City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Anthony Cotten
Complainant,
v.

Lou Mitchell's
Respondent.

Case No.: 06-P-9

Date of Ruling: December 16, 2009
Date Mailed: January 7, 2010

TO:

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FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on December 16, 2009, the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek a review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

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FINAL RULING ON LIABILITY

A. Procedural History

On February 16, 2006, Complainant Anthony Cotten filed a Complaint alleging that Respondent Lou Mitchell's discriminated against him based on his disability (paraplegia) in violation of the Chicago Human Rights Ordinance, Chicago Municipal Code Ch. 2-160, by failing to accommodate his disability when he ate at Respondent's restaurant on February 2, 2006. In particular, Complainant—who uses a wheelchair on account of his disability—asserts that he was denied access to the restaurant's restroom facilities because they are located on a lower level down a flight of stairs, and there was no elevator or wheelchair lift that Complainant could use to reach them. Respondent filed a Verified Response and an Additional Verified Response to the Complaint. On November 15, 2007, the Commission determined that there was substantial evidence that Respondent violated the Ordinance with respect to the disability discrimination claim alleged in the Complaint.

By its order dated June 4, 2008, the Commission set this case for an administrative hearing on September 17, 2008. Prior to the administrative hearing, each party filed a Pre-Hearing Memorandum. In its Pre-Hearing Memorandum, Respondent asserted: (1) providing wheelchair access to its lower level restrooms was not feasible for structural reasons; (2) it would suffer an undue hardship if it constructed a wheelchair accessible restroom on the main floor of the restaurant; and (3) it reasonably accommodated Complainant because one of its employees offered to carry Complainant down the stairs so he could access the restrooms and another employee offered to escort Complainant to accessible restrooms in nearby buildings. Respondent also filed a Memorandum of Law that set forth its legal argument that the Commission lacks authority to order it to construct an accessible restroom or to award damages to Complainant because it lacks one. Finally, Respondent made an unopposed motion for a protective order under Regulation 240.307(c) to seal the financial records it intended to rely upon to prove its undue hardship defense.

On September 17, 2008, the Commission held an administrative hearing. At the administrative hearing, the parties called no witnesses but instead presented eighteen detailed stipulations of fact along with documentary evidence to support the facts agreed to in their stipulations. The parties further stipulated to admit the documentary evidence (which included various financial records from Respondent and statements from Respondent's experts) into evidence. After the administrative hearing, the Commission entered an order requiring Respondent to file a memorandum of law in support of its motion for a protective order. By its order dated July 16, 2009, the Commission granted Respondent's motion after it found that there was "good cause" for the entry of a protective order to preserve the confidentiality of Respondent's sensitive and proprietary financial information.

Respondent's desire to maintain the confidentiality of its financial information while simultaneously using that same information to establish its undue hardship defense implicates two competing concerns. On the one hand, the Commission cannot determine the viability of Respondent's undue hardship defense without consideration of Respondent's confidential financial information. On the other hand, the Commission's "proceedings held, and evidence taken, on the way to a final decision are presumptively in the public domain" and the Commission's rulings "are public documents [that] should not be kept under seal." *Pepsico, Inc. v. Redmond,* 46 F.3d 29, 31 (7th Cir. 1995); *A.P. v. M.E.E.,* 354 Ill.App.3d 989, 997, 821 N.E.2d 1238, 1248 (1st Dist. 2004). To balance the public's right to access the Commission's decision and the rationale for it with Respondent's legitimate interest in maintaining the confidentiality of its financial information, the Commission will follow the lead of the federal and state courts by preparing a decision suitable for general circulation that keeps the confidential information itself under seal and makes only general or oblique references to the information in the body of the ruling. See, e.g,, *Pepsico,* 46 F.3d at 31; *Abbott Laboratories v. Mylan Pharmaceuticals, Inc.,* 2006 WL 850916 at *3 n.2 (N.D.Ill. 2006); *F.T.C. v. QT, Inc.,* 2005 WL 2240874 at *5 n.21 (N.D.Ill. 2005); *A.P.,* 354 Ill.App.3d at 997.

The hearing officer issued his Recommended Ruling on October 20, 2009. Neither party filed objections.

B. Findings of Fact

The Commission bases its findings of fact on the parties' stipulations, their exhibits, Complainant's Complaint, and Respondent's Verified Response and Supplemental Verified Response.[1]

I. The Parties

1. Complainant Anthony Cotten is a T-12 paraplegic who uses a wheelchair for mobility. Complaint ("Comp."), ¶1.

2. Respondent Lou Mitchell's Inc. is an Illinois corporation that operates a restaurant located at 565 West Jackson Boulevard, Chicago Illinois. Stipulations of Fact ("Stip."), ¶¶1-2. Respondent was founded in 1923 and it has continuously operated at the 565 West Jackson location since 1949 without any new construction or structural modification since that time. Stip., ¶3. Respondent is listed on the U.S. Department of Interior National Park Service's "National Register of Historic Places." Stip., ¶17.

3. The building in which Respondent is located was built before the 1871 Great Chicago Fire and it consists of a main floor with a basement. Stip., ¶3. Respondent does not have a wheelchair-accessible[2] restroom. Stip., ¶5. Respondent's two non-accessible restrooms are located in the basement and can be reached only by descending a flight of stairs. Stip., ¶6.

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[1] Although the parties' pleadings were not introduced into evidence at the administrative hearing, the Commission can take administrative (or "judicial") notice of pleadings filed in this case. See *Hodges v. Hua,* CCHR Case No. 06-H-11, at 4 n.2 (July 10, 2008)(citing cases). Moreover, the Complaint and Verified Responses are part of the official hearing record pursuant to Reg. 240.510, and as such may be considered without formal admission into evidence. The Commission will draw upon the parties' pleadings to supplement its findings of fact to the extent that the pleadings are not inconsistent with the parties' stipulated facts.

[2] The Commission has modified the language of the findings of fact to avoid use of the now-disfavored term "handicap" as a reference to disability, without intention to alter the substance of the hearing officer's findings.

4. Respondent's dining area has 134 seats. Stip., ¶10.

5. Respondent is a highly popular breakfast restaurant that is open between 5:30 a.m. and 3:00 p.m. Monday through Saturday and between 7:00 a.m. and 3:00 p.m. on Sunday. Stip., ¶4. Most days, at different times of the day, customers have to wait in line for a seat in the restaurant because all of the restaurant's seats are occupied. Stip., ¶4.

II. The Events of February 2, 2006

6. On February 2, 2006, Complainant went to Respondent with a friend to have breakfast. Stip., ¶6; Comp., ¶2. The temperature on that date was "frigid." Comp., ¶4.

7. Upon Complainant's arrival, Respondent's General Manager, Heleen Thanas, informed Complainant and his friend that the restroom facilities were on the lower level and she asked if that would pose a problem for them. Verified Response (filed May 22, 2006). Complainant and his friend indicated that the location of the restroom would not be a problem. Verified Response (filed May 22, 2006).

