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CONFIDENTIAL – NOT A PUBLIC DOCUMENT

Hon. Charles G. Russo and
Members of the Select Board
Flynn Building
278 Old Sudbury Road
Sudbury, MA 01776

Re: Americans with Disabilities Act (ADA)

Dear Members of the Select Board:

You have requested an opinion regarding the applicability of Title II and/or Title III of the Americans with Disabilities Act ("ADA") to certain aspects of the Town-owned property known as "Sewataro". The Sewataro property is managed year-round by Camp Sewataro, LLC which also operates a private day camp during the summer months. When the day camp is not in session, limited public access on the Sewataro property is permitted, all pursuant to that certain "Contract for Day Camp Operator and Management of Real Property" by and between the Town and Camp Sewataro, LLC, dated as of September 10, 2019, as amended (the "Contract").

I will first provide a summary of Article II and Article III of the ADA and their applicability to Camp Sewataro, LLC (a private entity) and the Town being a public entity. Second, I will analyze whether the fact that Camp Sewataro, LLC provides scholarships to Sudbury residents affects the applicability of Title II or Title III of the ADA to Camp Sewataro, LLC's operations. Third, you have inquired whether the fact that Camp Sewataro, LLC is responsible for the management of the property and uses certain equipment owned by the Town pursuant to the Contract affects the applicability of Title II and/or Title III of the ADA to camp operations. Lastly, you have asked how Title II and/or Title III would apply to Town-sponsored events at the Sewataro property. These questions will be addressed in detail below.

1. Summary of Relevant Provisions of Title II and Title III of the ADA

A. Title II of the ADA

Title II of the ADA applies to "public entities" defined as: any state or local government, any department, agency, special purpose district, or other instrumentality of a state or local government; and commuter and intercity rail (Amtrak). 42 U.S.C. § 12131(1).

Title II of the ADA prohibits discrimination against any qualified individual with a disability. Discrimination includes outright exclusion from participation in, or denial of the benefits of, the services, programs, or activities of a public entity. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

Under Title II of the ADA, no otherwise qualified individual with a disability shall, on the basis of disability, be excluded from participation in a public program. A disability is defined as a physical or mental impairment which substantially limits one or more major life activities, and having a record of such impairment or being regarded as having such impairment. When Title II of the ADA applies, a public entity cannot discriminate against a qualified individual on the basis of their disability. Public entities are required to provide reasonable accommodations to qualified individuals seeking to access public programs.

In my further opinion, however, the obligation of public entities to provide reasonable accommodations to qualified individuals is not open-ended and is limited by the following factors. Under the ADA, a public entity does not have to make an accommodation if it will fundamentally alter the nature of the program or cause an undue financial or administrative burden. Enica v. Principi, 544 F.3d 328 (1st Cir. 2008); McDavid v. Arthur, 437 F.Supp.2d 425 (Md. D.Ct. 2006); 28 C.F.R. §35.150(a)(3). If challenged, it is the individual's burden to prove the accommodation is reasonable and necessary, and the party against whom the challenge is made may then raise as a defense that the requested accommodation would fundamentally alter the nature of the program or cause an undue financial or administrative burden. Id. I note that this requirement is analyzed on a case-by-case basis, but factors that are considered are the cost of the accommodation, the overall financial resources of the public entity, and the effect on expenses and resources. E.E.O.C. v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997).

The Department of Justice's Technical Assistance Manual ("TAM") provides guidance for complying with Title II of the ADA. The TAM recognizes that "in some cases it is difficult to determine whether a particular entity that is providing a public service, such as a library, museum, or volunteer fire department, is in fact a public entity." *See* Americans with Disabilities Act Title II Technical Assistance Manual, § II-1.2000 (https://www.ada.gov/taman2.html) and the New England ADA Center (https://www.adaactionguide.org/ada-title-ii-requirements). It lays out several factors to consider in such cases:

