Creating an Accessible City:
Providing Access and Accommodations to Public Facilities and Rights-of-Way

Best Best & Krieger LLP Webinar
July 24, 2018
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Americans with Disabilities Act

- 42 U.S.C. sections 12101 et seq.

- Three Components:
  - Title I – Employment
  - Title II – Public Services
  - Title III – Privately-Owned Public Accommodations
Title II – Public Services

• The Basic Rule:
  • No qualified individual with a disability shall, by reason of such
disability, be excluded from participation in or be denied the
benefits of the services, programs, or activities of a public
entity, or be subjected to discrimination by any such entity.

• Title II applies to everything a public entity does.
  • Includes public services, as well as public facilities
    • Exercise facilities, recreation facilities (mini golf, boating,
amusement parks, playgrounds, pools, etc.)
    • Zoning, Police/Emergency Services, Websites

• Disability = A physical or mental impairment that substantially
limits one or more of the major life activities of such individual
Title II – Public Services

• Consequences of non-compliance:
  • Injunctive relief (i.e., Fix It!)
  • Attorney’s fees and expert’s costs
  • Damages
    • For “deliberate indifference” under federal law
    • Statutory damages of $4,000 per violation under California Law
Title II – Regulatory Framework

• Americans With Disabilities Act charges Department of Justice with adopting regulations

• *Chevron* deference: Courts defer to administrative agency’s interpretation of regulations, unless unreasonable.
  • What does this mean?
Title II – Regulatory Framework

• DOJ Regulations
  • Originally adopted in 1992
  • Updated in 2010

• DOJ Section-by-Section Analysis

• Other DOJ Publications
Title II – Regulatory Framework

• Procedure for Design Standards
  • Proposed by Access Board
  • Adopted By DOJ

• Design Standards:
  • 1991 ADA Accessibility Guidelines (ADAAG)
  • 2010 ADA Standards for Accessible Design

• Explanatory Materials:
  • DOJ Guidance on 2010 Standard
  • DOJ Technical Assistance Manual

• Other DOJ Publications

*All available at www.ada.gov
Title II – Regulatory Framework

• Public Rights-of-Way Accessibility Guidelines (PROWAG)
  • Proposed by Access Board in 2011
  • Not yet adopted by DOJ
  • Available at www.access-board.gov
Title II – Regulatory Framework

• California:
  • Unruh Civil Rights Act – makes any violation of federal ADA a violation of State law
  • California Building Code – contains accessible design standards
    • Other protocols, e.g., Manual for Uniform Traffic Control Devices (MUTCD)
Public Facilities - Distinction

- **Existing Facilities** – Not constructed or altered since January 26 1992
  - Program Access Standard

- **New Facilities** – Constructed or altered since 1992.
  - Design Standard – new or altered portions must comply with design standards
Program Access Standard

- Each service, program, or activity conducted by a public entity, *when viewed in its entirety*, must be readily accessible to and usable by individuals with disabilities.

- Does not necessarily require structural changes to existing facilities
Program Access Standard

• May be achieved by:
  • Redesign or acquisition of equipment
  • Reassignment of services to accessible buildings
  • Assignment of aides to beneficiaries,
  • Home visits
  • Delivery of services at alternate accessible sites
  • Alteration of existing facilities and construction of new facilities
  • Use of accessible rolling stock or other conveyances, or
  • Any other methods
Program Access Standard

- What does it mean to provide access to all public services?

- Cities must provide **meaningful** access
  - Independent
  - Integrated
  - No surcharge

- *Tip: Show empathy!*
Title II – Public Services

• General Exceptions to Program Access:
  • Direct Threat to Health or Safety
  • Historical Preservation
    • *Only to preserve historical significance*
  • Fundamental Alteration
  • Undue Financial Burden
  • Undue Administrative Burden

*Exceptions do not provide an absolute defense*
Title II – Public Services

• To establish fundamental alteration or administrative burden:
  • Burden of proof is on agency
  • Determination must be made by agency head after considering all options
  • Must be in writing
What Triggers ADA Upgrades?

• New Construction

• **Alteration**: A change that affects or could affect the usability of all or part of a building or facility.
  • Generally is a physical change – excludes painting and other routine maintenance.