8. While he was dining at Respondent, Complainant wanted to use the restroom but he was unable to gain access to Respondent's restroom facilities because they were down a flight of stairs. Comp., ¶3.

9. Respondent's cook, Leroy "Peanut" Richardson, offered to carry Complainant down the stairs so that he could use the restroom. Stip., ¶6; Comp., ¶3. Complainant refused Mr. Richardson's offer because he was concerned about his safety. Comp., ¶3.

10. Respondent's hostess, Dulce Morales, suggested to Complainant that he could use the restroom in another building and she offered to accompany him to the other building. Comp., ¶3; Stip., ¶6. Complainant declined Ms. Morales's offer. Stip., ¶6. Respondent's cook Richardson further suggested that Complainant go around the corner and use the restroom at the Safer Foundation. Comp., ¶3. Both of these accessible restrooms are less than one block away from Respondent's building. Supplemental Verified Response (filed May 1, 2006).

11. Complainant left Respondent and went outside in order to use a wheelchair-accessible restroom. Comp., ¶4. After using the restroom, Complainant returned to Respondent and finished his breakfast. Comp., ¶4.

III. Facts concerning the feasibility of creating a wheelchair-accessible restroom within Respondent's building

12. There are two possible locations for a wheelchair-accessible restroom within Respondent's building: the basement and the main floor. Stip., ¶7.

13. The stairway leading from the main floor of Respondent's building to the basement "does not meet the required dimensions to accommodate a wheelchair lift for both stairway width and overhead clearance" period, let alone a wheelchair lift that would be

compliant with the 1994 Americans with Disabilities Act Accessibility Guidelines, 29 CFR Part 36, App.A, §4.11. Exhibit 1 (statement of Jerry Meyer), at 2;[3] Stip., ¶¶8-9.

14. Due to Respondent's building's construction, plumbing, and ventilation system, the only possible main floor location for a wheelchair-accessible restroom is along the building's east wall, just north of Respondent's kitchen. Stip., ¶10; Exhibit 5 (statement of Vito Spillone, Jr.), at 1.[4]

15. The City of Chicago Department of Health might not approve the construction of a wheelchair-accessible restroom on the main floor of Respondent's building because of the proximity of the proposed restroom to Respondent's kitchen. Exhibit 5 (statement of Vito Spillone, Jr.), at 1; Stip., ¶16.

16. Construction of a wheelchair-accessible restroom that would meet the applicable requirements of Title III of the Americans with Disabilities Act would require an area of approximately 150 to 200 square feet including the construction of a wall separating the new restroom from the food preparation area. Exhibit 5 (statement of Vito Spillone, Jr.), at 1; Stip., ¶10.

17. Construction of such a wheelchair-accessible restroom would permanently eliminate six to eight of Respondent's dining tables and this would, in turn, reduce the number of seats in Respondent's dining area by 18 seats (from 134 seats to 116 seats). Exhibit 5 (statement of Vito Spillone, Jr.), at 1; Stip., ¶10. A main floor wheelchair-accessible restroom would also substantially alter the historical look of Respondent. Stip., ¶17.

18. A loss of 18 seats within Respondent's dining area would translate to a 13.5% reduction in the total number of customers that Respondent could serve at any given point in time. Stip., ¶10. A reduction in the number of customers who could be served would, in turn, impact upon Respondent's goodwill by subjecting its customers to an increased waiting time. Stip., ¶12. Respondent would also face the risk of a loss in sales on account of the possibility that some of its customers would go elsewhere because of the increased waiting time. Stip., ¶12.

19. Installing a wheelchair-accessible restroom on the main floor of Respondent's building would (a) require Respondent to close for approximately three weeks; (b) cost between $95,000 and $110,000, not including interior remodeling to incorporate the bathroom into the design of the restaurant; and (c) cause Respondent to lose substantial gross revenues from lost sales. Exhibit 5 (statement of Vito Spillone, Jr.), at 1; Stip., ¶15.

20. Respondent's debt service would increase by several thousand dollars per year to finance the costs of constructing a wheelchair-accessible restroom. Stip., ¶13. Moreover, notwithstanding the loss of 18 seats, Respondent's operating expenses would not decline significantly because its occupancy costs (including rent, repairs and maintenance, property insurance, and utilities) are fixed costs. Stip., ¶13.

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[3] Jerry Meyer is a sales representative and corporate training coordinator for a firm called Integrity Home Lifts. Exhibit 1. Integrity Home Lifts specializes in the installation of stairway lifts, wheelchair lifts, home elevators, and dumbwaiters. Exhibit 1.

[4] Vito Spillane, Jr. is the President of VDS Windy City Contracting. Exhibit 5. Mr. Spillane, who began working in a the building trades in 1978, has an extensive background in all aspects of the construction process for commercial, retail, and residential projects from the ground up to interior build-outs. Exhibit 8.

21. Based upon Respondent's financial documentation (including its CPA-certified financial statements from 2007 and the first two quarters of 2008) and the statement of its certified public accountant Robert Silverman, [5] the sales revenue lost by Respondent due to the elimination of 18 customer seats for a wheelchair-accessible restroom and being closed for the three-week construction period would exceed Respondent's combined profits for 2007 and the first two quarters of 2008, and the expected profits for future time periods as well. Stip, ¶¶14-15.

22. Based upon Respondent's financial documentation (*supra,* at ¶21) and the statement of its CPA, Robert Silverman, the elimination of 18 seats to construct a wheelchair-accessible restroom would cause Respondent to fail to meet its existing debt service obligation and to operate at a loss in the future. Stip., ¶14. Ultimately, Respondent would lose the capacity to continue as a going concern as a result of the elimination of 18 seats to construct a wheelchair-accessible restroom. Stip., ¶14.

C. Conclusions of Law

I. Standards for Liability

1. Complainant is a person with a disability within the meaning of §2-160-020(c) of the Chicago Human Rights Ordinance in that he is a paraplegic who uses a wheelchair for mobility.

2. Respondent Lou Mitchell's is a public accommodation within the meaning of §2-160-202(j) of the Human Rights Ordinance and Regulation 510.110(f).

3. The Human Rights Ordinance, at §2-160-170, provides in pertinent part:

> No person that owns, leases, rents, operates, manages or in any manner controls a public accommodation shall withhold, deny, curtail, limit or discriminate concerning the full use of such public accommodation by any individual because of the individual's . . . disability. . . .

See also Regulation 520.100.

4. To prove a *prima facie* case of disability discrimination with respect to a public accommodation, Complainant must show that (a) he is a person with a "disability" within the meaning of the Ordinance; (b) he is a qualified individual in that he satisfied all non-discriminatory standards for service; and (c) he did not have full use of facility, as customers without disabilities did. *Cotten v. Taylor Street Food and Liquor,* CCHR Case No. 07-P-12, at 3 (Aug. 22, 2008); *Maat v. El Novillo Steak House,* CCHR Case No. 05-P-31, at 3 (Aug. 16, 2006).

