

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & LEON GLASMAN,
On behalf of JULIA GLASMAN

v.

DOCKET NO. 07BPA03389

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION¹,
Respondent

Appearances:

Franziskus Lepionka, Esquire for Leon Glasman
Owen P. Kane, Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 4, 2007, Leon Glasman filed a complaint with this Commission on behalf of his minor daughter, Julia Glasman, against Respondent Massachusetts Department of Transportation, alleging that Complainant was denied access to a place of public accommodation (a highway) on account of Respondent's actions, on the basis of her handicap, in violation of M.G.L.C.272, §98. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified to public hearing. A public hearing was held before me on September 21, 2010. Leon Glasman and Brian Lewis testified at the public hearing. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

¹ Formerly known as "MassHighway"

II. FINDINGS OF FACT

1. Leon Glasman and his wife Anna have owned the home located at 389 Main Street (Route 27) in Sharon, Massachusetts since May 31, 2003. At the time of the public hearing, the Glasmans were separated and Mr. Glasman has resided in Worcester, MA since August 2010. Anna Glasman and their two children continue to reside at the premises at 389 Main Street, Sharon.

2. The Glasmans' daughter Julia Glasman is the Complainant in this matter. At the time of the public hearing, she was 14 years old. Complainant suffers from several disabling conditions, including chromosome deletion disorder, brain palsy and osteocondrosis. She has the developmental capacity of a three-year-old and is wheelchair bound. She is able to manipulate her wheelchair on flat surfaces, but she has always needed assistance going up an inclined surface. She is learning how to use a power wheelchair.

3. On or about August 9, 2003, the residents of Sharon were notified that Route 27 was to undergo reconstruction beginning in the winter of 2003-2004. The five mile project included the entire length of the town of Sharon. The project was to be overseen by Respondent, which hired the builders, modified the design when necessary and was responsible to ensure that the project conformed to all state and federal standards.

4. The Glasman home is a split-level ranch on a one-acre parcel of land that sits about 70 feet from Route 27. At the time of purchase, the upper level of the home was well below the grade of North Main Street, resulting in less than ideal driveway access to North Main Street. (Ex. C-18) Leon Glasman testified that they chose the home because it was wheelchair accessible. At the time of purchase, the home at issue had a partially

completed first floor containing two rooms: a playroom/family room and a room that would become Complainant's bedroom, a project that Glasman worked on over time. The ground floor was adjacent to a garage at the bottom of a relatively steep horseshoe shaped driveway. Complainant was able to be wheeled directly into the house from the driveway and garage.

5. The driveway had two entrances on Route 27, the left or "north apron" and the right or "south apron." The Glasmans could push Complainant in her wheelchair from the garage, via the south apron, up to Route 27.

6. Complainant attends the Massachusetts Hospital School and is transported to and from school by a van. Prior to the road re-construction on Route 27, the van picked her up at the bottom of the driveway.

7. On April 22, 2004, Glasman signed a "Right of Entry" allowing the town of Sharon to enter the Glasman property in connection with the reconstruction of Route 27. The "Right of Entry" stated that the town might have to reconstruct the existing driveway aprons to match the new street grade, including the installation of driveway pavement to transition from the new street grade to the existing driveway grade. (Ex. C-4) Glasman understood that Route 27 would be raised or lowered.

8. Reconstruction of Route 27 did not begin until 2005. Brian Lewis, a long-time employee of Respondent, took over supervision of the project in the summer of 2005. Reconstruction of the stretch of road contiguous to Complainant's property was begun in the fall of 2005. When Lewis took over supervision of the project, workers were performing drainage and utility work underground in the area of Complainant's property. Physical work began on the roadway in October, 2005.

9. Lewis testified that in order to comply with federal and state safety guidelines, roads require certain “sight distances” which allow drivers to safely see over the crest of hills and around corners. The Glasman home was located on a stretch of road near a tight corner and a steep hill that did not meet sightline requirements. This required construction of a steeply banked curve in front of the Glasman property, something the original road reconstruction design had failed to take into account. In order to comply with federal guidelines, the design was changed during construction and the roadway was raised in front of the Glasman property; at the south entrance the road was raised by 28” and at the north entrance it was raised 30”. Respondent temporarily graded the south gate, with a slope of approximately 25% at the south entrance, but the north entrance was a “sheer drop off” to the driveway.

