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Camp-robber, Rocky Mountain National Park. Photograph by Charles W. Pike

IN THIS ISSUE:

The ADA and Privately Owned Historic Facilities

by Casey Frank

Colorado contains many privately owned historic facilities that are a cherished part of the state's cultural heritage. At the same time, Coloradans aspire to make their facilities accessible to people protected by the Americans With Disabilities Act ("ADA"), including the estimated 30,000 who use wheelchairs in Colorado.[1] Disabled people want to be woven more fully into the fabric of society. Preservationists want to resist the impairment of venerable building treasures. This article discusses the issues involved in reconciling these competing values.

Background

Although the ADA prohibits discrimination against persons with disabilities, privately owned historic facilities are accorded special status by Title III of the ADA[2] in order to balance the competing values of disabled access and historic preservation. Historic facilities are not completely exempt from the ADA as are private residences, religious entities and private clubs.[3] Because of its exemption as a religious entity, for example, no ADA requirements were triggered when extensive restoration of the Cathedral of the Immaculate Conception in Denver was undertaken in the 1990s.

The presumption is that historic facilities will normally comply with the ADA just like others must.[4] However, although a proposed change may be required under the general principles of the ADA, if such change would "threaten or destroy the historic significance" of a facility, alternative and less onerous solutions may be sought.[5]

Unlike privately owned historic facilities, government-owned facilities and their public functions are covered under a different section of the ADA and are held to a significantly different standard.[6] While ADA modifications to private property must comply with the ADA Accessibility Guidelines ("ADAAG"),[7] state and local governments may follow ADAAG or the Uniform Federal Accessibility Standards ("UFAS").[8] An analysis of the application of the ADA to governmental facilities is outside the scope of this article.

To understand how privately owned historic facilities are treated under the ADA, it is essential to first review the general ADA principles that apply, because the special historic provisions are only invoked subsequent to that analysis. Determining the status of a facility under the ADA and applying the general ADA requirements and qualifications may yield a set of preliminary, proposed actions. Only then can any proposed actions be scrutinized for their effect on the historicity of the facility. An overview of these general ADA requirements recently appeared in *The Colorado Lawyer*.[9]

Threaten or Destroy Historic Significance

Unlike the general ADA principles—which apply to the *party* (owner, tenant or manager of the facility)—the special provisions of the ADA pertaining to historic facilities apply to the *place*. These provisions are employed in the context of a facility's physical characteristics.

The special provisions apply only to a facility that is on the federal National Register or that is an explicitly designated state or local landmark.[10] Even if the facility in question is lovely and old, if it has never been formally designated as a landmark, the special provisions are inapplicable. Inclusion on the National Register is controlled by federal law.[11] Colorado has a similar Register of Historic Places. Those properties are defined by state statute.[12] Many municipalities pass ordinances that similarly designate historic districts or buildings.[13]

An historic district may contain facilities that have several different designations. For example, in Denver's Lower Downtown Historic District, there are important contributing facilities within the district that are subject to the district's preservation guidelines, such as Union Station. There are also more recently built noncontributing facilities, such as the Guaranty Bank Building, that are not of such special character. Although located within the boundaries of the historic district, the latter facili-

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ties are not considered landmarks subject to the district's guidelines. In addition, there are facilities that are Denver Landmarks—individually—and facilities on the National Register, all within the same district.[14]

If a facility falls within the scope of one of the categories that confer landmark status, the threshold question becomes whether the proposed modification would "threaten or destroy the historic significance of the building or facility."[15] If not, the building must comply with ADAAG as other buildings must.[16] However, if the proposed modification would be potentially damaging, there are special procedures to follow.

Approvals

The determination that ADA compliance would be a threat to a landmark is not a private one. The owner, tenant or manager of a privately owned historic facility must consult with the appropriate authority to seek approval for a proposed building modification. The authority with whom such person consults depends on the type of landmark involved. If the facility is on the National Register, approval for any exemption from normal ADA provisions must be obtained from both the responsible federal agency and the Advisory Council on Historic Preservation or State Historic Preservation Officer ("SHPO").[17] If the facility is a state or local landmark, approval must be obtained from the SHPO alone.[18]

However, the SHPO can designate the decision-making authority to a "certified local government" that meets state and federal standards.[19] Denver is a certified local government, and the SHPO has informally delegated its approval process to the Denver Commission for People with Disabilities ("Commission").[20] Although the U.S. Department of Justice apparently favors a more formal delegation,[21] the present approval path in Denver is through the Commission. In other communities, the SHPO may still wield authority exclusively.