5. Under Regulation 521.110, "full use" of a public accommodation means that "all parts of the premises open for public use shall be available to persons who are members of a Protected Class . . . at all times and under the same conditions as the premises are available to all other persons, and that the services offered to persons who are members of a Protected Class shall be offered under the same terms and conditions as are applied to all other persons." See also *Luna v. SLA Uno, Inc.,* CCHR Case No. 02-PA-70, at 6 (Mar. 29, 2005)("the CHRO does require that public accommodations be available to person with disabilities under the same terms and conditions as to all other persons").

[5] Mr. Silverman, who has been an accountant since 1977, is Vice President of Reifer Sharps Schuetz, Ltd., a professional accountancy corporation. Exhibit 7.

6. "A public accommodation must fully accommodate a person with a disability unless it shows that the full accommodation would cause an undue hardship. In that instance, the public accommodation must still reasonably accommodate the person with a disability unless it shows that even the reasonable accommodation would cause an undue hardship." *Maat, supra,* at 3; *Massingale v. Ford City Mall and Sears Roebuck and Co.,* CCHR Case No. 99-PA-11, at 6 & n.1 (Sept. 14, 2000); *Doering v. Zum Deutschen Eck,* CCHR Case No. 94-PA-36, at 5 (Sept. 29, 1995).

7. The Commission finds (and Respondent does not dispute) that Complainant has established a *prima facie* case. Complainant is a person with a disability; he was a patron at Respondent; and he did not have "full use" of Respondent's facility in that he was denied access to restroom facilities that Respondent's non-disabled patrons could access, due to a barrier (namely, a flight of stairs) that his disability rendered him unable to circumvent.

8. Once a complainant has established his/her *prima facie* case, a public accommodation must prove by a preponderance of the evidence its affirmative defense that providing full use of its public accommodation would cause undue hardship. *Cotten v. Eat-A-Pita,* CCHR Case No. 07-P-108, at 4, 6 (May 20, 2009).

9. If due to undue hardship within the meaning of Commission Regulation 520.130, it is not feasible to eliminate any or all physical barriers to wheelchair access, Respondent must then—absent a further showing of undue hardship—"(a) provide reasonable alternative accommodations within the meaning of Commission Regulation 520.120 . . . which enable wheelchair users to obtain access to the same services in the same manner as are provided to persons without a disability, and (b) provide a conspicuous notice to wheelchair users approaching the entrance from the sidewalk sufficient to inform them how to enter the premises and/or obtain access to the same services offered by Respondent to persons without a disability." *Maat, supra,* at 6.

10. "'Reasonable accommodation' . . . means, but is not limited to, accommodations (physical changes or changes in rules, policies, practices or procedures) which provide persons with a disability access to the same services, in the same manner as are provided to persons without a disability." Reg. 520.120. "[T]he reasonableness of an alternative available to a person with a disability is a fact-specific inquiry." *Belcastro v. 860 N. Lake Shore Drive Trust,* CCHR Case No. 95-H-160, at 23 (Feb. 20, 2002). When determining the reasonableness of an alternative, the Commission considers whether the alternative is "inherently degrading or stigmatizing." *Id.*

II. Respondent's Arguments

11. Before turning to Respondent's arguments, the Commission states its recognition that this is a difficult case which poses a conflict between the rights and legitimate expectations of both Complainant and Respondent. See *Speciner v. Nationsbank, N.A.,* 215 F.Supp.2d 622, 624-25 (D.Md. 2002), discussing the competing rights and interests of the disabled plaintiff and defendant public accommodation. Complainant has a right under the Human Rights Ordinance to the full and equal enjoyment of Respondent's public accommodations notwithstanding his disability. Complainant also has the reasonable expectation (undoubtedly shared by non-disabled diners) that he would be able to use the restroom in the restaurant where he is dining. On the other hand, Respondent—while obliged not to discriminate against the disabled—has the reasonable expectation and right under the Human Rights Ordinance to operate its restaurant without being subjected to undue hardship that could drive it out of business. In sum, as the

Speciner court noted in another public accommodations case, there are no villains before the Commission. *Speciner*, 215 F.Supp.2d at 624.

12. Respondent argues that it has no liability under the Human Rights Ordinance for the reasons listed below. The Commission will address each one of these arguments in turn.

a. The Human Rights Ordinance does not provide the Commission with authority to order a public accommodation to make structural alterations to an existing facility to reasonably accommodate the disabled.

b. The Commission cannot order Respondent restaurant to reduce its seating capacity to incorporate a wheelchair-accessible restroom or award damages based on the lack of one because to do so would constitute an unconstitutional taking of property without compensation.

c. Installation of a wheelchair-accessible restroom on the main floor of its building would be an undue hardship based on prohibitively high cost.

d. Installation of a wheelchair lift between the main floor and the basement of its building would be an undue hardship based on physical infeasibility.

e. Installation of a stairway lift between the main floor and the basement of its building would not be a reasonable accommodation.

f. Respondent's employee reasonably accommodated Complainant by offering to carry him down the stairs to use the restroom in its building.

g. Respondent's employees reasonably accommodated Complainant by telling him about the location of accessible bathrooms located in other buildings, and offering to accompany him to one of the accessible restrooms.

a. The Commission has the authority to require the operator of a public accommodation to make structural alterations to its existing facility necessary to provide a person with a disability the full and equal enjoyment of its facilities and services.

Respondent contends that it is not subject to liability because the "City ordinances granting authority to the Commission do not include the power to require (either by injunction or damages) an operator of a public accommodation to undertake structural alterations (in this case building a wheelchair-accessible bathroom) in an existing facility." Respondent's Memorandum of Law ("Resp. Mem."), at 1. In support of its argument, Respondent cites the fact that neither the Human Rights Ordinance, the Enabling Ordinance, nor the Commission's Regulations explicitly state that the Commission can order a respondent public accommodation to make structural changes to its building in order to accommodate a person with a disability. Resp. Mem., at 2-3.

Although this is literally true and the Commission—as an administrative agency—has no power to act beyond the authority granted to it by the governing ordinances (*Luna, supra*, at 2-3), the inquiry as to the scope of the Commission's remedial authority is not at an end. It is well settled that "where there is an express grant of authority [to an administrative agency], there is

power or perform the duty specifically conferred." *Chemetco, Inc. v. Illinois Pollution Control Board,* 140 Ill.App.3d 283, 286-87, 488 N.E. 2d 639, 642 (5th Dist. 1986); *Ray v. Illinois Racing Board,* 113 Ill.App.3d 510, 513, 447 N.E.2d 886, 889 (1st Dist. 1983); *Santiago v. Bickerdike,* CCHR Case No. 91-FHO-54-5639, at 18 n.6 (May 26, 1992).

