

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BNY MELLON, NATIONAL ASSOCIATION  
and THE BANK OF NEW YORK MELLON,

Plaintiffs,

OCCUPY PITTSBURGH, an unincorporated  
association, JANE DOES (1-50), and JOHN  
DOES (1-50),

Defendants.

CIVIL DIVISION

No.: GD 11-025549

AMICUS BRIEF IN OPPOSITION  
TO PRELIMINARY INJUNCTION

Code: 003 Trespass

Filed on behalf of City of  
Pittsburgh / Allegheny County  
Task Force on Disabilities,  
Amicus Curiae

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DEPT OF COURT RECORDS  
CIVIL FAMILY DIVISION  
ALLEGHENY COUNTY PA

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	:	
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AMICUS CURIAE BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION

The City of Pittsburgh-Allegheny County Task Force on Disabilities files this amicus curiae brief in the above-captioned case.

A. Interest of the Amicus Curiae

The City of Pittsburgh-Allegheny County Task Force on Disabilities (Task Force) is an official advisory body established on July 26, 1994, with members appointed by the Mayor of the City of Pittsburgh and the Chief Executive of Allegheny County. The purpose of the Task Force is to: a) Advise the Mayor, County Executive, and other government officials on matters of policy that impact on the lives of people with disabilities; b) Promote the integration of people with disabilities into all community activities; c) Promote meaningful employment of people with disabilities in settings of their choosing; and d) Advise the Mayor, County Executive, and other government officials on state and federal issues that impact upon the dignity of the lives of people with disabilities in the City of Pittsburgh and Allegheny County.

The Task Force has a demonstrated interest in preserving Urban Open Spaces in Pittsburgh's Golden Triangle district, and ensuring that said spaces are "accessible to persons with disabilities" and "open without restriction to the general public." The Task Force became interested in this issue of Urban Open Space as a result of concerns raised by a Task Force member and also due to an article in the Pittsburgh Post-Gazette.<sup>1</sup>

The Task Force dedicated a substantial portion of its meeting on May 16, 2011 to the issue of Urban Open Spaces. Susan Tymoczko, the City of Pittsburgh Zoning Administrator and the Director of Land Use and Development, Administration Division, was invited to speak to the Task Force on the issue and provided background and responded to concerns raised by the Task Force and members of the public in attendance. Concerns raised at the meeting included issues of private encroachment of public space, physical accessibility, and concerns of "stigma" as seen in selective enforcement of "no loitering" signs.

B. Urban Open Space must be accessible to persons with disabilities

The requirement for Urban Open Space is established in the Pittsburgh Municipal Code, Code of Ordinances, Title Nine, Article IV, Planning Districts, Chapter 910: Downtown Districts.<sup>2</sup> As admitted in Plaintiffs' Complaint ¶ 25: "The 1988 Zoning Code required all new structures in C5-B Golden Triangle District B, including the proposed

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<sup>1</sup> "Places: Are building owners violating city code by restricting use of open spaces?" Patricia Lowry, Pittsburgh Post-Gazette, September 29, 2010. <http://www.post-gazette.com/pg/10272/1090994-51.stm?cmpid=newspanel0#ixzz1iH3oSDaX>

<sup>2</sup><http://library.municode.com/index.aspx?clientId=13525&stateId=38&stateName=Pennsylvania>

Project , to designate and provide 20% of the lot area at ground level as Urban Open Space.”

Three types of Urban Open Space are contemplated by the Zoning Code; space designed:

- to facilitate pedestrian circulation or relieve pedestrian congestion (“shall be accessible to persons with disabilities throughout the entire area”);
- to provide passive recreation space or informal activity areas (“A plaza or park may be located above or below the level of the abutting sidewalk or open space provided it is accessible to the handicapped.”); and
- as interior (urban open) space. (“An interior Urban Open Space shall be accessible to persons with disabilities.”)

The Zoning Code requires that Urban Open Space such as Mellon Green “shall be open without restriction to the general public at least during business hours normal to the area in which it is located and during periods of heavy pedestrian movement in the area.” 910.01.C.3(b) - Urban Open Space Requirements.

C. Plaintiffs’ averments would appear to violate the requirement that Urban Open Space be accessible to persons with disabilities

Plaintiffs’ Complaint fails to clarify how much Urban Open Space is required by the Zoning Code, and fails to clearly show the boundaries of that space:

- Plaintiffs’ Exhibit 5, Zoning Report which was proposed and approved by the Pittsburgh City Planning Commission on June 16, 1998 clearly states: “Urban Open Space – Required 41,609 sq. ft. – Proposed 79,279 sq. ft.” This would

suggest that Mellon's application to the Planning Commission proposed 79,279 sq. ft. of Urban Open Space.