1. Whether the entity is operated with public funds;
2. Whether the entity's employees are considered government employees;
3. Whether the entity receives significant assistance from the government by provision of property or equipment; and
4. Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Applying the four factors above to Camp Sewataro's operation, in my opinion, factors 2 and 4

indicate that Camp Sewataro, LLC is not a public entity as its employees are not government employees, and the LLC is governed by members of a private organization. Factor 1 could only apply if significant concessions for payments were made to Camp Sewataro, LLC by the Town in connection with the Contract. I am not aware of any such concessions. With regard to Factor 3, while Camp Sewataro, LLC uses the Town's real property and certain Town owned personal property and equipment, Camp Sewataro, LLC pays significant consideration for such use and, therefore, in my opinion, it is unlikely that a Court would determine that Camp Sewataro, LLC receives sufficient assistance from the Town to make it a "public entity" for purposes of Title II of the ADA. *See Schwarz v. The Villages Charter School, Inc.*, 165 F.Supp.3d 1153, 1183 (M.D. Fla. 2016) (holding that Residential Life Groups that use municipal district facilities do not become "public entities" under Title II of the ADA because, in part, the Residential Life Groups did not receive funding from publicly assessed amenities fees).

Accordingly, based upon the facts presented, in my opinion, Camp Sewataro, LLC is not a public entity subject to Title II of the ADA. However, in my further opinion, the Town is a public entity, thus, to the extent the Town is offering programs at Sewataro, subject to the particular facts and circumstances presented, the Town will likely be subject to Title II and a facts and circumstances analysis will be needed in order to determine whether any reasonable accommodations are required for any person(s) with disabilities. However, a distinction can be made between Town-offered programs at Sewataro and programs and activities that are offered by Camp Sewataro, LLC, which will likely require compliance with Title III and not Title II.

B. Title III of the ADA

Title III of the ADA applies to "public accommodations."

A "public accommodation" is a "'private entity' that owns, leases (or leases to), or operates a place of public accommodation[, and] [i]t is the public accommodation, and not the place of public accommodation, that is subject to the [ADA's] nondiscrimination requirement." 28 C.F.R. pt. 36, app. C, § 36.104. A "place of public accommodation" is "a facility operated by a private entity, whose operations affect commerce" and fall within at least one of twelve categories. The statute itself contains several examples in each category, but these are merely examples, and each category is to be broadly construed: 9. Places of Recreation… Title III indicates that the categories "'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." The Court held that a professional golfer was entitled to protection against discrimination by a private entity—the PGA Tour—that leased and operated a place of public accommodation—a golf course. *PGA Tour, Inc. v. Martin*, 532 U.S. at 674-81; *see also Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-01 (D. Mass. 2012).

Title III of the ADA generally provides that:

No individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. *See* 42 U.S.C. § 12182(a).

This section implicitly requires a place of public accommodation to provide reasonable accommodation for those with a disability, including auxiliary aids and services, so that such individuals can participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations being provided. There is, however, a limitation on this obligation; that is where the accommodation would result in an undue burden, *i.e.,* significant difficulty or expense. *See id* . § 12182(b)(2)(iii); 28 C.F.R. § 36.303(a). See Kerr v. Heather Gardens Association, 2010 WL 3791484 (D. Colo. 2010).

As stated above, because Camp Sewataro, LLC is a private entity that operates the Sewataro property pursuant to the Contract, it will likely be required to provide reasonable accommodations under Title III.

C. Interplay of Titles II and III of the ADA

Coverage by either Title II or III of the ADA is mutually exclusive—an entity cannot be subject to both Title II and Title III. *See* Department of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual, II-1.3000 ("Technical Assistance Manual").

Federal Courts outside of the First Circuit have grappled with the issue of whether Title II or Title III applies to publicly owned land operated by a private entity. In the Kerr decision, the U.S. District Court for the District of Colorado framed the issue before the court as follows: "When all of the subject services, programs and activities were provided by the Association (private entity), acting separate and apart from the District (public entity), does the District remain obligated under Title II of the ADA?" Kerr, 2010 WL 3791484 at *7. The Court held that a public entity, who contracts with another entity to perform its duties, remains liable to ensure that the other entity performs those duties in compliance with Title II.

In a more recent decision, the U.S. District Court for the Middle District of Florida distinguished the Colorado District Court's reasoning in Kerr to a situation more analogous to Sewataro's operations, in my opinion. See Schwarz v. The Villages Charter School, Inc., 165

F.Supp.3d 1153, 1183 (M.D. Fla. 2016).