In this instance, the Enabling Ordinance empowers the Commission:

> To render a decision upon the conclusion of a hearing, or upon receipt of a hearing officer's recommendation at the conclusion of a hearing, including findings of fact relating to the complaint, and to order such relief as may be appropriate under the circumstances determined in the hearing. Relief *may include but is not limited to* an order: to cease the illegal conduct complained of; to pay actual damages, as reasonably determined by the Commission, for injury or loss suffered by the complainant; . . . to admit the complainant to a public accommodation; *to extend to the complainant the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent.* . . [and] to take such action as may be necessary to make the individual complainant whole . . ..

Section 2-120-510(l) [emphasis added]. Thus, the Enabling Ordinance, which must be construed in a "liberal fashion," [6] expressly empowers the Commission to award relief necessary to extend to a disabled complainant "the full and equal enjoyment of the . . . accommodations of the respondent" and contains no express limitation on the *type* of relief the Commission may award.

The Illinois Appellate Court has rejected the analogous argument of a respondent who claimed that the Commission lacked authority to award punitive damages because the Enabling Ordinance did not expressly list punitive damages as a type of relief that could be awarded. See *Page v. City of Chicago,* 299 Ill.App.3d 450, 463-64, 701 N.E.2d 218, 227-28 (1st Dist. 1998), holding that the Commission had authority to award punitive damages where it would be "highly appropriate and necessary" to provide an effective remedy; see also *Godinez v. Sullivan-Lackey,* 352 Ill.App.3d 87, 91, 815 N.E.2d 822, 826-27 (1st Dist. 2004), holding that the phrase "source of income" as used in the Fair Housing Ordinance encompasses Section 8 vouchers even though the Ordinance does not explicitly mention Section 8. Consistent with this precedent, the Commission finds that it has authority—subject to a showing of undue hardship—to require a respondent to make a structural alteration in its existing facility if necessary to extend to people with disabilities the full and equal enjoyment of the public accommodations of the respondent.

Respondent makes two other arguments in support of its position that the Commission lacks authority to impose a remedial order that would require a respondent to make structural alterations. First, Respondent notes that although the Commission has ordered the removal of physical barriers, it "has never ordered a structural alteration (such as building a wheelchair-accessible bathroom) to provide full use of a public accommodation." Resp. Mem., at 3-4. Although this may be true, the fact that the Commission has never awarded such relief does not mean that it lacks authority to do so in an appropriate case.

Moreover, the Commission has previously suggested that the sort of expensive structural alteration that Respondent seeks to avoid might be required to provide a wheelchair user with full and equal access to a facility. See *Massingale v. Ford City Mall and Sears Roebuck and Co., supra,* at 2-5, 7-9. In *Massingale,* the complainant wheelchair user attempted to gain access to the respondent Sears store by using a pedestrian passageway between an underground parking lot and the store but he was unable to do so because the passageway was linked to the store by a

[6] See *Solar v. City Colleges of Chicago,* CCHR Case No. 95-PA-16, at 7 (Sept. 25, 1998).

staircase and an escalator. *Id.*, at 2. The Commission had a site survey prepared which culminated in a proposal to have an existing elevator shaft extended upwards and an elevator installed. *Id.*, at 3. Respondent asserted that the Commission's proposal would cause it to suffer undue hardship because extending the elevator shaft into the store would "significantly alter and interfere with Sears' leased space" by decreasing and negatively impacting the amount of space Sears had for its interior layout, storage, and display of goods. *Id.*, at 3-4. Respondent further argued that the construction necessary for this project would take significant time, involve major changes to the store, disrupt Sears's customers, and likely decrease sales. *Id.*, at 4. Notwithstanding the fact that the proposed accommodation would have required a "structural alteration" of the store, the Commission rejected respondent's argument that it had proven undue hardship sufficiently for the Commission to find no substantial evidence. *Id.*, at 7-8.

Finally, Respondent asserts that the Commission lacks authority to order a respondent to construct a wheelchair-accessible bathroom for an existing facility because Title III of the Americans with Disabilities Act ("ADA") would not require such an accommodation and the Illinois Human Rights Act ("IHRA") does not require anything more than is required by the ADA. Resp. Mem., at 4-7. Even if Respondent has correctly stated the degree to which the duty to accommodate is limited under the ADA and IHRA,[7] this argument is unavailing. The Commission is not required to read its governing ordinances "as coterminous with any other law" and the IHRA explicitly "permits municipalities to pass anti-discrimination measures more sweeping in scope than Illinois law." *Godinez,* 352 Ill.App.3d at 94-95 (citing to 775 ILCS 5/7-108(A)); *Page,* 299 Ill.App.3d at 460-62. Consequently, whatever limitations that exist under the ADA and IDHR do not automatically constrain the Commission's application of its ordinances. See *Smith v. Owner of Baby Gap,* CCHR Case No. 02-PA-125, at 2 (April 11, 2003), holding that the Commission is not bound by the ADA when applying the Ordinances.

b. The enforcement of the Human Rights Ordinance would not result in an unconstitutional taking of property without compensation

Respondent contends that the Commission would subject the City of Chicago "to an inverse condemnation claim for taking property (the seating capacity) without compensation" if it entered an order to require Respondent to reduce its seating capacity to incorporate a wheelchair-accessible restroom or to award damages based on the lack of one. Resp. Mem., at 1, 8. This argument, while a novel one before the Commission, is without merit. See *Pinnock v. International House of Pancakes Franchisee,* 844 F.Supp. 574, 586-89 (S.D.Cal. 1993), rejecting a defendant's argument that the expenditure of funds necessary to make its restaurant's restrooms accessible to disabled wheelchair users, if required by the ADA, would constitute an unconstitutional taking of private property.[8] As explained below, such an order would not effect a "taking" of Respondent's property under the pertinent constitutional standards even if the

[7] The Commission need not assess the accuracy of Respondent's assertion but it does note that an EEOC publication quoted by Respondent indicates that the ADA might in fact require the installation of an elevator in an existing facility so long as "such installation is readily achievable." See Resp. Mem., at 6, quoting "The ADA: 'Questions and Answers,' Public Accommodations." Moreover, at least one court has noted that the installation of a bathroom in a disabled plaintiff's work area might be a reasonable accommodation under the ADA. See *Wiley v. UPS,* 11 AD Cases 1529, 1533 (M.D.N.C. 2000).

[8] The Commission has previously rejected a "takings" challenge to the City's Fair Housing Ordinance. See *Smith v. Wilmette Real Estate & Management Co.,* CCHR Case Nos. 95-H-159 & 98-H-44/63, at 30-32 (April 13, 1999)("*Smith I*"), rejecting the respondent landlord's argument that the Fair Housing Ordinance's requirement that it accept tenants whose "source of income" was Section 8 housing choice vouchers constituted an unconstitutional "taking"; *Jones v. Shaheed,* CCHR Case No. 00-H-82, at 21-22 (March 17, 2004)(*quoting Smith I*).

factual record were sufficient to cause the Commission to enter an order compelling Respondent to reduce its seating capacity to construct a wheelchair-accessible restroom.