- Urban Open Space equal to 41,609 sq. ft. would be consistent with Plaintiffs' Exhibit 3, final page (Attachment), which shows the total square feet for the various parcels included in the development equaled 208,045. Twenty percent of 208,045 is 41,609.
- Plaintiffs' Complaint ¶ 31, however states "BNY Mellon was required to provide approximately 21,405 square feet of Urban Open Space, BNY Mellon also provided 57,874 square feet of Open Space, including the temporary Open Space which constitutes BNY Mellon Green." At no place in Plaintiffs' Complaint or Exhibits does it establish which 107,025sq. ft. of development would justify only 21,405 sq. ft. of Urban Open Space, nor does it give any justification for ignoring the Exhibit 3 sum of 208,045.

In addition to confusion about how much Urban Open Space was approved by the City of Pittsburgh Planning Commission, the Complaint and exhibits fail to clearly identify the boundaries of the Urban Open Space.

- Plaintiffs' Complaint at ¶ 18 states: "The landscape plan involved a permanent pedestrian promenade extending from Grant Street through the site to Sixth Avenue. This will serve as part of the Urban Open Space Requirement. . ." (Emphasis added.)
- Plaintiffs' Complaint at ¶ 22 states: "BNY Mellon constructed the pedestrian walkway immediately abutting the T-Station and connecting from Grant Street to Ross Street (the "Sidewalk") which Sidewalk was

designated as required accessory Urban Open Space for the Project. The Sidewalk is bordered by BNY Mellon Center, Ross Street, and BNY Mellon Green.”

- Plaintiffs’ Complaint at ¶ 34 states: “Under the Project and as approved by the Planning Commission, the only portion of the property between Grant Street and Ross Street designated as Urban Open Space was the Sidewalk adjacent to BNY Mellon Green that extends from Grant Street to Ross Street in front of the main entrance at BNY Mellon Client Service Center.” (Emphasis added.)
  1. Plaintiffs’ Exhibits show other space was included as Urban Open Space to provide “handicapped access.”

Plaintiffs’ Complaint Exhibit 6 is the City Planning Commission: Zoning Report dated November 10, 1998. Paragraph 5 of that Report, Landscape Plan states:

The Landscape Plan for the proposed project involves permanent and temporary landscaping. Permanent landscaping includes a permanent pedestrian promenade that will extend from Grant Street through the site to Sixth Ave Extension. This will provide a pedestrian walkway to the main entrance of the new building from Grant Street, and will serve as part of the Urban Open Space requirement. Additional landscaping includes permanent street trees on Fifth Avenue and Sixth Street Extension and an additional row of trees along Grant Street. All sidewalk details will be constructed to City standards, including granite curbs and access panels. Temporary open spaces will be created at Grant Street and Sixth Avenue, and one block to the east at Ross Street and Sixth Avenue. The Grant Street open space will have a rolling lawn that is crossed by two paths that provide handicapped access between Ross Street and Grant Street. The lawn area will have several varieties of trees throughout. The Ross Street open space will remain primarily a grass lawn. . . (Emphasis added. Plaintiffs’ Complaint ¶ 17 also quotes the Landscape Plan at length, but omits this highlighted section.)

The Task Force suggests that the Planning Commission understood the rolling lawn crossed by two paths that provided handicapped access was part of the proposed

Urban Open Space. It isn't logical that the Planning Commission would see any relevance in "handicapped access" being important for their consideration if this was unencumbered Mellon property which could later be developed, removing the access provided by these paths.

2. The "pedestrian promenade" referred to by Plaintiffs as "the Sidewalk" is in fact a "Stairway" and cannot be considered Urban Open Space.

The pedestrian walkway referred to in Plaintiffs' Complaint at ¶s 22 and 34 has approximately 24 steps, three flights with 8 steps in each flight. It would be more accurate to refer to this as "the Stairway" rather than "the Sidewalk."

To the extent that Plaintiffs are alleging that this pedestrian promenade is Urban Open Space, then it would be subject to the requirements of 910.01.C.3(b)(1): "Urban Open Space designed to facilitate pedestrian circulation or relieve pedestrian congestion shall be at the same level as abutting public sidewalks, shall provide a clear path or area for movement, and shall be accessible to persons with disabilities throughout the entire area." (Emphasis added.) These three flights of steps clearly disqualify any part of "the Sidewalk" as Urban Open Space.

3. The "two paths that provide handicapped access" must necessarily be part of the required Urban Open Space.

Insofar as "the Sidewalk" with its 24 steps cannot qualify as Urban Open Space, and insofar as an area as great as 79,279 sq. ft. must be set aside by BNY Mellon as Urban Open Space – then some or all of Mellon Green must be that Urban Open Space required by the Pittsburgh Municipal Code. Since this is not indoor space, Mellon Green must fall into Urban Open Space designed to provide a "passive recreation

space or informal activity area” and / or “to facilitate pedestrian circulation or relieve pedestrian congestion.” In either case, the “two paths that provide handicapped access” must be included in that Urban Open Space to make the space accessible to persons with disabilities.

Another significant consideration is that the Steel Plaza T Station is underneath Mellon Green. The only accessible entrance/exit to that T Station opens on Grant Street at the juncture of “the Sidewalk” (with its 24 steps) and one of the accessible paths that cut through the center of Mellon Green (providing “handicapped access between Grant Street and Ross Street”). Significantly, the “Development standards for urban open space” requires “[w]hen a development site is adjacent to a bus stop or transit station, the required Urban Open Space shall be designed to provide access to and waiting areas for transit riders.” 959.06(B)(3).

