**Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion filed July 28, 2011.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-11-00382-CV**

**IN RE MALAIKA ADAN, Relator**

**ORIGINAL PROCEEDING**
**WRIT OF MANDAMUS**
**190th District Court**
**Harris County**
**Trial Court Cause No. 2010-47551**

## MEMORANDUM OPINION

On May 2, 2011, relator Malaika Adan filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. §22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Patricia Kerrigan, presiding judge of the 190th District Court of Harris County to vacate the order of abatement in cause number 2010-47551, styled *Malaika Adan v. Beth Yeshua Hamashiach and*

*Sharpstown Baptist Church*. The issue in this case is whether the Texas Department of Licensing and Regulation ("TDLR") has primary jurisdiction over threshold questions of the applicability of the Texas Architectural Barriers Act ("TABA") and the Texas Accessibility Standards ("TAS"). We conclude that it does not, and conditionally grant mandamus relief.

## Background

Relator is a member of Beth Yeshua Hamashiach, a Jewish synagogue that rents space from the Sharpstown Baptist Church. According to her petition relator is confined to a wheelchair, which is too wide for the restroom facilities at the church. Relator used the restroom in the sanctuary of the building until Sharpstown complained she was scratching the stall door. As a result of the scratched door, relator was told to use a restroom in the church's gym. Relator alleged that the restroom in the gym was inaccessible for a number of reasons. In response to being asked to use another restroom, relator allegedly made "rancorous and divisive" remarks about the leadership of Beth Yeshua and Sharpstown Baptist Church. Subsequently, Beth Yeshua sent a letter informing relator:

> After much prayer, biblical counsel and consultation, the leadership of Beth Yeshua HaMashiach has decided on the following findings in order for you to be restored and allowed to attend Beth Yeshua again.
>
> a) You are not allowed on the premises of Sharpstown Baptist Church for six weeks from Feb. 11th 2010.
>
> b) You must send an apology letter to Rabbi Jim Pratt, Kathleen Elowitz, Steve Mullins & Pastor Mike Jeter showing evidence of repentance.
>
> c) You are allowed only on the Sharpstown Baptist Campus if approved by Sharpstown's Leadership.

Following receipt of this letter, relator filed suit against Beth Yeshua and Sharpstown alleging

- violation of the Americans with Disabilities Act ("ADA"), TABA, and TAS, and
- discrimination under section 121.003 of the Texas Human Resources Code based on the churches' failure to make reasonable accommodations in policies, practices, and procedures.

Real-parties-in-interest, Beth Yeshua and Sharpstown answered relator's petition and filed a motion to dismiss, or in the alternative, abate for exhaustion of administrative remedies. Specifically, real parties allege that relator's claim should be dismissed as not ripe because the TDLR is charged with administering the TABA, or the suit should be abated because TDLR has primary jurisdiction over relator's claims for relief under the TABA. The trial court granted real parties' motion to abate pending "appropriate determinations by the Commission" and ordered the case abated "until further order of this Court."[1] Relator filed a petition for writ of mandamus in this court alleging the trial court abused its discretion in abating the case.

**The Controversy**

The intent of the TABA is "to eliminate, to the extent possible, unnecessary barriers encountered by persons with disabilities," and "to ensure that each building and facility subject to [the TABA] is accessible to and functional for persons with disabilities without causing the loss of function, space, or facilities." Tex. Gov't Code Ann. § 469.001. The application of the TABA is limited to public buildings or facilities constructed or substantially renovated on or after January 1, 1970, and privately funded

[1] Neither the order of the trial court nor real parties' argument on primary jurisdiction makes clear which party has the obligation to seek a ruling from TDLR or whether any party has solicited such ruling. By abatement rather than dismissal, the trial court implicitly rejected real parties' exclusive jurisdiction argument and the associated exhaustion threshold. It is clear, however, that real parties did not seek a ruling from TDLR prior to relator instituting this proceeding. Thus, on this record, the case is abated indefinitely.

buildings or facilities defined as commercial facilities by the ADA. Tex. Gov't Code Ann. § 469.003(a)(1) & (5). The standards adopted by the TABA "do not apply to a place used primarily for religious rituals within a building or facility of a religious organization." Tex. Gov't Code Ann. § 469.003(c).