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment . . . provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 536 (2005)(citation omitted). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537; *Davis v. Brown*, 221 Ill.2d 435, 443, 851 N.E.2d 1198, 1204 (2006)(same). Neither of these circumstances is present here. See, e.g., *Pinnock*, 844 F.Supp. at 587, rejecting tge argument that ADA-required remodeling that eliminated up to 20 restaurant seats constituted a "physical invasion" within the meaning of the Fifth Amendment.[9]

The Supreme Court has also recognized that:

> government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and such 'regulatory takings' may be compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'

Lingle, 544 U.S. at 537, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Davis*, 221 Ill.2d at 443. Two categories of regulatory action "go too far" by definition and are "deemed *per se* takings for Fifth Amendment purposes": (1) "where government requires an owner to suffer a permanent physical invasion of her property—however minor";[10] and (2) where a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538, *quoting Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In this case, an order requiring Respondent to construct a wheelchair-accessible restroom on its premises would not constitute a *per se* taking because such an order would neither cause Respondent to suffer "a permanent physical invasion of [its] property" nor "completely deprive" Respondent of "*all* economically beneficial use" of its property.

Outside of these two relatively narrow *per se* categories, regulatory takings challenges are evaluated through a fact-based consideration of the following factors: (1) the economic impact of the regulations on the party challenging the regulation; (2) the extent to which the regulation has interfered with "distinct investment-backed expectations"; and (3) "'the character of the government action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 538-39, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In general, regulatory action constitutes a "taking" if it is the "functional[] equivalent to the classic taking in which government directly appropriates private property or ousts the owner of his domain." *Lingle*, 544 U.S. at 539.

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[9] The Commission notes that while "[c]ases interpreting federal and state antidiscrimination laws are not dispositive or binding as precedent in cases under the CHRO," they "nonetheless offer helpful guidance." *Dawson v. YMCA*, CCHR Case No. 93-E-128, at 8 n.2 (January 19, 1994). See also Reg. 270.510(c).

[10] "A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Lingle*, 544 U.S. at 539.

Respondent's "takings" argument is thoroughly undercut by a consideration of the above factors. First, the fact that the Human Rights Ordinance could require respondents to incur some costs to provide a "reasonable accommodation" to people with disabilities is insufficient in itself to establish a "taking," particularly given that the potential economic impact is mitigated by the availability of an "undue hardship" defense that protects respondents from suffering severe financial harm. See *Pinnock,* 844 F.Supp. at 588, rejecting compensatory takings argument and noting that "the ADA was specifically drafted to protect existing businesses from undue hardship"; see also *Ramsey Winch, Inc., v. Henry,* 555 F.3d 1199, 1210 (10th Cir. 2009), which stated, "A constitutional taking requires more than an incidental increase in potential costs for employers as a result of a new regulation"; *Tennessee Scrap Recyclers Association v. Bredesen,* 556 F.3d 442, 456 (6th Cir. 2009), stating that "diminution of the value of property or other financial injury because of regulatory action by itself does not generally establish a taking"; compare *Penn Central,* 438 U.S. at 127, noting that a regulatory restriction on the use of real property might constitute a "taking" "if it has an unduly harsh impact upon the owner's use of the property"; also compare *Cienega Gardens v. U.S.,* 331 F.3d 1319, 1340-44 (Fed.Cir. 2003), holding that loss of 96% of possible rate of return on equity was a compensatory taking under the Fifth Amendment.

As to the second factor, it is well settled that the Human Rights and Fair Housing Ordinances were promulgated by the City of Chicago through a proper exercise of its police power to promote the public welfare of its populace,[11] and the Supreme Court has held that a "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas,* 505 U.S. at 1027; *Franklin Memorial Hospital v. Harvey,* 575 F.3d 121, 128 (1st Cir. 2009); *Ramsey,* 555 F.3d at 1210; *Peterson v. City of Naperville,* 9 Ill.2d 233, 247, 137 N.E.2d 371, 379 (1956). Moreover, Respondent—as a restaurant within the City of Chicago—is subject to extensive regulation as to many aspects of its operations and its owners "ought to be aware of the possibility that new regulations" might subject Respondent to additional costs. *Lucas,* 505 U.S. at 1027-28; *Franklin Memorial,* 575 F.3d at 128, stating that "heavy government regulation may diminish a property owner's expectations"; *Bredesen,* 556 F.3d at 457; see also *Pinnock,* 844 F.Supp. at 588, finding that the ADA did not frustrate the property owner's expectations because "the ADA was drafted to avoid the imposition of economic hardship upon owner of public accommodations." For these reasons, there is no basis to conclude that any reasonable "investment-backed expectations" would be disturbed by the prospect that Respondent might be subjected to additional costs to alter its facility so that people with disabilities can enjoy the full and equal enjoyment of its accommodations.

Third, the Human Rights Ordinance promotes the public policy of "adjusting the benefits and burdens of economic life to promote the common good" of having public accommodations that are accessible to people with disabilities. *Lingle,* 544 U.S. at 539; *Penn Central,* 438 U.S. at 124. Moreover, the Human Rights Ordinance imposes the duty to reasonably accommodate people with disabilities on public accommodations across the City, and not solely and arbitrarily upon Respondent. See *Penn Central,* 438 U.S. at 123, recognizing that the Fifth Amendment's guarantee is designed to bar the government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole; and at 134-35,

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[11] See, e.g., *Smith v. Wilmette Real Estate & Management Co.,* CCHR Case Nos. 95-H-159 & 98-H-44/63, at 15-16 (October 5, 2000)("*Smith II*"); *Smith I, supra,,* at 14; *Page,* 299 Ill.App.3d at 459-60; see also *Dube v. City of Chicago,* 7 Ill.2d 313, 324, 131 N.E.2d 9, 15 (1955, stating that "so long as such ordinances have as their object the protection of the public health, safety, comfort, morals and general welfare, are reasonably calculated to effect that purpose and are not arbitrary or unreasonable, they are to be upheld as a proper exercise of the police power."

rejecting a takings argument in part based on the fact that the burden of the challenged regulation was shared broadly. Given these facts, "the nature of the [Ordinance] weighs against [Respondent's] takings claim." *Bredesen*, 556 F.3d at 457; *Penn Central*, 438 U.S. at 124-25; *Franklin Memorial*, 575 F.3d at 128-29; *Ramsey*, 555 F.3d at 1210.[12]

For all of the above reasons, the Commission rejects Respondent's argument that the Commission would subject the City of Chicago to an inverse condemnation suit if it determined that it was appropriate and necessary to enter an order compelling Respondent to reduce its seating capacity and make the structural changes necessary to construct a wheelchair-accessible restroom in order to provide Complainant with the full and equal enjoyment of its accommodations. See *Pinnock*, 844 F.Supp. at 586-89, 591, granting the United States government's motion for summary judgment on defendant's claim that the application of the ADA would result in an unconstitutional taking of private property.