10. Glasman testified that upon arriving home from work one day in July 2005, he discovered that the road had been raised and there was a drop from the road to his driveway. (Ex. C-5; C-6) He testified that after this construction, the driveway was accessible only by use of the Glasmans’ four-wheel drive vehicles. According to Glasman, this caused an unacceptably steep pitch for the aprons connecting the Glasman’s driveway to the street. I credit his testimony, but since construction did not begin until October 2005, I find this did not occur in July.

11. Glasman testified that he visited Sharon’s public works Superintendent Hooper, and in October and November 2005, he wrote to town officials informing them that nothing had been done to rectify the situation on his property. (Ex. C-6; Ex. C-7; Ex.C-8; Ex. C-9) In the letters, Glasman mentioned that because of his daughter’s disabilities, she could not traverse the gap between the driveway and the road.

12. Lewis learned of the Glasmans' concerns about the driveway through an email the first week in November, 2005 but he had also been informed by a project foreman to take a look at the Glasman property, where the road had been raised. In November 2005 Lewis went to view the Glasman property and Mr. Glasman happened to be in the yard. Lewis told Glasman he realized there was an issue and he would look into it. Lewis testified that the slope of the driveway was already quite steep and the fill that was placed at the driveway had raised the slope.

13. In November Lewis and a coworker measured the Glasmans' driveway. At this time, Glasman did not raise the issue of Complainant's access to the road with Lewis. Therefore, Lewis was not aware of this issue and did not consider it in trying to establish a fix for the driveway.

14. In November, with Glasman present, Lewis and town officials placed poles and string lines along the driveway. In mid-November 2005, Lewis wrote Glasman a letter proposing to regrade the driveway at 13% at the south entrance and 9% at the north entrance.

15. On December 1, 2005, prior to the contractor beginning the regrading, Lewis took measurements of the driveway heading towards the street. At that time, the highest grade at the south side was 15.1 and the highest grade on the north side was 7.0 (Ex. R-1;R-2)

16. On December 1 and 2, 2005, the contractor excavated and regraded the Glasmans' entire lower driveway according to the proposal. This fix was made within 1 ½ months after the construction in 2005. By Christmas 2005, the project was completed

up to the “binder,” meaning all that was left was to put a top on the entire project that was 1 to 1 ½ inches deep and would not change the grade in any measurable way.

17. Glasman testified that the steep slope of the reconstructed driveways bars Complainant from accessing Route 27 in her wheel chair on her own. It is also extremely difficult to push her wheelchair up the steep slope.

18. In July 2006, Glasman wrote to Respondent’s district director about the matter. (Ex.C-9; C-10)

19. Lewis testified that Glasman contacted the town in early summer 2006 with complaints about water coming into his basement and about the contractor’s failure to replace plantings after the project was completed and failure to top off the driveway.

20. Lewis testified that in October 2006, he and others met at the Glasman property regarding Complainant’s wheel chair access. As a result of that meeting, in February 2007, Respondent made a written proposal to redo the driveway with a slope of 13% at the south entrance and 7.5% at the north entrance. Glasman rejected that proposal.

21. In 2007, Glasman hired an architectural firm and an engineering firm to survey the situation and make recommendations. In September 2007 the architectural firm made a report without taking its own measurements of the driveway. (Ex.C-18) These measurements of the property were not taken until 2008. The architectural firm put forward four proposals in order to make the driveway ADA compliant: (1) raise the house and driveway 46-inches to restore the status quo; 2) fill the ground floor level and build another floor above the current top floor of the house; 3) build a garage level to the top floor of the house and the roof and connect it with a gallery to the top floor of the

house; 4) demolish the house and build a new one. Glasman testified that he did not take the fourth option seriously.