• **Accessible Route to Altered Facility**: Alteration triggers upgrades to accessible routes to area, as well as restrooms, phones, and drinking fountains.
  • Unless the upgrades to the accessible route are not proportional to the cost of the primary upgrade (*i.e.*, greater than 20%)
What Triggers ADA Upgrades?

- **Non-compliance of new or altered facilities**
  - Must be brought in conformance with standards
  - Reasonable accommodation/program access is not a defense to non-compliant new or altered facilities
  - Undue financial burden is not defense to non-compliant new or altered facilities

- **Tips:**
  - Inspections are crucial
  - Indemnification/bonds
Exceptions to Strict Compliance with Standards

• Safe Harbor - Compliance with applicable standards at time of alteration

• Technical Infeasibility
  • Viewed from an engineering, not financial perspective
  • Right-of-way limitations?
    • From the CBC: “existing physical or site constraints [that] prohibit modification or addition or elements, spaces or feature that are in full or strict compliance

• Direct threat to health or safety
  • Conflicts with MUTCD?

• Construction tolerances
Street Alterations

• Special Requirement
  • Triggers a duty to provide **curb ramps** if work spans from one intersection to another or includes crosswalks.

• Per DOJ, street alterations include reconstruction, rehabilitation, widening, resurfacing, etc.
  • Resurfacing includes: addition of a new layer of asphalt, concrete pavement rehabilitation and reconstruction, open-graded surface course, micro-surfacing and thin lift overlays, cape seals, and in-place asphalt recycling.
    • Does not include maintenance such as filling potholes, slurry seals, crack filling and sealing, etc.

• Tip: include curb ramps in Capital Improvement Plan
Maintenance of Altered Facilities

- Accessible features of altered or newly constructed facilities must be kept usable for persons with disabilities.
  - Exceptions should be only as needed.
    - E.g., temporary construction

- *Cohen v. City of Culver City*
  - City hosted a car show
  - Vendor’s display blocked a curb ramp
  - Elderly patron injured stepping up curb, even though another ramp was only twenty feet away
  - City could be liable because “simple, low-cost, reasonable measures, could have accommodated the plaintiff.”
Lessons from *Cohen*

- Cities should consider and maintain accessibility when hosting farmer’s markets, street fairs, and other events in public rights-of-way or facilities.

*Tips:*
- Take stock of accessible elements – e.g., ramps, restrooms (including portable facilities), parking, etc.
- Control where vendors may locate booths.
  - Mark off accessible areas?
- Inspect conditions during event.
- Indemnification?
Sidewalks – Existing Facilities or Separate Programs?

• *Barden v. Sacramento* (9th Cir.)
  • Sidewalks are programs requiring access
  • Did not necessarily preclude program access standard

• *Frame v. City of Arlington* (5th Cir.)
  • Sidewalks are programs; BUT, existing facilities are an exception and only trigger alterations if denying access to some other program

• *Daubert v. Lindsay Unified School District* (9th Cir.)
  • For program access: Must identify the relevant program and consider whether existing facilities prevent access.
Lessons from *Daubert v. LUSD*

• Existing high school bleachers were inaccessible but school provided access to football games with field-level seating.

• Plaintiff argued that bleacher-seating was a service, program, or activity.

• Court’s Analysis: If bleachers were a program, the program access standard would be meaningless.
  • Benefits derived from bleacher seating are “ancillary.”
Lessons from *Daubert v. LUSD*

- **Takeaways:**
  - Identify program offered.
  - Consider access in its entirety (meaningful access).
  - Develop a plan for providing alternative but equivalent access.

- **Application for Cities:**
  - Sidewalks and other rights-of-way facilities
    - Is circulation provided throughout city or at least to key locations?
Sidewalks - Tips

• Key Areas
  • Public Transit connection
  • Connections to public facilities
  • Main commercial areas
• CIP Programs – consider sidewalk upgrades concurrently with street/curb cut work
• Underground utilities
  • Be careful with new encroachments
• Require as offsite improvements
  • Maintain development standards
No Design Standard?

• What happens when there is a new or altered facility but no design standards?
  • The ADA still applies
  • DOJ says there are two methods to consider:
    • Analogous design standards
    • Program access
Example - On-Street Parking

• Current design standards only apply to parking in lots or facilities, not on-streets

• PROWAG contains standards for on-street parking
  • Not yet adopted by DOJ
  • Generally similar to existing standards, but requires one accessible space per block perimeter
Fortyune v. City of Lomita

- Plaintiff sued because City did not have on-street accessible parking.