This delegation of authority is different from formal local-code certification under the ADA, whereby the U.S. Attorney General may certify that a local code meets or exceeds all ADA Title III requirements. Such certification would provide permit-seekers with rebuttable evidence that they have complied with the ADA if they have complied with the local code.[22] While no state has been certified yet, four states and New York City have requested certification.[23] If they obtain it, they would have the convenience and clarity of one-stop permit shopping.

Generally, there is only a narrow basis for obtaining exemption from general ADA requirements.[24] As a practical matter, the burden is on the facility owner, tenant or manager to prove the threat to the historic facility that would result from ADA compliance. He or she may submit photos, drawings (including elevations) and a written explanation that demonstrates prior consultation with disabled groups, accessibility officials and historic officials.

"Unlike the general ADA principles—which apply to the *party*—the special provisions of the ADA pertaining to historic facilities apply to the *place*."

Incidentally, tax incentives that are available for the substantial rehabilitation of historic facilities on the National Register[25] can probably be obtained for work required for ADA compliance. Requests are made through the SHPO, and certifications are issued by the National Park Service.

Special Historic Provisions

If the owner, tenant or manager of a privately owned historic facility can convince the appropriate authority that the modifications that are being demanded are indeed a threat to the historic fabric of the facility, the facility will be exempted from full compliance with ADAAG. However, this does not confer a blanket exemption from the ADA. If feasible, minimum ADAAG requirements must still be met.[26] These standards are less demanding than full ADA compliance, but are still significant. In brief, they include:

- at least one wheelchair-accessible route to the facility's entrance;
- at least one accessible public entrance or one accessible separate entrance;
- one unisex accessible toilet (if they are otherwise available);
- access to entrance-level public spaces;
- access to all levels, if practical; and
- signage at seated level, not higher.

Accommodating the ADA requirements may be the result of a settlement agreement among a complainant, the Department of Justice and a building owner. For example, the Granite building in historic Larimer Square in Denver met its ADA requirements through creative design and compromise. At the corner entrance, a wrap-around ramp has provided access with minimal disruption of the lines of the building or sidewalk traffic.[27] A related solution has been proposed for the historic Brown Palace Hotel in Denver, using a secondary entrance on Seventeenth Street. However, because the main entrance would still be inaccessible under this proposal, negotiations are ongoing among the U.S. Department of Justice, the building owner and the complainant.[28]

The Cousin's Ranch Museum, in Frazier, Colorado—a converted 1874 ranch house—provided access to its porch and entrance by means of a long, gentle ramp. This was actually an overall functional asset, which directed traffic and reduced mud and snow problems. It was a pre-ADA solution, but one that addresses the same issues.[29]

The Temple Events Center in Denver—a national and local landmark built in 1899—negotiated a solution with the appropriate authorities and the Colorado Cross-Disabilities Coalition before a formal complaint was filed. One accessible entrance—serving most of the interior—was created through the use of unobtrusive sidewalk grading. Another compromise was reached to preserve as much as possible of the building's prominent, interior oak paneling by allowing the use of a home-sized elevator instead of the much larger one normally required by the building code.[30] A collaborative solution such as this is highly desirable.

If compliance with even these minimum ADAAG standards is not feasible,[31] alternative remedies, such as changed policies and auxiliary aids,[32] must be used. These alternatives might include:

- home delivery service by an inaccessible store;
- rotating all movies from an inaccessible multiplex cinema into an accessible one;
- retrieval of inaccessible merchandise by clerks; and
- partial accessibility in a store or restaurant.

For example, the high stone entry steps make accessibility to the historic Molly Brown House in Denver extraordinarily

difficult without considerable modification to the facility. As an alternative, the House produced a video tour of the interior. The video is available for viewing in the rear Carriage House—which is wheelchair accessible—by those people who are excluded from the main facility.[33] This is a model alternative remedy.

Conclusion

The intersection between the drive to provide disabled access and the drive to preserve landmarks has no clear traffic signals. Consequently, disputes are inevitable. One New Jersey court invalidated administrative rules granting a blanket exemption to historic facilities from compliance with that state's handicapped access law. The court held that the regulations exceeded the scope of the enabling statute and that the statute lacked "objective, reasonable standards to control exemption."[34] The court favorably contrasted the ADA with the state law. However, future litigants may challenge the ADA for lack of specificity similar to the New Jersey laws.