c. The installation of a wheelchair-accessible restroom on the main floor of Respondent's building would subject Respondent to an undue hardship within the meaning of Regulation 520.130

Respondent asserts that it would experience an undue hardship if it were forced to construct a wheelchair-accessible bathroom. See Respondent's Pre-Hearing Memorandum ("Resp. PH Mem."), at 1-3. Under Reg. 520.130:

> "[U]ndue hardship" will be proven if the financial costs or administrative changes that are demonstrably attributable to the accommodation of the needs of persons with disabilities would be prohibitively expensive or unduly affect the nature of the public accommodation.
>
> (a) There must be objective evidence of financial costs, administrative changes, or projected costs or changes which would result from accommodating the needs of persons with disabilities.
>
> (b) Factors to be considered in determining whether an accommodation would impose an undue hardship include, but are not limited to:
>
> (1) the nature and cost of the accommodation;
>
> (2) the overall financial resources of the public accommodation, including resources of any parent organization;
>
> (3) the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the public accommodation; and
>
> (4) the type of operation or operations of the public accommodation.

[12] The sole case cited by Respondent in support of its argument, *City of Oakbrook Terrace v. Suburban Bank and Trust Co.*, 364 Ill.App.3d 506, 845 N.E.2d 1000(2d Dist. 2006), is inapposite. In *Oakbrook Terrace*, the Appellate Court held that the municipal ordinance in question was "an improper exercise of home rule authority [which] obviate[d] a further analysis of the taking-without-just-compensation issue." *Oakbrook Terrace*, 364 Ill.App.3d at 519. Respondent in this case does not contend that the City of Chicago exceeded its home rule authority by promulgating the Commission's governing Ordinances.

See also *Doering, supra,* at 7; and *Cotten v. Eat-a-Pita, supra,* at 6, 5, holding that "objective evidence" is required to provide an "adequate factual foundation" sufficient to prove an undue hardship.[13]

Thus, it is not enough for a respondent merely to cite the prospective costs of an accommodation without providing concrete evidence that such costs would impose an undue hardship on respondent. See *Massingale, supra,* at 8, stating that "whether costs are 'too high' depends, in large part, on the circumstances of the party who would have to pay them." In *Belcastro,* for example, the respondent (a residential condominium building) asserted that it would incur $333,600 in costs to provide the complainant, a wheelchair-user, with his requested accommodation of ability to enter and exit from the front of the building. *Belcastro, supra,* at 31.[14] Despite the expensive nature of the proposed accommodation, the Commission noted that the respondent failed to prove that the costs would impose an "undue hardship" because it "offered no evidence of the [in]ability of [its] residents to pay an increased assessment" needed to cover the costs of the accommodation and the evidence showed that the respondent could secure financing for the costs. *Belcastro, supra,* at 31-32; see also *Massingale, supra,* at 8, finding that the $100,000 cost for renovations was "not dispositive" where respondent offered no evidence about its inability to pay for the construction; *Doering, supra,* at 8; *Guzman v. Denny's Inc.,* 40 F.Supp.2d 930, 935-36 (S.D.Ohio 1999), finding it an issue of fact whether renovation of a restaurant's inaccessible restroom was "readily achievable" notwithstanding evidence that the work would cost $21,500, eliminate storage and seating space, and cause lost profits where it appeared that defendant had the financial ability to pay for the renovation.

Similarly, a respondent cannot prove undue hardship by asserting that its business operations would be shut down or impaired during the construction needed to provide an accommodation unless the respondent also provides concrete evidence as to how the business disruption would impact its financial wherewithal. In *Doering,* the respondent restaurant asserted that the Commission should find no substantial evidence of a violation because the restaurant would have to be closed for at least one—and possibly three to four—weeks while the renovations necessary to accommodate the complainant wheelchair user were completed. *Doering, supra,* at 8. The Commission rejected the argument because the respondent (which was normally closed for two weeks at the end of each year) offered "no conclusive evidence that the work would have to have an undue, or any, affect on [its] business." *Id.*

Respondent makes the following assertions in support of its undue hardship defense:

(1) the only possible location for a wheelchair-accessible restroom is on the first floor of the restaurant in a location that might not be approved by the City of Chicago's Department of Health because of its proximity to the kitchen;

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[13] Respondent argues that the Ordinances and the Commission's Regulations are intended to conform with the ADA and that it can establish an "undue hardship" under the Ordinance by showing that proposed accommodations are not "readily achievable" under the ADA. Resp. <em., at 7-8. The Commission disagrees. The ADA's "readily achievable" standard "is less demanding" than the undue hardship defense under the ADA (which is virtually identical to the undue hardship defense under the Chicago Human Rights Ordinance). See *Colorado Cross Disability Coalition v. Hermanson Family Ltd.,* 264 F.3d 999, 1004 (10 Cir. 2001); *Pinnock,* 844 F.Supp. at 583; compare with Reg. 520.130 *Garza v. Abbott Laboratories,* 940 F.Supp. 1227, 1239 (N.D.Ill. 1996), quoting 42 U.S.C. §12111(10)(B) (defining undue hardship under the ADA).

[14] Although the Commission's discussion of the parameters of the undue hardship defense in *Belcastro* was *dicta* (see *Belcastro, supra,* at 26), the Commission reaffirms that its analysis in that case was correct.

(2) constructing such a restroom would require Respondent to eliminate 18 (or 13.5%) of its seats and result in increased customer waiting time;

(3) constructing the restroom would require approximately three weeks' time during which Respondent would be closed and deprived of revenue;

(4) construction would cost between $95,000-110,000 (not including remodeling costs), and increase Respondent's debt service by several thousands of dollars per year;

(5) the revenue lost on account of closing for construction would exceed Respondent's combined profits for 2007 and the first two quarters of 2008; and

(6) on account of the loss of revenue caused by construction and its diminished seating capacity, Respondent would be unable to meet its debt service and it would operate at a loss into the future.

Respondent has introduced uncontradicted evidence (including the testimony of its CPA and other experts and its CPA-certified financial statements) to substantiate these assertions and the Commission has adopted them as part of its factual findings. *Supra*, at 5-8.

