# Homeowner Associations and ADA Compliance

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Homeowner Associations (Associations) must comply with anti-discrimination laws that pertain to disabled persons, or run the risk of being subject to civil liability and/or legal expenses. The focus of this article will be on the Americans with Disabilities Act (ADA) and a possible application to some Associations. Associations must keep on the alert and ensure that their actions, policies and governing documents comply with, and are consistent with the ADA. Compliance with the ADA will protect Associations from civil liability, ensure that disabled homeowners are provided a safer and better place to live, and ensure that guests to Associations who are disabled are treated equally.

The ADA, which is a Federal Law, applies to "public accommodations," which may include facilities that are part of a common interest development. Public accommodations are defined by the ADA as facilities, "operated by a private entity, whose operations affect commerce. . . ." Such facilities may include rental offices, which receive traffic from the public; club houses; golf courses open to the public; restaurants; swimming pools; or any other facility that is open to the public, no matter how long the duration. Whether or not a facility is considered a public accommodation in the eyes of the ADA is a complex question, which is based on a number of factors.

If a facility located within a common interest development is not open to the public, but instead, is open only to association members, then such facility is probably not a public accommodation under the American with Disabilities Act because it would not "affect commerce." If, however, the Association leases a facility to the public in exchange for money, or if that facility is open for public use, then that facility likely will be construed as a public accommodation under the ADA. To avoid confusion, a Homeowner association should consider posting notices on the particular facility in question, informing whomever and making it clear, that it is not open to the public. For example, if an Association maintains a jungle gym or children's play area, the Association should post a conspicuous sign near the play area stating that such play area is not open to the public, and that it can only be accessed by members and their guests. In so doing, the Association will increase the chances that such children's play area will not be construed as a public accommodation under the ADA.

Nevertheless, if a particular facility is deemed a public accommodation, the ADA requires Associations to take certain actions with respect to architectural barriers that exist on the Association's premises and with respect to the Association's

governing documents (i.e., its CC&Rs). As to "architectural barriers," the Association may be in violation of the ADA if it fails to remove architectural barriers in existing facilities where such removal is "readily achievable" by the Association. 42 U.S.C.A. Section 12182(b)(2)(A)(iv). However, the ADA also allows for some barriers to remain if the cost of removal is overly burdensome to the Association.

Architectural barriers could include the non-existence of ramps for wheelchairs, inaccessible restroom and/or shower facilities, or any other structure which prohibits or prevents a disabled person from accessing the public accommodation. The Association should employ a cost-benefit analysis when gauging whether removal of a particular architectural barrier is "readily achievable." If it will cost a Association a substantial amount of money to remove an architectural barrier (e.g., a wheelchair ramp, a narrow hallway, or inaccessible bathroom), and will provide little benefit to the disabled person, then removal of the barrier is likely not required by the ADA. If the barrier can be easily removed by the Association, at little cost, then the Association should do so. Associations should inform themselves and act in good faith when deciding whether removal is "readily achievable."

An Association must also make reasonable modifications in its policies when necessary to afford such accommodations to disabled persons, unless it can demonstrate that making such modifications would fundamentally alter the nature of such accommodations. 42 U.S.C.A. Section 12182(b)(2)(A)(ii). An example of modifying a rule and/or policy that would prevent access to a public accommodation by a disabled person would be if a Association holds a golf tournament, which is open to the public, and does not allow the use of golf carts for its participants. If there is a disabled person who needs the assistance of a golf cart due to his or her disability, and he or she is not able to participate without the aid of a golf cart, then the Association would probably be in violation of the ADA, if the Association does not allow an exception to its golf cart policy.

This same sort of scenario was analyzed by the United States Supreme Court in the case of PGA Tour, Inc., v. Martin in 2001, albeit the defendant was not a Association. In Martin, any golfer from the general public could qualify to be in the PGA Tour by paying an entrance fee and competing with other contestants during three rounds of golf, two of which allowed the use of golf carts, and one of which prohibited the use of golf carts. Casey Martin was considered to be disabled, as he is afflicted with a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. The PGA Tour did not grant an exception for Casey Martin to allow him to use a golf cart during the third round of qualifying. Martin sued and the United States Supreme Court held that such qualifying event was a public accommodation, that Casey Martin is disabled, and that Martin should be able to use a golf cart during the third round of

qualifying because allowing Martin to use a golf cart would not be a modification that would "fundamentally alter the nature of the qualifying event." That is, allowing Martin to use a golf cart would not fundamentally change the golf tournament.

In sum, an Association can be deemed out of compliance with the ADA either through its rules and/or its policies, or through its possible architectural barriers. Associations must become aware of any potential facilities that may be considered public accommodations as the ADA defines them. This important determination will decide the issue of whether the ADA even applies. If a facility or activity - that is intended to be a private facility or a private activity - has the potential of being interpreted as a public accommodation, the Association should take steps to ensure that such facility is not open to the public and is to be used only by owners of the association. If, however, the Association maintains a public accommodation, it should take steps to ensure that its policies and its architectural components are in compliance with the ADA. Not only will Associations want to avoid civil liability, but they also will want to act fairly and reasonably towards persons who are disabled. Associations should consult an expert in the field of Association law to determine if a facility located on the premises of the Association will be considered a public accommodation and require modification.