22. Lewis testified that he considered the proposals made by the architectural firm to be extreme and too costly.

23. Lewis returned to the property in January 2008 and took measurements from the driveway. The driveway is steep close to the street and flattens out as it proceeds down to the house. The grade at the south entrance was 24.9%; at 5 Ft. it was 16.5%; at 10 Ft. it was 13.3%; and at 15 Ft. it was 10.4%. The grade at the north entrance was 18%; at 5 Ft. it was 8.0%; at 10 Ft. it was 9.7%; at 15 Ft. it was 10.3%, at 20 Ft. it was 8.2%. (Ex.R-10; Ex. R-1 1) On the driveway to the garage the grade was 14.9%

24. In November 2009, Respondent offered to lower the driveway back to its original grade of 9%, which was as it had existed prior to the reconstruction, and had permitted Complainant access to and from the house to the street. As part of this proposal, the south entrance to the driveway would have had to be closed, and a very flat area from the lower driveway to the front door would have been created. Glasman rejected that proposal as well, because he had concerns about the safety of exiting and entering via the north apron due to the sharp angle of the road. Lewis testified that those concerns could have been resolved through alterations.

25. Respondent covered two steps in the front driveway at the property and built a new concrete driveway. Respondent also built a stone retaining wall in order to reduce the slope of a semi-circle grass island.² (Ex. R-15)

26. The Glasmans have filed an eminent domain case against Respondent and others in Norfolk Superior Court charging an unlawful taking of their land as a result of

² It is not clear from the record when the retaining wall and concrete walk were built.

the Route 27 reconstruction project. (Docket No. NOCV2009-01050) That matter has not yet been adjudicated and is still pending.

27. Glasman testified that prior to the reconstruction in 2005, Complainant was able to navigate up the driveway in her wheel chair with assistance and a school van or car could reach the garage level at any time of year. Since the reconstruction, the van will not come down the driveway in rain and in winter weather. On those occasions, Glasman or a housekeeper has to carry Complainant up the driveway to the road to meet the van. (Ex. C-20) Glasman was unable to push the wheelchair up the driveway,³ but others have been able to do so.

28. According to Lewis, the new sidewalk in front of the Glasman property is ADA compliant. Despite its many proposals to make alterations to the Glasmans' property to remedy the situation, Respondent asserts that it had no obligation to make the apron and the driveway, which are private property, ADA compliant.

29. Complainant was not present at the public hearing and there was no testimony about emotional distress suffered by her or the family as a result of Respondent's actions.

III. CONCLUSIONS OF LAW

Leon Glasman has alleged on behalf of his daughter that Respondent's regrading of Route 27 which raised the roadbed adjacent to his property and Respondent's failure to correct the situation constitutes discrimination in a place of public accommodation because it limits his daughter's access to the public highway. He contends that Respondent's actions violated M.G.L. c. 272 § 98, which provides, in relevant part: "Whoever makes any distinction, discrimination or restriction on account of...any

³ It appears from the record that others could push Julia up the driveway.

physical or mental disability....relative to the admission of any person to, or his treatment in any place of public accommodation...as defined in §92A, or whoever aids or incites such distinction, discrimination or restriction...shall be liable to any person aggrieved thereby for such damages as are enumerated in §5 of chapter 151 B.” A public highway is a place of public accommodation. M.G.L.c. 272 sec. 92A.⁴

In this case, Respondent supervised a project involving regrading of a five mile stretch of Route 27 in Sharon, Massachusetts. The road is owned by the Town of Sharon. In the course of the project, Respondent raised the roadbed which abuts Complainant’s home in order to comply with state and federal safety regulations regarding “sight lines.” This resulted in an increase in the slope of Complainant’s driveway, which Glasman contends, restricted her access to the public highway. Glasman alleges that a van that takes Complainant to and from school can no longer access the bottom of the driveway in winter weather and that it is more difficult for her to get up the driveway. He also alleges that the increased slope caused water damage to the bottom level of the home. In response to these complaints Respondent regraded the driveway, installed a retaining wall and a new front walk, and has since made at least two proposals to regrade the driveway again that have been rejected by Glassman. Mr. Glasman remained unsatisfied with the alterations and Respondent’s proposals and retained an engineering firm that recommended several extraordinary and exceedingly costly remedies, including razing the home and rebuilding it. Respondent responded that none of these remedies was feasible and all were exceedingly cost prohibitive. In addition, the Glasmans filed an

