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The American with Disabilities Act...

Do we really have to comply?

After tackling federal jobs, public transportation and public accommodations, in September 2010, the Justice Department decided it was finally time to change the historic exclusion and discriminatory treatment of people with disabilities participation in recreational activities, such as swimming. Entitled the "2010 Standards for Accessible Design," the Justice Department established new regulations under the Americans with Disabilities Act ("ADA") specifically setting minimum accessibility requirements and standards for swimming pools made available to the public for rental or use.

The 2010 regulations and Standards sent pool operators across the country into a frenzy about the applicability and difficulty or expense to comply with such rules. While it was clear that the standards applied to all public swimming pools, hotels, and recreation facilities, guidance from the Justice Department suggested that the standards could also apply to community association pools in private residential neighborhoods, if made available for public rental or use. Faced with concerns over the requirements for accessible pools and looming compliance deadlines, the new rules left many boards of directors and managers confused as to how, after so many years, community associations may be affected by the ADA.

The fact of the matter is that, although there have been recent changes to the ADA, nothing in the law has changed in recent years with respect to whether the ADA will apply to a community association. However, the 2010 changes in the ADA have prompted many to reconsider whether the way communities use their amenities in this age makes community associations subject to the ADA, particularly with the explosion of swim team and tennis team events. The following is a brief review of the ADA and its effect on community associations.

What is the ADA?

The Americans with Disabilities Act is a federal law that was created on July 26, 1990. The primary goal of the ADA is to ensure that disabled individuals have full and equal access to the same, or similar, benefits enjoyed by the general public. The ADA is divided into five different sections, called titles. Title 3 in particular prohibits discrimination against handicapped persons in places of public accommodation and commercial facilities. These provisions require owners and operators of public accommodations and commercial facilities to make changes or improvements to their property to allow disabled people the same ability to enjoy the property as non-disabled people.

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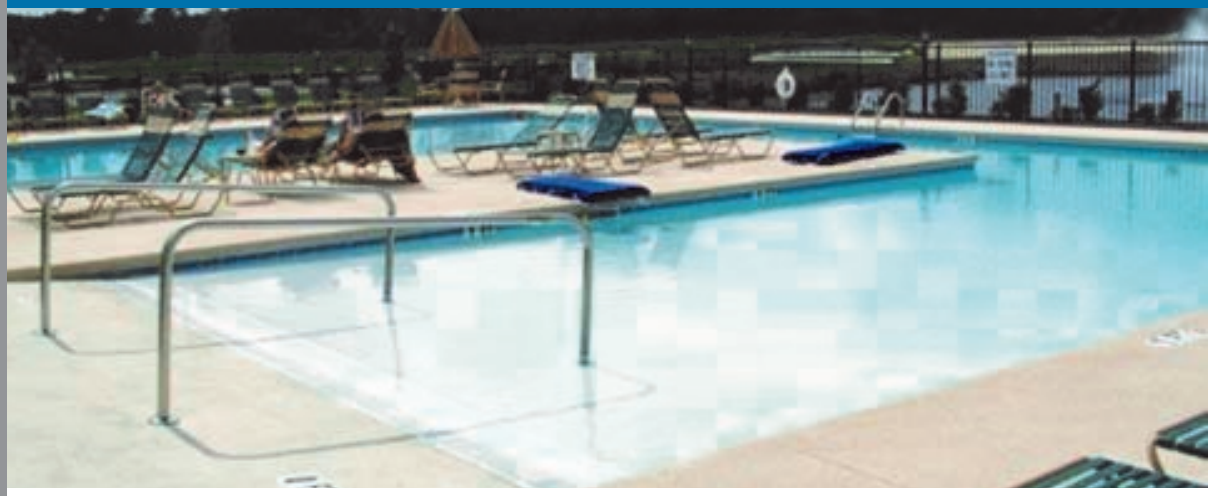

When will the ADA apply to community associations?