The real parties in interest, Beth Yeshua and Sharpstown Baptist Church, contend that the expertise of the TDLR is necessary to determine whether the TABA applies to their facility. They argue that the agency has primary jurisdiction over this threshold issue, which must be answered before relator may move forward with her suit. Relator argues that while the TDLR is charged with administering and enforcing the TABA, the applicability of the TABA is of such a nature that agency expertise is not required.

**Mandamus Standard**

To obtain mandamus relief a relator must show that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). A trial court abuses its discretion if it fails to analyze or apply the law correctly. *In re Kuntz*, 124 S.W.3d 179, 181 (Tex. 2003). An adequate remedy by appeal does not exist under circumstances such as those presented here because the plaintiff is "effectively denied any other method of challenging the court's action for an indefinite period of time during which the cause of action remains in a suspended state." *In re Discovery Operating, Inc.*, 216 S.W.3d 898, 904 (Tex. App.—Eastland 2007, orig. proceeding); *cf. In re Southwestern Bell Telephone Co.*, 226 S.W.3d 400, 403 (Tex. 2007) (finding no adequate remedy by appeal when trial court denied abatement because proceeding with trial would interfere with function and purpose of agency).

## Primary Jurisdiction

Trial courts are courts of general jurisdiction. *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). The Texas Constitution provides that a trial court's jurisdiction "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8. Courts of general jurisdiction presumably have subject matter jurisdiction unless a contrary showing is made. *Id.* A similar presumption does not exist for administrative agencies, which may exercise only those powers the law confers upon them in clear and express statutory language and those reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed with the agency. *In re Entergy Corp*., 142 S.W.3d 316, 322 (Tex. 2004). As a creature of the legislature, an agency exercises only those powers conferred by statute. *Public Util. Comm'n v. City Pub. Serv. Bd*., 53 S.W.3d 310, 316 (Tex. 2001).

Real parties argue that referral to the TDLR and abatement of the suit is required because the TDLR has primary jurisdiction over whether the TABA applies to the building at issue. The primary-jurisdiction doctrine allocates power between courts and agencies when both have authority to make initial determinations in a dispute.[2] *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). Under this administrative law doctrine, trial courts should allow an administrative agency to initially decide an issue when (1) the agency is staffed with experts trained in handling complex problems within the agency's purview, and (2) great benefit is derived from the agency's

[2] As mentioned, the trial court rejected real parties' exclusive jurisdiction argument. Under the exclusive jurisdiction doctrine, the agency alone has the authority to make the initial determination in a dispute and, therefore, the party must exhaust its administrative remedies prior to filing suit. *See Cash America International, Inc. v. Bennett,* 35 S.W.3d 12 (Tex. 2000).

uniform interpretation of laws within its purview and the agency's rules and regulations whereas courts and juries might reach differing results under similar fact situations. *Id.*

Here, real parties urge the TDLR should make the following determinations in the first instance: (1) whether the facility is subject to the TABA — that is, "a place used primarily for religious rituals within a building or facility of a religious organization"; and (2) whether the facility violates the TABA. No Texas court has specifically addressed the issue of the TDLR's primary jurisdiction. However, two courts have addressed whether the TABA applies to particular facilities without resort to agency assistance. In *Spector v. Norwegian Cruise Line Ltd.*, No. 01-02-00017-CV, 2004 WL 637894 at *9–10 (Tex. App.—Houston [1st Dist.] March 30, 2004, no pet.) (memo. op.), the First Court of Appeals determined that the TABA and TAS did not apply to a cruise ship that had never sailed in Texas waters. In *Sapp v. MHI Partnership, Ltd.*, 199 F.Supp. 578, 588–89 (N.D. Tex. 2002), a federal district court determined that a model home/sales office was subject to the TABA because it was considered a public facility.

Similarly, federal district courts evaluating the religious-organization exception under the Americans with Disabilities Act ("ADA"), upon which the Texas statute was modeled, also resolve the application of the statute without the necessity of U.S. Access Board input. These courts examine various factors, including the purpose of the organization, whether it has a religious curriculum, and whether it is a tax exempt organization. *See Rose v. Cahee*, 727 F. Supp.2d 728, 746 (E. D. Wis. 2010). Moreover, these courts resolve the religious-organization issue, a mixed question of fact and law, based upon a full evidentiary record and adversarial proceeding in order to afford a claimant the opportunity to contest the religious exemption urged. *See Doe v. Abington Friends School*, 480 F.3d 252, 257–58 (3d Cir. 2007). The inquiry at issue is more akin to cases in which the action or dispute is inherently judicial in nature and over which the legislature has not vested primary jurisdiction in an administrative body. *Discovery*