⁴ Complaint also alleged violations of the Americans with Disabilities Act (“ADA”) a statute far broader in scope than c. 272 §98. I previously ruled that this Commission has no jurisdiction over ADA claims as the relate to public accommodations and therefore would consider only whether the Commission has jurisdiction over this matter under c. 272 sec. 98A and if so, whether Respondent has violated that statute.

eminent domain/taking lawsuit against Respondent in Norfolk Superior Court, which remains pending. Having considered all the facts in this matter, for the reasons stated below, I conclude that this Commission has no jurisdiction over this matter.

The Massachusetts public accommodation statute, MGL c. 272 s. 98 prohibits any distinction, discrimination or restriction on account of....any physical or mental disability....relative to the admission of any person to, or his treatment in any place of public accommodation. This Commission has adjudicated numerous public accommodation cases involving handicap discrimination. In many of these cases, the respondent deliberately refused to admit or provide services to a person *because of* the handicap of the individual seeking service. Lombardo v. Rendezvous Restaurant and Lounge, 24 MDLR 250, 251 (2002); (Respondent restaurant unlawfully refused entry to restaurant patient with seizure disorder); Lowe and Craft v. Frank's Place, 16 MDLR 1478, 1480 (1994) (wheelchair bound quadriplegic and his friend unlawfully refused entry to tavern) In certain situations the Commission has held that Respondents must grant an accommodation to a disabled person, where its policy or practice results in a denial or restriction of access to a disabled person. See, e.g. Poliwczak v. Mitch's Marina and Campground, et al, 33 MDLR 133 (2011) (Respondent obligated to provide handicapped complainant with a parking space close to campground, absent sufficient evidence of safety issue or undue hardship.) In this matter, Respondent managed a highway reconstruction project that included raising the public roadway which resulted in a change to the grade of the Glasmans' *private driveway*, creating difficulties with access to the street for Complainant. It is clear that raising the roadway was not intended to deliberately create an obstacle for Complainant, but was done for the legitimate purpose

of complying with federal and state safety regulations regarding drivers' sightlines on Route 27. Respondent did not treat Complainant differently in a place of public accommodation or deny her access on account of her disability. The result of the construction project was an unfortunate limitation of her access to the public roadway, which Respondent has attempted to correct. What Glasman seeks on behalf of his daughter is an accommodation to his private property that would cure any such limitation and restore the prior ease of access to the roadway. While plead as a denial of access to public accommodation claim, it is clear from the record that Glasman is alleging that his private property has been unlawfully taken, that Complainant's use of that property has been limited, and that the value of the property has been diminished, as a result of a public works project. I conclude that this is not a claim of discrimination within the meaning and intent of the public accommodations statute, because matters alleging the unlawful taking of property are not within the purview of this Commission. That is not to say that Complainant is without remedy or recourse for the unintended and unfortunate result of this public action. This claim sounds more in the nature of an unlawful taking of property, for which there is a statutory remedy which includes the provision of damages for the taking by eminent domain. See, generally, M.G.L.c.79. The Glasmans have pursued those statutory rights and remedies by filing an eminent domain/taking case against Respondent and others with respect to the reconstruction project. That matter is pending in Superior Court. Because I conclude that the Commission has no jurisdiction in this matter, the complaint is hereby dismissed.⁵

⁵ Even if one were to conclude that the Commission has jurisdiction over this matter, which I do not, and even if Respondent were found to have a duty to accommodate Complainant's disability, the record supports a conclusion that Respondent has fulfilled that duty by offering several reasonable accommodations, including returning the driveway to its original grade. Glasman rejected all such offers

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 2nd day of December 2011.

JUDITH E. KAPLAN,
Hearing Officer

of reasonable accommodation, and sought accommodations involving reconstruction of the Glasman property that were unreasonable and financially exorbitant.