Historically, the community association industry has taken the position that the ADA does not apply to community association common areas because they typically are reserved for use by members and guests, and thus are not public accommodations or commercial facilities. But, the growth of heavily attended events like swim meets or ALTA tennis matches has forced a rethinking of this issue.

Whether the ADA applies to a particular community association will depend on whether the association's amenities and common areas are deemed a place of public accommodation under the ADA. The ADA has a broad definition of what is considered to be a place of public accommodation, and the ADA specifically defines places of recreation or exercise to be public accommodations, if available for use by the public generally.

In a nutshell, then, community association amenities that are open to the general public will be considered a place of public accommodation under the ADA, as a place of exercise or recreation. And, association amenities that are restricted to use only by association members and their guests then should not be considered a place of public accommodation.

What constitutes being open amenities to the general public?

Whether an association's amenities will fall within the definition of a place of public accommodation will depend greatly on each community's specific situation. As a general rule, any time the amenities are open to the general public, even if for a limited purpose, the amenities are likely to be considered a place of public accommodation. If, for example, a community hosts a high school fundraising event on the community play fields, inviting the general public, the facility would be considered a place of public accommodation under the ADA.

The following are examples of other situations that may place association common areas into the definition of a place of public accommodation:

- **Selling memberships.** If an association sells memberships to its amenities to the general public, or allows rentals of its facilities to the public at large, it will clearly fall within the definition of a place of public accommodation. However, a cost sharing or a shared use arrangement whereby an association allows limited memberships only to residents of a neighboring property or community, may not fall within the purview of the ADA.

- **Swim meets.** Perhaps the biggest buzz coming from the new ADA requirements is the realization that associations that host swim meets at their community pool may fall within the definition of a place of public accommodation. When an association hosts swim meets, often the association has no control over or ability to limit what guests come with the opposing team, especially when the teams and the meets are set by a local swim league. Furthermore, during those meets, the facilities are typically open to spectators who may not even be residents of the community, with limited or no supervision or control by the association. Moreover, some associations that host a swim team will open spots on its team to the public at large.

  Each particular circumstance for an association will merit its own review, but, in any circumstance where the facilities are open to the public at large, even if for a limited purpose such as a swim meet, an association runs the risk of being subject to the ADA. If swim team memberships are open to anyone outside of the community without invitation, the pool will be considered a place of public

accommodation, regardless of any other restrictions the association may have in place.

If the home swim team participation is limited to only residents of the community and possibly specifically invited additional participants, this alone should not trigger the ADA.

But, the open question is whether the volume of and unrestricted access by other teams and their guests and spectators triggers the ADA. Many pool vendors and others in the community association industry are taking the position that this unlimited or uncontrolled visitor and spectator audience triggers the ADA. There are arguably some steps an association can take to dispel any perception that it is opening its facilities to the public at large. But, it is very possible that ADA enforcement agents would take a broad view of the definition and find this to be a use of the facilities that requires ADA compliance.

Below we discuss the impact of the ADA applying to association common areas, but here are some strategies to minimize that risk with events like swim meets:

⇒ Adopt policies identifying opposing players and their guests as association home team guests.
⇒ Obtain visiting team rosters before events.
⇒ Limit the number of non-player visiting team guests, and require those guests to sign a guest log.
⇒ Adopt and apply some procedure for enforcing guest and sign-in procedures.

There is no guaranty that these steps will prevent a ruling that the ADA applies to association common areas, but it could help.

- **Tennis Tournaments.** Tennis tournaments or tennis teams hosted by an association bear the same analysis as swim teams. If the association team is open to the public at large, it is likely that the courts and any facilities used by the tennis team will fall under the ADA. Likewise, if the association allows other teams from the public at large to host tournaments on its property, then any of the facilities available to the participants and the spectators will likely be subject to the ADA. Similar procedures as those discussed for swim teams may reduce the risk of ADA application for other events.

