

## **THE ADA – CONSIDERATIONS FOR HOUSING PROVIDERS**

The American with Disabilities Act (ADA) prohibits discrimination 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. For purposes of the ADA, a person is considered disabled if that person has a physical or mental impairment that substantially limits one or more of the major life activities of the person.

The purpose of the Act is to remove barriers to persons with disabilities so they may participate in and have an equal opportunity to enjoy life in the same manner as others. The term "facility" includes all or any part of a building, structure, equipment, vehicle, site (including roads, walks, passageways, and parking lots), or other real or personal property. Both permanent and temporary facilities are subject to the barrier removal requirements.

The U.S. Department of Justice requires that public accommodations establish procedures for a continuing review of compliance progress.

### **Public Accommodations**

The applicability of the ADA to private parties under Title III turns on whether there is a place of public accommodation.

Places where business is conducted and the public is invited are public accommodations. A sales office, therefore, is subject to the ADA. In a Baltimore case, the trial court found that a sales center located in an inaccessible condominium violated the ADA. Likewise, a rental center in an apartment that was not accessible was found to be in violation of the ADA by a Texas trial court.

Private residences are not public accommodations. A few courts have found, or implied, that mobile home parks are not places of public accommodations. If the use of facilities is limited to residents and their guests, they are not subject to the ADA. However, if the public is invited and the facility is a place where the public gathers, i.e., bingo games, club meetings, church services, then the ADA requirements do apply.

Some places may be "mixed" use. If a sales office is located in a model home or clubhouse not ordinarily subject to the ADA, the building must still meet the ADA accessibility standards.

### **Removing Barriers**

There are two standards in terms of removing barriers. Strict compliance with accessibility requirements must be met when new facilities are designed and constructed. The only persons who engage in intentional discrimination under this standard are those involved in the design and construction of the building. A housing provider is directly affected though if violations of the ADA are claimed with respect to new construction.

because the property owner becomes involved in litigation and/or remediation efforts resulting in delays, reconfiguration of space and lost income, to say nothing of damage to reputation.

A more fluent standard applies to existing buildings. Owners of existing buildings are required to remove barriers where such removal is "readily achievable". A project is "readily achievable" if the project can be easily completed without much difficulty or expense. This standard incorporates a reasonable period of time within which to remove barriers.

Department of Justice (DOJ) guidance suggests the following factors should be considered in determining if a project is readily achievable:

- 1) The nature and cost of the action;
- 2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
- 3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- 4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- 5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

If the public accommodation is a facility that is owned or operated by a parent entity that conducts operations at many different sites, the public accommodation must consider the resources of both the local facility and the parent entity to determine if removal of a particular barrier is "readily achievable." The administrative and fiscal relationship between the local facility and the parent entity must also be considered in evaluating what resources are available for any particular act of barrier removal.

Priorities for removal of barriers are first, measures that allow access to the place of business from the sidewalks and parking and second, measures that provide access to the place where goods and services are made available to the public. Basically there must be an accessible route to and through the place of business. In most cases, the removal of curbs, the provision of handicapped parking, along with an accessible route from the parking to the business, will be viewed as readily achievable. The construction of a wheelchair accessible ramp is considered readily achievable. An accessible route to a

bathroom equipped and designed to be wheelchair accessible may or may not be readily achievable depending on the circumstances. In making this determination, regulators and the courts may look at the financial resources of a parent company and all related businesses, as well as the structural integrity and architectural considerations of the building.

The duty to remove barriers under the ADA exists even if you know of no handicapped person who wants to use your facilities or access your services. You never know when a handicapped person will want to become a customer. This duty combined with the fact the ADA has been in existence for over ten years, has caused some investigators to take a more demanding view of what should have been accomplished in making places of business accessible.

To show a violation, the complainant must establish that elements of an existing facility deviate from the accessibility guidelines of ADA's "alteration standard" and that removal of a given barrier is readily achievable. The owner may also rebut the claim by showing there is an alternative effective means of access.

Historically, one alternative to having an accessible sales location has been to meet with persons who cannot access a sales office in alternative locations, such as their home or the community's clubhouse. A Texas court recently addressed a claim made by a wheelchair bound person who was injured trying to access a sales office in a site-built model home. The builder argued there were other accessible offices the claimant could have used. The court held this was insufficient, noting that "separate but equal" went out many years ago with the school desegregation cases.

## **Alterations**

An alteration that affects usability must comply with ADA alteration standards (less stringent than new construction standards) to the "maximum extent feasible". Costs are not considered when addressing compliance during alterations. Alterations include remodeling, renovation, rearrangements in structural parts, and changes or rearrangement of walls and full-height partitions. Normal maintenance, reroofing, painting, wallpapering, asbestos removal, and changes to electrical and mechanical systems are not "alterations," unless they affect usability.

An alteration may trigger the need to create accessible paths if the alteration is made to a "primary function area", an area where a major activity for which the facility is intended takes place. It includes customer services areas, work areas, and offices. It does not include mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, or restrooms. Whether the exercise room in a primary function area is certainly open to debate and would be a fact question precluding summary judgment.

In addition to the requirement that the altered area itself is ADA compliant, there are

additional accessibility requirements that address the "path of travel". This includes an accessible route from the entrance to the altered area, aisles, etc., and the bathrooms, telephones and drinking fountains serving the area. "Path of travel" alterations are not required if they are "disproportionate" to the original alteration—if they exceed 20 percent of the cost of the original alteration to the primary function area. To prevent owners from making small alterations to avoid the cost of increasing accessibility, enforcement agencies will combine the costs of alterations to primary function area and/or the same path of travel areas for the past three years.

If the cost is disproportionate, the owner must make necessary modifications to the path or travel to the 20 percent requirement. Department of Justice (the federal agency that enforces the ADA) guidance states changes should be made in the following order: accessible entrance, accessible route to the altered area, at least one accessible restroom for each sex or single unisex restroom, phones, drinking fountains, and then other elements such as parking, storage, and alarms.

### **Fair Housing - Duty to Provide Reasonable Accommodation**

Whether or not there is a duty under the ADA to remove barriers, an individual resident with a handicap may be entitled to a reasonable accommodation under fair housing laws. Both the Federal and Florida Fair Housing Acts protect persons with disabilities. The protections for those who are disabled and the duties of the property owner/management are, however, different under the ADA and fair housing laws.