In sum, Respondent has offered sufficient objective evidence to prove that constructing a wheelchair-accessible restroom on its first floor would cause it to sustain such severe financial losses on account of the construction costs and lost revenue that it would cease to operate as a going concern. The Commission finds that Respondent has thereby proven that this proposed accommodation would be "prohibitively expensive" and an "undue hardship" within the meaning of Reg. 520.130. See *Eat-a-Pita, supra*, at 6, explaining that a respondent can satisfy its burden of proving undue hardship by "establishing the significant financial costs or administrative changes necessary to accommodate the needs of the person with disabilities"); see also *Vande Zande v. State of Wisconsin*, 44 F.3d 538, 543 (7 Cir. 1995), stating that an employer can demonstrate undue hardship by showing that the costs of an accommodation "are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health"); *Wiley v. U.P.S.*, 11 AD Cases 1529, 1533 (M.D.N.C. 2000), finding that construction of a permanent bathroom in the disabled plaintiff's work area was an undue hardship as a matter of law where it would cost $10,000 and require installation of new water lines and sanitary drains; *Alford v. City of Cannon Beach*, 2000 WL 33200554 at *8 (D.Or. 2000), holding that renovation of a restaurant's restroom to make it wheelchair-accessible was not "readily achievable" as a matter of law where "the cost of the remodel would exceed the business's net annual income."

d. The installation of a wheelchair lift between the main floor and the basement of its building would be an undue hardship based on physical infeasibility

Respondent does not dispute that a wheelchair lift can under some circumstances provide a reasonable accommodation that would enable a wheelchair user to circumvent the barrier posed by a flight of stairs. See Illinois Accessibility Code, 71 Ill.Adm.Code, Sub. Pt. B, §400.310(h) Platform Lifts (Wheelchair Lifts); 1994 Americans with Disabilities Act Accessibility Guidelines, 29 CFR Part 36, App.A, §4.11 Platform Lifts (Wheelchair Lifts); *Massingale, supra*, at 8 n.4, noting that a platform lift, "if feasible," could reasonably accommodate a disabled wheelchair user; *Shariff v. Coombe*, 2009 WL 2431941 at *13 (S.D.N.Y. 2009), holding that the installation of a wheelchair lift helped redress the alleged lack of accessibility of restrooms in an auditorium. However, Respondent has provided evidence to establish that a wheelchair lift could

not be constructed consistent with the ADA Accessibility Guidelines[15] because the stairway between the main floor of the restaurant and its lower level where the restrooms are located does not meet the required dimensions for both stairway width and overhead clearance to accommodate a wheelchair lift. *Supra*, at 6. The Commission has recognized that undue hardship can be based on "physical infeasibility," see *Cotten v. Eat-A-Pita, supra*, at 14, and the Commission holds that Respondent has proven that it would be an undue hardship based on physical infeasibility to install a wheelchair lift between its main floor and lower level.

e. The installation of a stairway lift between the main floor and the basement of its building would not be a reasonable accommodation

Although Respondent has shown that it is not feasible to eliminate the barriers to providing an accessible restroom for wheelchair users due to undue hardship within the meaning of Reg. 520.130, Respondent must still provide reasonable alternative accommodations within the meaning of Reg. 520.120 unless it would experience undue hardship in doing so. *Maat, supra*, at 6. Consistent with this obligation, Respondent investigated the possibility that installing a stairway lift—which would enable a wheelchair user to traverse stairs by being transferred from the wheelchair to the stairway lift—between the main floor of its restaurant and its lower level would provide a reasonable accommodation. Although Respondent concluded that a stairway lift could be installed on its staircase at a modest cost ($10,410), it asserts that a stairway lift would not provide a reasonable accommodation because the wheelchair user would have "to leave the chair, be placed on the lift, with another person carrying the wheelchair to the bottom of the stairs, where the person would need to be placed in it." Resp. PH Mem., at 2; Exhibit 1. According to Respondent, this "process is obviously inconvenient, potentially embarrassing for the wheelchair [user], and . . . [poses a] risk [of] serious injury to those involved in the process." Resp. PH Mem., at 2.

The Commission agrees that a stairway lift would not provide a reasonable accommodation. A stairway or wheelchair lift that *requires* a disabled wheelchair user to rely on the assistance of others who may be unavailable, unable, or simply unwilling to provide help is an unreasonable accommodation. See Illinois Accessibility Code, 71 Ill.Adm.Code, Sub. Pt. B, §400.310(h)(2) Platform Lifts (Wheelchair Lifts), stating, "If a platform lift is permitted, it shall facilitate *unassisted entry, operation, and exit from the lift*" [emphasis added]; *Hankins v. El Torito Restaurants, Inc.*, 63 Cal.App.4th 510, 528 (1st Dist. 1998), noting that Section 4.11.3 of the ADA Accessibility Guidelines "requires the facilitation of unassisted entry operation, and exit from the lift"; see also *Tyler v. City of Manhattan*, 857 F.Supp. 800, 811, 819 (D.Kan. 1994), holding that an arrangement that required a disabled plaintiff to request a key to gain access to the only accessible restroom did not comport with Title II of the ADA.

Moreover, as Respondent notes and Complainant fears (*supra*, at 5), the act of assisting a wheelchair user in maneuvering in and out of his/her wheelchair is fraught with risks and potential danger for all concerned. It is also possible that the wheelchair user would experience humiliation when being lifted out of his/her wheelchair and placed in the chair lift in the middle

[15] Reg. 540 provides that the Commission shall refer to the Illinois Accessibility Code and the American National Standards Institute standards when determining whether a proposed physical accommodation to fully or reasonably accommodate a person with a disability under the Ordinance is "adequate and appropriate." Section §400.310(h) of the Accessibility Code, which concerns wheelchair lifts, is consistent with (and in fact incorporates in part) the ADA Accessibility Guidelines concerning wheelchair lifts. See Illinois Accessibility Code, 71 Ill.Adm.Code, Sub. Pt. B, §400.310(h) Platform Lifts (Wheelchair Lifts). Thus, Respondent's evidence that the wheelchair lift could not be constructed consistent with the ADA Guidelines likewise demonstrates that the lift could not be constructed consistent with the Accessibility Code.

of a crowded restaurant. See, e.g., *Hanson v. Association of Volleyball Professionals,* CCHR Case No. 97-PA-62, at 11-12 (October 22, 1998), crediting a disabled complainant's testimony that it would be humiliating to be carried in front of a number of strangers; *Matthews v. Jefferson,* 29 F.Supp.2d 525, 529 (W.D.Ark. 1998), expressing concern about the dignity of individual who would have to use a chairlift. For all of these reasons, the Commission finds that a stairway lift would not provide a reasonable accommodation under the facts of this case.

f. Respondent's employee's offer to carry Complainant down the stairs to use the restroom in its building was not a reasonable accommodation