- **Sales Offices.** For any community that maintains a sales or rental office, the office itself and other open portions of common area typically will be considered a place of public accommodation.

- **Permissive Use by General Public.** If an association has private amenities but knowingly allows the general public to use its amenities without attempting to enforce the private nature of the amenities, then the association runs the risk of being subject to the ADA. For example, if the association maintains nature trails or playing fields that are regularly used by members of the public at large, even if the amenities are solely for residents of the community, it is likely that the amenities would be considered a place of public accommodation, especially if the association is permitting the use by the public.

While the foregoing examples could potentially classify an association as a public accommodation covered by the ADA, public use of one common area recreational facility does not automatically make another common area recreational facility a public accommodation subject to ADA requirements. Determining whether a common area constitutes a public accommodation is examined on a facility by facility basis.

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What does an association have to do to become ADA compliant?

Under the ADA, the owners of public accommodations are required to remove all architectural and structural barriers to the facilities where the removal is "readily achievable" and where the removal will allow a disabled person to have the same enjoyment of the facilities as a non-disabled person. For example, under new ADA requirements any pool deemed to be public must either have a sloped entry or an ADA compliant pool lift.

The ADA provides that in determining whether an action is readily achievable, some of the factors to be considered include:

- ⇒ The nature and cost of the action needed to comply with the ADA;
- ⇒ The overall financial resources of the facility or facilities involved in the action, including the number of staff and legitimate safety requirements necessary for safe operations;
- ⇒ The effect on expenses and resources or the impact of such action upon the operation of the facility; and
- ⇒ The overall financial resources of the covered entity; and the type of operation or operations of the covered entity.

In general, it should be expected that any governing body reviewing whether or not an alteration or improvement is readily achievable for an association will give broad discretion to the needs of disabled persons, especially when viable alternatives for compliance exist. For example, remodeling a pool to allow for sloped entry may be clearly cost prohibitive for most associations; however, an argument that the pool lift is also too expensive will likely not be sufficient to get around the ADA requirements, if the ADA applies. When it comes to making a decision as to whether or not it is financially reasonable for an association to make alterations or improvements to become ADA compliant, an association may have to decide between the alterations or a complete change of use of its property so that it is not considered a place of public accommodation.

Who is responsible for the costs?

Unlike the provisions of the Federal Fair Housing Act (FHA), which compels all community associations to allow reasonable accommodations in operating procedures and modifications to common areas at the expense of the person making such request, the ADA requires the property owner to absorb the costs of the alterations or repairs. In some cases, communities may be able to negotiate for contribution from outside users such as a swim team, but, as the owner of the property, the liability for the alterations or improvements will ultimately fall upon the association.

What happens if we don't comply?

Like other civil rights laws, the ADA can be enforced by both private citizens and the Justice Department. Individuals have a right to bring an action to force a facility to comply with the Act. Individuals are not permitted to file a claim for damages but can recover attorney's fees and litigation expenses.

The Justice Department is authorized to file a claim for compliance and can seek monetary damages on behalf of damaged individuals. In addition, civil penalties of up to $50,000.00 can be awarded for a first violation and up to $100,000.00 for any subsequent violations.

Can we change the use of our property to not be subject to the ADA?

Yes, if your common areas, or a portion of your common areas are deemed a place of public accommodation because of use or visitation by outsiders, eliminating that outside use or visitation should remove the property from being subject to the ADA.

Does allowing public tennis events make our pool subject to the ADA?

Not necessarily. The term place of public accommodation should apply only to those portions of common areas that are used in a way that triggers the ADA.

It is important for associations to review their processes and procedures with respect to the use of common areas and amenities from time to time to ensure that there are no potential issues with compliance with the ADA. Clearly, with stiff penalties for noncompliance, and with the increased public awareness of the ADA requirements, failure to comply may not be a risk associations will want to take. If you have any questions about your specific situation, please do not hesitate to contact us.