A LEXIS search revealed that there are apparently no reported appellate cases based on the ADA itself in this context. However, controversy and settlement continue in other forums. For example, the famous Empire State Building in New York City recently was the object of a $1.8 million settlement agreement with the U.S. Department of Justice to ensure ADA compliance.[35] The ADA attempts to ensure access to historic facilities, while simultaneously honoring the nation's architectural heritage. As a result, both passionate advocates for the disabled and for preservation may feel dissatisfied. Such is the art of compromise in our pluralistic society.

NOTES

1. Germer, "Unlimited Access," *Rocky Mountain News* (Aug. 18, 1994) at 3D. For pre-1994 articles about the ADA, see the listing under "Americans With Disabilities Act" in the five-year Article Index published in the December 1993 issue of *The Colorado Lawyer* at page 2715; also see Carr, "Effects of the ADA on Licensing and Regulation of Professionals," 23 *The Colorado Lawyer* 343 (Feb. 1994); Lower, "The Americans With Disabilities Act: Regulations, Technical Assistance Manual and Developing Case Law," 23 *The Colorado Lawyer* 804 (April 1994); Passaglia, "Appearance Discrimination: The Evidence of the Weight," 23 *The Colorado Lawyer* 841 (April 1994); and Norton, "The ADA: A Trap for Unwary Building Owners," 23 *The Colorado Lawyer* 1293 (June 1994).

2. 42 U.S.C. § 12181 *et seq.*

3. 28 C.F.R. §§ 36.102(e), 36.104—Definitions of Commercial Facility, Place of Public Accommodation, Private Club and Religious Entity.

4. ADA Accessibility Guidelines ("ADAAG") 4.1.7(1), 56 F.R. 35544 (July 26, 1991).

5. *Id.*

6. ADA, Title II, 42 U.S.C. § 12115 *et seq.*, and 28 C.F.R. § 35.150.

7. ADAAG 4.1.7(1)(a).

8. 42 U.S.C. §§ 4151-4157; 49 F.R. 31528 (Aug. 7, 1984).

9. *See* Norton, "The ADA: A Trap for the Unwary Building Owner," 23 *The Colorado Lawyer* 1293 (June 1994).

10. 28 C.F.R. § 36.405.

11. 16 U.S.C. § 470a *et seq.*

12. CRS § 24-80.1-101 *et seq.*

13. For example, Denver had twenty-two historic districts as of October 15, 1993, in addition to numerous individual historic facilities. A current list of historic districts is available from the Planning and Community Development Office, City and County of Denver, 200 W. Fourteenth Ave., Denver, CO 80204.

14. City of Denver Ordinance No. 109, enacted March 9, 1988.

15. ADAAG 4.1.7(1)(a).

16. *Id.*

17. ADAAG 4.1.7(2)(a)(i), (ii).

18. ADAAG 4.1.7(2)(b). The SHPO in Colorado is James Stratis, (303) 866-4678 or (303) 894-2539 in Denver.

19. ADAAG 4.1.7(2)(d).

20. The current director is Frank Nelson, (303) 640-3056 in Denver.

21. Telephone conversation with attorney Bebe Novich, U.S. Dept. of Justice (Oct. 10, 1994); (202) 616-2313.

22. 28 C.F.R. § 36.601; U.S. Dept. of Justice, Title III, Technical Assistance Manual ("TAM") III-9.0000.

23. "Enforcing the ADA: A Status Report from the Department of Justice," § III (May 1994), available on the U.S. Dept. of Justice ADA Information Line (electronically) at (202) 514-6193.

24. U.S. Dept. of Justice, ADA Handbook, Title III at III-141.

25. 36 C.F.R. § 67.

26. ADAAG 4.1.7(3).

27. For information, contact Susan Spencer, Larimer Square Management, 1429 Larimer St., Denver, CO 80202; (303) 534-2367.

28. For more information, contact attorney David Moseley, Moseley & Standerfer, (214) 521-3400, or the architect, Ron Birkey, The Birkey Design Group, 1121 Grant St., Denver, CO 80203; (303) 832-3227.