As noted by the Court in Schwarz, the DOJ regulations promulgated under the ADA address where a public entity is indirectly liable under Title II, providing that:

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability …[d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service[.] 28 C.F.R. § 35.130(b)(1)(I). Further, the appendix to this section of the Regulations explains that:

[T]itle II applies to anything a public entity does.... All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by [T]itle II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with [T]itle II's requirements. 28 C.F.R., Pt. 35, App. B.

In Lang v. Or. Shakespeare Festival Ass'n, No. 1:12–cv–01844–CL., 2013 WL 5944184 (D.Or. Oct. 31, 2013), a disabled plaintiff sued the Oregon Shakespeare Festival Association ("OSF"), a private non-profit company which operates the Oregon Shakespeare Festival, and the City of Ashland, under Title II of the ADA on the grounds that certain OSF facilities were not accessible. Lang, 2013 WL 5944184, at *1. The City argued that the plaintiff's complaint was due to be dismissed because "the mere fact that it rents lands to OSF does not make it liable under Title II of the ADA for the conditions of the Festival's facilities." Lang, 2013 WL 5944184, at *4. The court agreed, stating that "the Festival as a whole is not a service, program, or activity of the City[.]" Id.

In distinguishing the facts of its case from the Kerr decision, the Court in Schwarz noted that the Residential Life Group ("RLG") although operating on property owned by a public entity was not subject to Title II liability because, among other reasons, the public entity exercised no control over the RLGs nor did the public entity derive any income from the RLGs.

"Liability under this regulation must still hinge on the fact that the program, service or activity subject to the allegedly discriminatory "methods of administration" is a program, service, or activity of the public entity. Ultimately, the facts establish that while the Districts facilitate the formation and logistical functions of RLG programs and activities, the RLG programs and activities are distinct from those offered by the Districts themselves. As such, the Districts cannot be held liable for the RLG's alleged failures to accommodate with respect to the RLG programs, activities, and events." See Schwarz, 165 F.Supp.3d at 1182.

Similarly, it is my understanding that the Town does not play a role in oversight of the day-to-

day operations of Camp Sewataro. Accordingly, in my opinion, the reasoning of the Schwarz decision suggests that the Town would not be liable under Title II of the ADA for any violations of the ADA committed by Camp Sewataro, LLC in connection with its camp operation or for programs and activities that are made available by Camp Sewataro, LLC.

2. How does the fact that Camp Sewataro, LLC provides scholarships to Sudbury residents impact the applicability of Title II and/or Title III of the ADA?

In my opinion, the fact that Camp Sewataro, LLC provides scholarships to Sudbury Residents does not convert Camp Sewataro, LLC into a "public entity" for purposes of applicability of Title II or Title III of the ADA. Camp Sewataro, LLC is a "public accommodation" responsible for operating its camp in compliance with Title III of the ADA, in my opinion. On the other hand, the Town is a public entity subject to the requirements of Title II of the ADA. Accordingly, to the extent that the Town plays a role in distributing any scholarships from Sewataro to Sudbury Residents, the Town should do so in compliance with Title II of the ADA. However, in my opinion, if the camp operator is the party responsible for distributing the scholarships, the Town will not be subject to Title II requirements in connection with the distribution of the scholarships.

3. How does the fact that Camp Sewataro, LLC may host Town-sponsored events impact the applicability of Title II and/or Title III of the ADA?

In my opinion, to the extent that the Town sponsors events at Sewataro, the Town should ensure that such events comply with Title II of the ADA. There is case law holding that a municipality providing advertising and extra police services for a private event does not result in the municipality being liable for violation(s) of Title II at a privately conducted event. See Alford v. City of Cannon Beach, 2000 WL 33200554 at *21-22 (D. Ore. 2000) (holding events where City provided extra police and lifeguards and provided money to an information center which advertised them were not city services "even if the City [was] indirectly involved with the events.") Id. (stating "I fail to see how any of these three events is a City service, activity, or program when the City itself is not the actual sponsor, even if the City is indirectly involved with the events.") However, if the Town actually sponsors an event at Sewataro, arguably the Town may be subject to ensuring Title II compliance. Accordingly, in my opinion, the Town should be aware of the potential of applicability of Title II compliance when sponsoring any events at Camp Sewataro.

Very truly yours,

Alex Weisheit

A. Alexander Weisheit

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