Again, the conclusion seems inescapable that the accessible path through the center of Mellon Green must be part of the Urban Open Space.

4. BNY Mellon has no legal authority to close the accessible paths through Mellon Green during the winter.

If the accessible paths are part of the Urban Open Space, then Plaintiffs’ stated intention of closing Mellon Green for the winter months is called into question. Plaintiffs at ¶ 44 states: “Historically, BNY Mellon closes BNY Mellon Green during the winter by placing chains at all pedestrian entrances to BNY Mellon Green. Because BNY Mellon closes BNY Mellon Green in the winter, there is no snow removal or treatment at BNY Mellon Green.”

- a. The Pittsburgh Municipal Code does not permit closing Urban Open Space during the winter.

Urban Open Space designed “to facilitate pedestrian circulation or relieve pedestrian congestion . . . shall be accessible to the handicapped throughout the entire area and shall be open without restriction to the general public at all reasonable times.” 959.06(B)(1) (Emphasis added.)

Urban Open Space “designed to provide passive recreation space or informal activity areas . . . shall be open without restriction to the general public at least during business hours normal to that area in which it is located and during periods of heavy pedestrian movement in the area.” 959.06(B)(2) (Emphasis added).

At no place in the Pittsburgh Municipal Code does it allow for Urban Open Space to be closed during the winter months.

- b. It would violate Title III of the Americans with Disabilities Act for BNY Mellon to fail to maintain the accessible paths through Mellon Green during the winter months.

Insofar as Urban Open Space is privately owned, it would be considered a public accommodation, covered by Title III of the Americans with Disabilities Act of 1990 (42 U.S.C. §12181 et seq.), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, altered and maintained in compliance with the accessibility standards established pursuant to the A.D.A.

A place of public accommodation is a facility whose operations affect commerce; and falls within at least one of the established categories. Relevant to the case at hand, this would include:

- Places of public gathering
- Public transportation terminals, depots, or stations
- Places of exercise or recreation

In addition to requiring design and construction in compliance with accessibility standards, the A.D.A. also requires that accessible features must be maintained in operable working condition; e.g., clearing ice and snow from accessible walkways. “A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.” 28 C.F.R. § 36.211, Maintenance of accessible features.

D. This Court should reject Plaintiffs’ attempts to characterize BNY Mellon Green as Open Space and not Urban Open Space.

The definitional section of the Zoning Code (Chapter 926) states: “Words and terms used in this Code shall be given the meanings set forth in this section. All words not defined in this section shall be given their common, ordinary meanings, as the context may reasonably suggest.”

Plaintiffs at ¶ 33 claim “BNY Mellon Green is Open Space subject (at BNY Mellon’s discretion) to future commercial development and is not required to be made accessible to the public.” The Task Force asks this Court to take notice of the definition of “Open Space, usable – outdoor open space required for residential uses.” (Emphasis added.) The definition of “Open Space” is related to residential use. Mellon Green has no proximity to residences, and cannot reasonably be considered “Open Space” under the Zoning Code.

“Open Space, urban” is defined as

a portion of a lot, not occupied by buildings, parking areas, streets, driveways, or loading areas, and characterized by the following features:

- (a) Open to the sky. . .
- (b) Developed and maintained for use by the general public;
- (c) Easily accessible to pedestrian from public streets and sidewalks;
- (d) Open to the public at least during all business hours common to the area of the district in which it is located;
- (e) Containing specified amenities or developmental features designed to encourage use and enjoyment of the urban open space;
- (f) Accessible to the handicapped;
- (g) Designed to enhance the overall environment of the district in which it is located. . .

Mellon Green clearly meets all the conditions of being Urban Open Space. It looks like, is maintained as (with the exception of the winter months), and is used by the public as Urban Open Space.

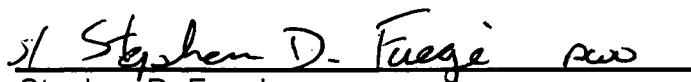
E. Conclusion

The Task Force respectfully urges this Court to

- designate the portions of BNY Mellon's lot including Mellon Green and surrounding portions not occupied by buildings, parking areas, driveways, streets or loading areas as "Urban Open Space" subject to the requirements of the Zoning Code;
- determine that the two accessible paths through the center of Mellon Green are required to be urban open space; and
- Direct that Plaintiffs may not close Mellon Green for the Winter, and must maintain the accessible paths in operable working condition throughout the year.

Dated: January 9, 2012

Respectfully Submitted,

A handwritten signature in black ink that reads "Stephen D. Fuegi" with a horizontal line underneath it.

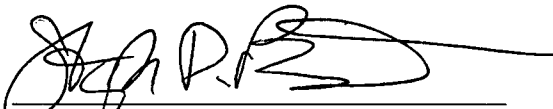
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served this  
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