Respondent contends that its cook's offer to carry Complainant down the stairs so that he could use the restroom on its lower level was a reasonable accommodation. Resp. PH Mem., at 1. The Commission disagrees. Complainant declined Respondent's offer based on a justifiable concern for his safety. *Supra,* at 5. Moreover, under federal regulations—which the Commission finds instructive—"'carrying an individual with a disability is considered ineffective and therefore an unacceptable method for achieving program accessibility.'" *Matthews,* 29 F.Supp.2d at 533, quoting 28 C.F.R. §35.150(b)(1); *Ramirez v. District of Columbia,* 10 A.D. Cases 738, 740 (D.D.C. 2000)(same). This is particularly true given that there is no evidence that Respondent's cook had any training regarding "the safest and least humiliating means of carrying" a wheelchair user. See *Matthews,* 29 F.Supp.2d at 533, quoting 28 C.F.R. §35.150(b)(1), stating that in the "'manifestly exceptional'" circumstances where carrying is appropriate, "'personnel who are permitted to participate in carrying an individual with a disability [must be] formally instructed on the safest and least humiliating means of carrying.'" Thus, while the cook's offer to carry Complainant down the stairs was undoubtedly well-intentioned, the Commission finds that his gesture was not a reasonable accommodation under the Human Rights Ordinance.

g. Respondent's employees reasonably accommodated Complainant by advising him of the lower level location of the restroom upon his arrival, telling him about the location of accessible restrooms located in other buildings, and offering to accompany him to one of the accessible restrooms

A respondent can provide a reasonable accommodation by arranging for the services that complainant cannot access at its facility to be made available at an alternative accessible location. See, e.g., *Pinnock,* 844 F.Supp. at 582, citing to 28 C.F.R. §36.305(b) and explaining that where barrier removal is not readily achievable under the ADA, a covered entity must make its services available through "alternative methods" including "relocating services and activities to accessible locations." In particular, the presence of an available, wheelchair-accessible restroom within a reasonable proximity to respondent's facility can provide a reasonable alternative accommodation when a respondent's facility lacks an accessible restroom. See *Brunnen v. Mission Ranch,* 1998 WL 34032533 (N.D.Cal. 1998)("*Brunnen I*"); 2000 WL 33915634 (N.D.Cal. 2000)("*Brunnen II*").[16] Thus, a respondent that lacks a wheelchair-

[16] In *Brunnen,* the plaintiff wheelchair user sued the defendant restaurant owners (who included actor Clint Eastwood) under the ADA and California state law asserting that they failed to provide accessible facilities. *Brunnen I,* 1998 WL 34032533 at *1. The restrooms for the defendants' restaurant, which were inaccessible for wheelchair users, were located in a recreation barn 40 feet away from the restaurant. *Id.* The nearest wheelchair-accessible restrooms were located in a catering barn between 200 and 243 feet away from the restaurant. *Id.* Plaintiff asserted that defendants violated the ADA by failing to remove the architectural barriers that rendered the recreation barn's restrooms inaccessible (*id.*), and the jury rejected this claim. *Brunnen II,* 2000 WL 33915634 at 1. The jury presumably concluded that the presence of accessible restrooms at the more distant catering barn was a sufficient alternative accommodation for plaintiff.

accessible restroom can reasonably accommodate a wheelchair user by directing him/her to an available wheelchair-accessible restroom within a reasonable proximity of respondent's building.

In this case, Respondent asserts that its personnel reasonably accommodated Complainant by advising him of the location of nearby accessible restrooms and offering to personally escort him to an accessible restroom. *Supra*, at 5. While Complainant spurned this offer to escort him to an accessible restroom, his lack of receptiveness does not in itself defeat Respondent's argument that its personnel provided a reasonable accommodation. See *Nichols v. Northwestern Memorial Hospital*, CCHR Case No. 01-PA-15, at 3 (June 27, 2001), noting that "complainants are not entitled to select what accommodation is 'best' so long as they receive one that works." To the contrary, courts have recognized that efforts by a defendant's employees to help disabled customers obtain access to services or facilities can constitute a reasonable accommodation. See, e.g., *Hubbard v. 7-Eleven, Inc.*, 433 F.Supp.2d 1134, 1148-49 (S.D.Cal. 2006), noting a defendant's "policy of assisting disabled customers"; see also *Boemio v. Love's Restaurant*, 954 F.Supp. 204, 206, 208 (S.D.Cal. 1997), lauding defendant for its employees' "past practice of rendering assistance to disabled persons" to enable them to access a restroom.

The Commission finds that Respondent, through the efforts of its personnel detailed above, has met its burden of showing that it reasonably accommodated Complainant within the meaning of Reg. 520.120. See *Eat-a-Pita, supra*, at 4. Once Complainant voiced his need for a restroom, Respondent's personnel accurately informed him of the location of nearby accessible restrooms and offered to escort him there. Complainant successfully made his way to one of the nearby restrooms and returned to finish his meal. *Supra*, at 5. While not the ideal sequence of events for Complainant, who understandably would have preferred to use an accessible restroom within Respondent's restaurant, Complainant was accommodated by Respondent's personnel and he presented no evidence that he was degraded or stigmatized in the process.[17]

The evidence also shows that Respondent's personnel placed Complainant on notice as he entered the restaurant that its restroom facilities were located down a flight of stairs on the lower level. By providing Complainant with this information, Respondent gave Complainant the opportunity to learn what alternative accessible restroom facilities might be available or to leave before he ordered his meal if he found the situation to be unacceptable. For these reasons, the Commission finds that Respondent's verbal notice to Complainant provided the type of "conspicuous notice" to wheelchair users as to how to obtain access to the same services offered by respondent to persons without a disability that the Commission has mandated in past public accommodation cases. *See Maat, supra*, at 6; *Maat v. Villareal Agencia de Viajcs*, CCHR Case No. 05-P-28, at 6 (August 16, 2006); *see also Eat-a-Pita, supra*, at 15 (ordering respondent to display exterior signage to inform the disabled that they could seek assistance accessing respondent's services by ringing a buzzer or calling respondent).

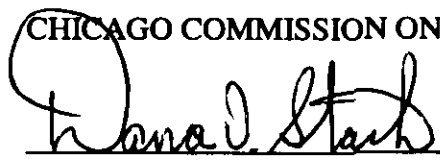
Conclusion

In sum, the Commission finds that Respondent has not violated the Human Rights Ordinance notwithstanding the fact that it did not provide full use of its facility to Complainant because Respondent has proven that (1) it would experience an undue hardship if it were

[17] Compare *Hankins*, 63 Cal.App.4th at 515-516, where a wheelchair user was "angered and humiliated" when he was forced to relieve himself in a bush after the defendant restaurant denied him use of an accessible "employee" restroom and directed him to another restaurant 75 yards away that likewise lacked an accessible restroom; *Boemio*, 954 F.Supp. at 208-09, where the failure of a restaurant's employees to follow the restaurant's past policy of assisting disabled customers with accessing the restroom resulted in disabled plaintiff experiencing humiliation when he was compelled to urinate in a parking lot.

required to provide a restroom accessible to wheelchair users; and (2) its personnel reasonably accommodated Complainant by directing him to the location of a nearby available accessible restroom. Accordingly, and for all the reasons stated above, the Commission finds against Complainant Anthony Cotten and in favor of Respondent Lou Mitchell's on Complainant's disability discrimination claim.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: 

Dana V. Starks, Chair and Commissioner
Entered: December 16, 2009