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PLAN FOR EXPENSE AND CHALLENGE OF ADA AND BUILDING CODE COMPLIANCE

When Considering New Projects in Your Community

Building codes and specifically the Americans with Disabilities Act ("ADA") are designed to make buildings safer and more accessible. The challenge is understanding when your building is not code-compliant, and when it may need to be. Title III of the ADA provides in relevant part as follows:

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

Under the ADA, "[t]he phrase 'public accommodation' is defined in terms of 12 extensive categories...." (See *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661.) Some of those categories could apply to a homeowners association, depending on the use of the association's facilities. California law defines "public accommodation" in a different manner. Specifically, Health and Safety Code Section 19955 defines "public accommodation" to mean "a building, structure, facility, complex, or improved area which is used by the general public and shall include auditoriums, hospitals, theatres, restaurants, hotels, motels, stadiums, and convention centers." The structural access standards promulgated in connection with Health and Safety Code Section 19955 et seq. and Government Code Section 4450 et seq. "give meaning to the public accommodation law prohibiting discrimination against the handicapped..." (See *Hankins v. El Torito Restaurants,*

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Inc. (1998) 63 Cal.App.4th 510, 520.) The ADA may also apply to areas accessed and used by employees. There are additional state and federal laws that may apply as well depending on the context, ***so any time a question regarding the ADA or discrimination arises, associations should always seek the advice of legal counsel and applicable construction or design professionals.***

In a 2009 decision from the California Court of Appeal, Fourth District, *Carolyn v. Orange Park Community Association* (2009) 177 Cal.App.4th 1090, the Court addressed the question of whether recreational common areas within a common interest development are public accommodations under the ADA under certain facts. In *Orange Park* the association maintained and exercised control over a series of recreational trails on common area. The association installed barriers on its trail entry points to prevent any vehicle access citing concerns for horseback riders and hikers as well as damage to the trails. A lawsuit was filed based on the fact that upon the installation of barriers by the association, the trails were no longer accessible for disabled persons who wanted to use horse drawn vehicles. In *Orange Park* the trial court granted summary judgment in favor of the association finding that the trails were not a public accommodation within the applicable legal definitions. The appellate Court in *Orange Park* affirmed relying upon legal authority that excludes the application of the ADA to "strictly residential facilities" (*Id.* at 1102). In a 1992 letter by the Department of Justice drafted in response to a citizen's request for information about the applicability of the ADA to a clubhouse in a housing development, the Department wrote:

> *Assuming your housing complex is strictly residential and would not be considered a social service center establishment, whether the ADA applies to the clubhouse depends on who is entitled to use the clubhouse. If activities in a clubhouse within a residential complex are intended for the exclusive use of residents and their guests, the facility is considered an amenity of the housing development . . . If the clubhouse facilities and activities are made available to the general public for rental or use, they would be covered by the ADA. (Id.)*

In its finding that the recreational trails were not a public accommodation, the appellate Court in *Orange Park* stated:

> *There is no evidence in the record suggesting OPCA's trails were built for anyone other than its own members. There is no evidence in the record suggesting OPCA encourages public use of its trails, through advertising or otherwise. Nor is there evidence in the record suggesting OPCA charges fees to members of the public for using the trails or benefits in other ways from the public's use of the trails. The OPCA trails are an "amenity" provided to OPCA's members in exchange for their membership and association dues, not a public accommodation. (Id. at 1105).*

The Court, however, did not dismiss the premise that recreational common areas within a common interest development can be classified as public accommodations in appropriate circumstances. (*Id.* at 1104).

In addition to that possibility, there may be more to the story, and associations are finding themselves in the position of having to comply with the ADA even if they may not be required to purely under the ADA itself. Many building ordinances have incorporated the ADA or portions of the ADA into requirements for all buildings in a particular jurisdiction. Some developments are designed for older residents and therefore must comply with the ADA from a practical need to accommodate the population of that development. Some developments must also respond to reasonable accommodation requests from individual residents, which could result in ADA upgrades through one form or another.

Managing finances a multifaceted real estate asset, such as a homeowners association, is a complicated process full of pitfalls

and unanticipated expenses. Civil Code Section 5600(b) only allows associations to levy assessments in the amount necessary to defray actual costs of the association, so there is no rainy day fund. Reserve studies account for many major components, but may not account for changes in circumstances that move a 50-year component to a 5-year component, or may require the reconfiguration of a building to address accessibility requirements.

With reasonable inquiry and big-picture planning, associations can tackle these big expenses without the pains of special assessments and serious legal claims. It may not be enough to rely solely on the idea that a facility is private and not covered by the ADA. The current state of the law, building standards, and the various forms of reasonable accommodation requests have added many exceptions that may make it inapplicable to a particular community association.

Replacing a sidewalk, or a clubhouse, or a recreational area often comes with ADA or other code upgrades.

Many building departments require this as part of the permit and approval process, and this can often increase construction costs by 30 percent or more. Your long-term planning for a project can quickly turn into a scenario where a special assessment is needed, and potentially on an emergency basis if a planning inspection reveals unsafe code violations. Careful consultation with your engineers and project managers can help plan for these expenses, and allow you to properly budget for a project or postpone a project altogether by avoiding the start a process that must be completed.

Any time an issue arises regarding the ADA or a claim of discrimination, associations should immediately consult with legal counsel and the appropriate construction or design professionals. The law is complicated, and with the various layers of federal, state and local laws that may apply, it can be difficult to navigate. Individual owners may have specific needs as well, and a development may not have been built in a manner that meets the needs of the owners.

These may seem like daunting issues for a community, especially older ones that may not meet current building standards. However, careful planning, informed responses to problems and claims, and reliance on experts can keep buildings safe, keep buildings accessible, prevent injuries, and avoid lawsuits. The ADA itself may not apply to a particular homeowners association or common area facility, but the facts and other applicable laws may lead to the same result that you would have had under the ADA. Not every cost can be planned for, but many can with careful planning and reliance on experts. A $2 advanced increase in monthly assessments is much less painful and unpopular, than a $5,000 special assessment once it is too late to plan ahead for a needed change to the common area.

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