ramp, fearing that she was going to lose her job because of her absenteeism, having to install a ramp on her own, finding out that the ramp was defective, and trying, unsuccessfully, to resolve the situation with the Board of Trustees. According to Linda Kacavich's credible testimony, she discussed her stress with friends, her co-workers, and her doctor. Linda Kacavich testified, as well, about her sister's physical and emotional harm resulting from Respondents' failure to install a ramp. Linda described her sister's inability to leave her apartment for months prior to the installation of a ramp and her sister's ongoing difficulty navigating the defective ramp because of its excessive slope. I conclude that Linda and Sandra Kacavich are entitled to recover \$25,000.00 in emotional distress damages.

As far as out of pocket expenses are concerned, Linda Kacavich testified that she

paid \$3,000.00 for the defective ramp and only received \$2,182.68 in reimbursement from small claims court.² She spent \$700.00 on an attorney, which was not reimbursed. Complainants are entitled to reimbursement of \$1,700.00 in out-of-pocket expenses for the cost of having to build the ramp at their expense.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.ch. 151B, sec. 5, Respondents are ordered to immediately cease and desist from further acts of discrimination and, at the expense of the Board of Trustees, to forthwith rebuild the ramp in accordance with the terms set forth in Complainant's Exhibit 14, p.4. In addition, Respondents shall pay Complainants, within sixty (60) days of receipt of this decision, the sum of \$ 26,700.00 in damages for out of pocket losses and emotional distress, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 30th day of September, 2008.

Betty E. Waxman, Esq.

² The judgment consisted of \$2,000.00 in out of pocket losses for the ramp and \$182.68 in court costs.