29. For information, contact Kathy Hoeft or Gary Long, Long Hoeft Architects, (303) 893-9516.

30. For more information, contact Marcia Johnson, Executive Director, Temple Events

Center, 1595 Pearl St., Denver, CO 80203; (303) 860-9400.

31. 28 C.F.R. § 36.405(b).

32. 28 C.F.R. § 36.305.

33. Telephone conversation with Molly Brown Museum Director Steve Friesen (Sept. 23, 1994); (303) 832-4092.

34. *D.I.A.L., Inc. v. N.J. Dept. of Community Affairs*, 603 A.2d 967, 975-77 (N.J. 1992).

35. Gruson, "Getting to the Top of Empire State: Opening the Way for the Disabled," *The New York Times* (March 4, 1994) at A12.

TWO CRLS OFFICES ARE SEEKING STAFF ATTORNEYS! SEE PAGE 2728.

A Letter to All CBA Members

by Diane Hartman
CBA Director of Communications

Have you ever had a toothache? I'll take a wild guess that your top priority was getting to a competent dentist. I'll also assume you didn't care if he or she painted houses for the poor.

When we talk about the "image" of attorneys, this analogy may be helpful.

Attorneys probably aren't under attack because the general public isn't aware of their good deeds. Lawyers are much in evidence as board members and civic leaders. That's just what educated, well-informed and right-thinking people do.

The image, good or bad, of attorneys has to do with what they do as attorneys every day.

We used to think that the best public relations policy was to tell people about the good things lawyers do; this was called the "reservoir of good will" theory. That is, if you painted enough houses for the poor and then you did something unattractive, everyone would think it all balanced out somehow, and you would be forgiven by the public.

This theory actually doesn't make much sense, and we've decided not to put a lot of energy into it.

Members sometimes wonder, though, why their *pro bono* project wasn't in the papers.

Just the other day, a newspaper editor reminded us that planes taking off successfully aren't news. And, as we said, lawyers helping in the community or donating their time to the poor aren't out-of-the-ordinary situations. Like it or not, the definition of "news" is the aberration, the unusual, the unheard of, the offbeat.

Take the summer law internship program in Denver this past summer, for example. A committee of DBA bar leaders shepherded this program, where nearly thirty "at risk" teens worked at law firms all summer. Meetings were held for the teens each Friday, and they were instructed about the world of work—how to dress, manners; in general, how professional people work and excel. We were a segment in a program going on across the city.

This was a sacrifice for the firms in terms of time, money and energy. Certainly, someone felt it was an investment in the community and well worth the extra efforts. No one said "Let's do it for the publicity," but at some point, there was the hope that the public might see lawyers contributing to the community.

Channel 4 in Denver did show some teens working in our program at Sherman & Howard. But neither daily Denver newspaper was interested. As you might expect, lots of organizations were trying to prevent another summer of violence and had turned their attentions to our youth. The papers featured what they considered the most interesting of these, for obvious reasons.

While we may have been disappointed, the program served its purpose and the organizers considered it a big success. They're already working on next summer's program. It's a good deal for everyone—but it's not news.

We've decided to use our energies in another way, and I'd like to tell you why. We've found that what the Communications Department can do most effectively is try to get accurate information about the legal system to the media.

We do this in several ways:

1) We send a Rolodex® card with our WATS line number to reporters throughout the state. If they need background information for a story, an explanation of a court proceeding, etc., we try to put them in touch with a lawyer who can help. We often ask the chairs of various sections to talk with reporters.
2) The *Legal Lines* column goes to about ninety-five newspapers in the state, and is printed by about fifty. We try to put helpful legal information into a short, interesting format, and we take and answer questions from readers.
3) We hold press briefings for reporters on legal topics that may be new or confusing or controversial. In the past several years, we've held briefings on Amendment 2, the release of juvenile names during arrest and charges, access to records and the juvenile justice system. We hope to hold a lot more of these in the future.
4) As our president travels around the state, she has visited with reporters and editors in each town to talk about legal issues. We make contacts at the newspaper and tell them to call the CBA any time they need information.
5) We belong to and are active in the Colorado Bar/Press Committee, a forum for solving problems between the bar and the press.

Getting helpful information to reporters should make what they write more accurate. Then, the public will be able to see and better understand the legal system and what you, as lawyers, do.

Diane Hartman is a former writer and editor at three daily papers and has taught journalism at two universities.