*Operating*, 216 S.W.3d at 904 (citing *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411 (1961)). In *Discovery Operating*, Discovery Operating filed suit against BP America Production Company, and alleged that BP had violated its injection-well permits and the rules and regulations of the Texas Railroad Commission. *Id.* at 901. The trial court abated the case for consideration by the Railroad Commission. *Id.* The court of appeals found that the Texas Supreme Court had addressed the issue of the Railroad Commission's primary jurisdiction on several occasions and "found it not to be so broad-sweeping as to oust the courts of jurisdiction just because the Commission might have jurisdiction to determine some facts related to the controversy." *Id.* at 904 (quoting *Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990)). The court determined the Railroad Commission did not have primary jurisdiction because the dispute was judicial in nature. *Id.* at 905.

In contrast, in *In re Southwestern Bell*, the supreme court determined that the Public Utility Commission ("PUC") had primary jurisdiction over a district court in an action involving the threshold questions about the meaning and effect of certain telephone interconnection agreements. 226 S.W.3d at 403–404. In that case, the supreme court determined that the PUC is staffed with experts "who routinely consider the validity and enforceability of interconnection agreements." *Id*. at 403. The court further determined that the uniform interpretation of the agreements by the PUC provides great benefit. *Id.* at 404. In that case, conflicting jury verdicts and rulings by different courts, the supreme court determined, could inhibit competition, compromise the agency's ability to perform its regulatory duties, and frustrate Congress's goal of providing opportunity for competition in the local market. *Id.*

Here, real parties identify no specific expertise of the TDLR in determining the application of the TABA to a particular facility. The statute contemplates an advisory board comprised of "building professionals and persons with disabilities." *See* Tex.

Gov't Code Ann. § 469.053. However, nothing in the statute suggests that the advisory board has an expertise in determining the application of the architectural barriers administrative rule for "Places Used Primarily for Religious Rituals"; nor does a particular expertise appear appropriate for identifying applicability under the rule. *See* Architectural Barriers Administrative Rules § 68.30(8).[3]

Petitioner correctly urges that there is no uniformity to be derived from deferring to the TDLR in a case such as this. Whether a facility qualified for an exemption as a "place used primarily for religious rituals within a building" or a "facility of a religious organization" is unique to the facts and circumstances of the particular facility.

Real parties further assert that section 51.051 of the Texas Occupations Code invests the TDLR with primary jurisdiction over the applicability of the TABA. The code section provides:

> (a) The Texas Department of Licensing and Regulation is the primary state agency responsible for the oversight of businesses, industries, general trades, and occupations that are regulated by the state and assigned to the department by the legislature.
>
> (b) The department is governed by the commission.

Neither the Occupations Code, nor the TABA invests the TDLR with such broad-sweeping oversight authority as to oust the courts of jurisdiction over the dispute at issue here.

Having determined the TDLR does not have primary jurisdiction, we must determine whether mandamus is appropriate. This court and the trial court must presume the trial court has jurisdiction over relator's suit, and the real parties have not shown that

[3] The administrative rule provides in pertinent part, that "[t]his exemption does not apply to common use areas. Examples of common use areas include, but are not limited to, the following: parking facilities, accessible routes, walkways, hallways, toilet facilities, entrances, public telephones, drinking fountains, and exits."

the Texas Constitution or some other law gives exclusive or primary jurisdiction over such claims to the TDLR. Therefore, the trial court has jurisdiction, and it was an abuse of discretion to abate the case pending a ruling by the agency. When a trial court erroneously sustains a plea in abatement, mandamus is appropriate if the plaintiff is "effectively denied any other method of challenging the court's action for an indefinite period of time during which the cause of action remains in a suspended state." *Discovery Operating*, 216 S.W.3d at 905 (quoting *Trapnell v. Hunter*, 785 S.W.2d 426, 429 (Tex. App.—Corpus Christi 1990, orig. proceeding)). Under these facts, we find that mandamus is an appropriate remedy because relator has no adequate remedy by appeal.

Relator's petition for writ of mandamus is conditionally granted. We are confident the trial judge will vacate the order of abatement, and only in the event she does not will a writ issue.

/s/ Sharon McCally
Justice

Panel consists of Justices Frost, Jamison, and McCally.