

Gause, John P

From: Gause, John P
Sent: Tuesday, March 30, 2010 2:14 PM
To: Davis, Fran
Cc: Ryan, Patricia
Subject: FW:
Fran,

I see three questions here.

First, does the Town's repair work—replacing rotting window frames, paint, emergency lighting, nothing structural—trigger any requirement regarding an accessible route? It does not appear so based on Eric's assessment. In order for that obligation to be triggered, there must be an "alteration," which is defined as a change that affects or could affect the usability of the building. *See* 5 M.R.S.A. § 4594-F(1)(A). Our accessibility regulations provide, in part, that "[n]ormal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical systems are not alterations unless they affect the usability of the building or facility." MHRC Accessibility Reg. § 7.01. It appears that what the Town is doing is normal maintenance. If it were determined to be an alteration, however, assuming the work is less than \$100,000, they would have the 20% path of travel obligation. *See* 5 M.R.S.A. § 4594-F(3)(B)(3); MHRC Accessibility Reg. § 7.27(F)(1).

Second, does the Town, which has a program access obligation, have to provide program access to the two private businesses located on Town property by virtue of the fact that the Town is renting the property to them? I do not think so. The program access obligation requires access to the "services, programs or activities of a public entity." 5 M.R.S.A. § 4592(1)(E) (emphasis added). Here, the dance studio and the Historical Society are private entities. They do not become public entities simply by virtue of the Town renting space to them. Although not directly on point, the Title II and Title III ADA Technical Assistance Manuals make clear that a Title II public entity does not become a Title III public accommodation, or vice versa, merely by virtue of the public entity leasing space to the private entity. *See* Title II Technical Assistance Manual, II-1.3000 Relationship to title III; Title III Technical Assistance Manual, III-1.7000 Relationship to title II.

Third, who is responsible for complying with the readily achievable barrier removal obligation? I think that only the private entities are responsible. Although both public and private entities are public accommodations under the MHRA, 5 M.R.S.A. § 4553(8); and although our regulations make clear that both a landlord and a tenant are subject to the regulations, MHRC Accessibility Reg. § 7.02(B); and although the regulations state that a "public accommodation" must meet the readily achievable barrier removal obligation, MHRC Accessibility Reg. § 7.18(A); the plain language of the statute provides that the readily achievable barrier removal obligation only applies to "private entities." *See* 5 M.R.S.A. § 4592(1)(D). I think the plain language of the statute will control here.

In sum, assuming the Town's current repairs will not and could not affect the usability of the building, the repairs will not trigger an obligation for the Town to make the Grange accessible. With respect to the use of the Grange as a dance studio and Historical Society, the private entities—not the Town—have an ongoing obligation to remove architectural barriers where "readily achievable."

With respect to _____'s other questions, the MHRA does not prohibit the Town from leasing existing inaccessible space to a private public accommodation, although the private public accommodation will need to comply with the readily achievable barrier removal obligation. With respect to a possible historical listing, the only significance would be that the private entities would only be required to remove barriers to the "maximum extent feasible" and in a manner that did not threaten the historical significance of the building. *See* MHRC Accessibility Reg. § 7.29.

John

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From:
Sent: Mon 3/29/2010 12:03 PM
To: Davis, Fran
Cc: Gause, John P
Subject:

Fran,

Q: How much obligation does a town have to remove barriers in a facility it leases to private entities who operate public accommodations in the facility, when the cost of barrier-removal is an undue burden on the town?

The Town _____ owns a Grange Hall next door to the Town Office but not connected to it. The Grange entrance is one step up, but inside the door there are ten stairs to the upstairs and to the downstairs. This two-story building houses a private dance studio upstairs and the _____ in the finished basement. Restrooms are only on the upper level.

The Town is doing some repairs -- replacing rotting window frames, paint, emergency lighting, nothing structural -- and they asked me about their obligation to make accessibility modifications. My understanding is the nature of the work they are doing on the building does not, in itself, trigger any requirements to provide an accessible route. (Correct me, if that is not true.)

My understanding is that private entities who use the facility are obligated to remove barriers only to the extent it would be readily achievable. It seems arguable that accessibility solutions would not be readily achievable. Potential accessibility solutions are an elevator in a shaft able to serve all levels, a wheelchair lift that runs on the stairs to each level, and excavated or built-up ramps with a roof over them. Also, a restroom would need to be made accessible, which would entail minimal expense, but without providing access to the upstairs, there is no restroom available. These \$25,000-\$100,000 solutions are beyond the private organizations' resources.

For the Town, as well, the costs are too much to handle, which makes me think it is an undue burden for the Town to make the facility accessible. I am, however, referring them to the mPower Loan program and to Community Development grant funding, if they can get it.

Q: Does the Town have any obligation to provide an accessible route into the Grange Hall if the facility is used by other organizations? Is the Town allowed to lease out the inaccessible facility for use by public accommodations?

They mentioned that they will be seeking to get the Grange Hall onto the National Register of Historic Buildings, but I don't think that affects the question of whether or not to provide an accessible route.

3/31/2010

Thanks.