Does the Americans With Disabilities Act (ADA) Apply to Your Association? Probably Not!

By David Swedelson, Esq. and Stephanie Rohde, Esq.

Owners like to accuse the board of directors of doing things wrong. "You breached your fiduciary duties to me." "You are in violation of the ADA." And the list goes on. As you are likely aware, homeowners associations are required to comply with numerous state and federal laws, relating to everything from building codes to employment law to fair housing. While most laws either obviously apply to homeowners associations or obviously do not, there are a few tricky ones, like the Americans with Disabilities Act (ADA), which can present confusion.

We encounter questions regarding the ADA frequently. For example, when residents with disabilities want service or comfort dogs in units at an association that prohibits dogs, they will typically ask for an exception based on the ADA (or more likely than not claim that the association is violating the ADA for not allowing them to keep their dog). Although there are other laws that prohibit associations from discriminating against individuals with disabilities and that require associations to make certain accommodations depending on the situation (i.e., the Federal Fair Housing Amendments Act and the California Fair Employment and Housing Act), the that the ADA does not apply. The distinction between compliance with fair housing laws and the ADA is important. Fair housing laws may require accommodation, whereas the ADA may require that the association take certain actions, such as modifying public areas, etc.

The good news is that community associations are not typically required to comply with the ADA because they do not offer services, nor are they open to the public. Title III of the ADA states that: "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." Subsequent cases, opinions and regulations have attempted to define what constitutes a public accommodation, and have provided examples such as publicly-used parks, zoos, amusement parks, gymnasiums, health spas, bowling alleys, golf courses, or other places of exercise and recreation. Because condominium buildings and other planned developments are generally not open to the public, but rather service only the owners and tenants

Does the Americans With Disabilities Act (ADA) Apply to Your Association? Probably Not!

continued from page 14

who reside within their properties, their facilities are regarded as being private instead of public. Therefore, the ADA (a law that applies to "public accommodations") does not apply. In fact, in most case law relating to discrimination claims by disabled persons against associations, any claims made under the ADA are dismissed with one sentence that simply states that because the association is a private entity and not a place of public accommodation, the ADA doesn't apply (*i.e., Southern California Housing Rights Center v. Los Feliz Towers Homeowners Association* (C.D. Cal. 2005) 426 F. Supp. 2d 1061 which held that the ADA did not apply//Firm partner David Swedelson was an attorney for the Association; *Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 Cal. App. 4th 831).

However, sometimes the line between public and private is blurred. An interesting example of this blurred line is found in a recent case, *Carolyn v. Orange Park Community Assn.* (4th Dist. 2009) 177 Cal. App. 4th 1090. In this case, the common area of Orange Park Community Association (OPCA) included dirt trails that were used for walking and horseback riding. These trails connected with public trails and trails belonging to other private owners, and although OPCA did not invite the public to use its trails or charge a fee for non-member use, it did not attempt to enforce a boundary and keep trespassers away. The association was aware that non-residents used its trails, but did nothing to either encourage or discourage it. In 2007, citing both safety concerns and damage to the trail, OPCA installed barriers on its trail's entry points to prevent vehicles from using the trails while still allowing pedestrians and horses. Evan Carolyn, a non-resident with a mobility impairment, brought suit against OPCA because these barriers prevented him from using a horse-drawn carriage on the trail, which, therefore, made him unable to use it.

The court acknowledged that past law dictates that purely residential areas of a condominium development are not subject to the ADA, but that portions of an otherwise residential development that are open to the public can qualify as public accommodations. It then considered factors that were identified by other courts to help determine whether certain facilities constituted public accommodations, such as the use of facilities by nonmembers, the purpose of the facility's existence, the nature of the facility, advertisement to the public, and profit or non-profit status. Ultimately, the court held that OPCA's trails are not "open" to the public, even though they are used by the public, and are not public accommodations and are, therefore, not covered by the ADA.

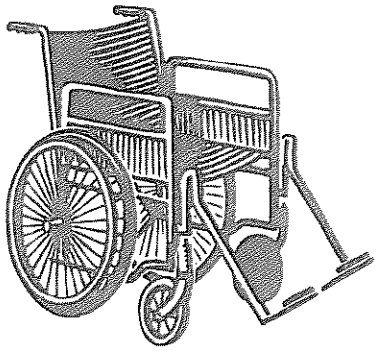
Continued on page 16

Does the Americans With Disabilities Act (ADA) Apply to Your Association? Probably Not!

continued from page 15

Although members of the public were not prohibited from using the trails, OPCA did not advertise to the public, nor did it receive any payment for the public's use. Because the court did not find any evidence that OPCA encouraged the public use of the trails, or that it was anything other than indifferent toward the public's use of the trails, it held that they did not qualify as a public accommodation. The court stated that it was more likely that OPCA did not want to deal with the hassle of attempting to police the borders between its trails and the public trails, and that this was not sufficient public use to invoke the ADA.

So, what does this mean for your association? Swimming pools and recreational facilities that are used only by residents and guests of residents clearly do not qualify as public accommodations and are therefore not subject to the ADA. On the other hand, if the swimming pool is used for kids' swimming lessons or the association forms a swim team that involves non-owners, this may be considered open to the public, especially if the public is invited in to watch the lessons or swim meets. The same applies to a gym or recreation room that is used for yoga classes that are open to the public for a fee. Such facilities certainly would be considered public accommodations. What if the public is invited to the clubhouse for a free lecture or other complimentary activity? How about if the recreation center is opened to the public as a balloting location? The *OPCA* case suggests that even if the association is not receiving money, but is receiving the benefit of good will in the community, the fact that it advertises the use of its facilities would likely mean that it is a public accommodation. What about a golf course that is not advertised to the public, but is known to look the other way when non-members use the facilities? Golf courses are one of the examples explicitly given as public accommodations, but the association is not advertising or gaining anything by the public use. This would be an extremely close call. This could depend on whether the non-owners are there as guests of another owner or are just using the course because it is available.



What you can take away from this article is this: Be aware of the way in which your association's common area facilities are being used. If you are inviting the public to use the facilities or the property for any reason, you may be subject to the ADA and the requirements that your facilities be equipped to handle disabled individuals. The ADA is a particularly unforgiving law, and does not allow the association an opportunity to cure its failure to meet the ADA requirements before exposing it to liability. If your association is subject to the ADA, you want to be certain that you are aware of what that means and that you are complying with its requirements. However, if the common area is intended to serve only the needs of the members, but the association does not actively police its boundaries to keep out trespassers, such use will likely not be sufficient to subject you to liability under the ADA. If you have a specific situation of which you are uncertain, it would be wise to speak with your attorney. This is not a law that you want to be caught breaking.

David Swedelson, Esq. is a senior partner and Stephanie Rohde, Esq. is an associate at the law firm of Swedelson & Gottlieb. They can be reached at dcs@sghoalaw.com and smr@sghoalaw.com respectively.