- City’s Response: City demurred on grounds that there is no regulation governing on-street parking.

- Court: Cities must provide on-street parking even in absence of regulations.
On-Street Parking in Light of Fortyune

- Still no clear standard

- Consider existing regulations, PROWAG, and program access standard.

- Where is on-street accessible parking required?
  - PROWAG says only “marked or metered” spaces.
  - Consider what services, programs, or activities are served:
    - City buildings
    - Downtown areas
    - Recreational programs
    - Parking not served through lots or facilities
On-Street Parking in Light of Fortyune

• Where should on-street parking be located?
  • Generally should be dispersed.
  • Should be concentrated where necessary (e.g., in downtown centers).

• How many spaces? Not clear, but consider some objective standards:
  • E.g., treat downtown area as a parking lot and use same number of spaces per design standards for parking lots. (recommended).
  • E.g., follow PROWAG requirement of spaces per block perimeter (generally not recommended)

• Technical requirements? Use existing standards for spaces in parking lots.
• Parallel parking? Only as a last resort. Consider other alternatives first.
Zoning, Right-of-Way, and Development Standards

- Rule: A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination.

- From Title Technical Assistance Manual:
  - ILLUSTRATION 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

- Tip: Adopt a procedure for applications for a reasonable modification to policies and procedures.
Private Businesses

• Title III – Privately-owned public accommodations must remove barriers if readily achievable.
  • No liabilities or duties on city
  • Cannot prevent ADA claims

• If public purpose, consider
  • Providing compliance workshop
  • Using grant funding for ADA compliance
  • Provide access or reference to CASp certified inspectors
ADA Administrative Requirements

• ADA Coordinator
  • Employee to coordinate city’s efforts to comply with and carry out its responsibilities under ADA, including investigation of complaints.

• Grievance Procedure
  • Cities must adopt procedures for prompt and equitable resolution of complaints

*Only required if 50 or more employees*
ADA Administrative Requirements

• Tips:
  • Grievance procedure is not prerequisite to litigation
  • Be practical in drafting grievance procedure; goals are to:
    • Provide customer service, and
    • Resolve disputes
  • Grievance/ADA coordinator does not have to be any particular employee
ADA Administrative Requirements

• Self Evaluation
  • Cities were required to perform self-evaluation to identify barriers within 1 year of adoption of ADA
    • i.e., in 1993.

• Transition Plan
  • Cities were required to develop a plan to remove barriers to access within 3 years
    • i.e., by 1995
ADA Administrative Requirements

- Self Evaluation/Transition Plan
  - Applies to barriers that prevent program access; can still apply program access standards to existing facilities
  - Does not apply to new construction or alterations
ADA Administrative Requirements

• Self Evaluation/Transition Plan Litigation
  • No private action to force transition plan
  • DOJ may be able to bring action

• New transition plan does not preclude liability
  • Identifying barriers is still important
  • Developing a plan to remove barriers is practical
  • Developing and following a plan may avoid a finding of deliberate indifference
Best Practices – Areas to Routinely Evaluate

• PARKING

• Accessible route to main entrances

• High-traffic public areas (e.g., counter to pay utility bills, permit counter, etc.)

• Council chambers (Brown Act compliance)
  • Ensure areas for wheel chairs
  • Maintain clear pathways
  • Accessible communications (e.g., alternative to mic at podium)

• Areas specially used by senior citizens and children
What If Your City Receives a Complaint?

- Contact legal counsel and risk management; cooperate with DOJ and other enforcement agencies

- Follow grievance procedure; try to find a resolution
  - Begin process similar to interactive process
    - Meet with staff to discuss options
    - Meet with complainant

- Inspect the facility
  - Determine when the facility was constructed/altered
  - Determine whether there is a design flaw and who is accountable
  - Document existing conditions and any discrepancies

- **FIX THE PROBLEM and ANY OTHER PROBLEMS ONSITE**

- Be realistic and practical
Additional Resources

• DOJ actions and consent decrees:
  • https://www.ada.gov/enforce_current.htm#TitleII
• The ADA and City Governments:
  • https://www.ada.gov/comprob.htm
• ADA Guide for Small Towns:
  • https://www.ada.gov/smtown.htm
• CASp Program
  • http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx
Thank you for attending.

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