Demystifying How The ADA Applies To Public Facilities And Services

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New Developments and Trends Under the ADA

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Demystifying How The ADA Applies To Public Facilities And Services
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While most city personnel are familiar with the Americans Disabilities Act, they are not always prepared for the far reaching impacts that this law has on virtually all of the facilities and operations of a city. City personnel are sometimes surprised by new court decisions giving broad application to the law, and applying it to situations and facilities not previously considered. Three areas that are currently developing and may be overlooked are the requirements to make on-street parking accessible, accessibility of temporary events, and effective communications under the ADA. While standards for accessible parking in lots is well known and clear standards exist, many cities have not addressed what is required to be done with on-street parking where it exists. Likewise, many cities have not considered their temporary events and the requirements to make them accessible. Effective communications with disabled individuals are generally addressed by cities for the most common situations (i.e. council meetings, etc.), but effective communications under the ADA is a broad concept and cities may not recognize all of their obligations. Below, within each of these three areas, issues are highlighted to help cities recognize the scope of their obligations under the ADA.

**ACCESSIBLE ON-STREET PARKING - FORTYUNE V. CITY OF LOMITA**

Cities have been complying with standards for accessible parking in lots for more than 20 years. However, no standards exist for on-street accessible parking and the requirement to add on-street accessible parking has been unclear until a recent Federal case in the Ninth Circuit Court of Appeals. On September 5, 2014 in *Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014), the Ninth Circuit, found in favor of Robin K. Fortyune, regarding accessible parking for persons with disabilities within the public right-of-way. It is important to note that the City of Lomita has requested that the United States Supreme Court review that decision. However, as it currently stands, this decision will impact cities throughout California and the United States.

The basic summary of the *Fortyune* case is as follows:

- Fortyune sued the City of Lomita for not having accessible parking in the public right-of-way (on-street parking).
- Title II of the ADA requires government entities to ensure that all city/agency programs are accessible to the disabled.
- The Ninth Circuit (the same court) has previously determined that sidewalks are city programs and therefore must be accessible to persons with disabilities.
- The *Fortyune* decision holds that parking in the public right-of-way is a program by the City and therefore, must be accessible.
- However, the *Fortyune* decision does not specify how accessible parking is to be designed except to say the plaintiff was suing over diagonal parking, not parallel. Therefore, the decision as it stands is specific to diagonal parking. Parallel parking may have additional safety concerns.
Background

The 2010 ADA Standards for Accessible Design (ADAAG) specify the minimum number of required accessible parking spaces per total number of parking spaces provided in a parking facility. These guidelines only specifically address parking lots and parking structures. However, current ADA Title II regulations guard against discrimination or exclusion of disabled individuals from the benefits of the services, programs, or activities of a public entity, by establishing that public agencies are required to operate their services, programs and activities so that they are accessible to disabled individuals.

In *Fortyune vs. City of Lomita*, the court held that under Title II and its implementing regulations on-street diagonal parking was required to be accessible, despite the lack of a current specifications or detailed guidelines on how to make the parking accessible. Therefore, under the decision a public entity must make accessible on-street diagonal parking, or other accessible accommodations, to individuals with disabilities. Though disabled parking is routinely provided, the existing design standards only govern parking within facilities, not on-street parking. *Fortyune* is the first case to find an obligation under the ADA, even in the absence of corresponding design standards, to provide accessible on-street parking.

The plaintiff in *Fortyune* was a paraplegic who alleged that he experienced “great difficulty, discomfort, and even fear for his safety” because of a lack of accessible on-street parking. The City moved to dismiss the complaint, arguing that, without specific regulations targeting on-street parking, the City could not have any obligations under the ADA. The Ninth Circuit found that, despite the lack of accessibility standards, on-street parking is a normal function of a city and therefore must be made accessible. In essence, the decision in *Fortyune* interprets the ADA as requiring a general obligation to make all public services accessible, and therefore it is not limited to circumstances in which there are specific guidelines which provide detailed guidance.

The U.S. Department of Justice is responsible for developing regulations to implement the ADA. As part of this duty, the Department of Justice adopts specific technical and scoping standards for the design and construction of public facilities. All public facilities that have been constructed or altered since 1992 — when the ADA regulations first became effective — must be built and constructed in conformance with these standards.

In addition to guaranteeing equal access to disabled citizens, the standards also provide a benefit to cities and other public agencies by essentially creating a safe harbor for compliance with the ADA. In most instances, a public facility’s obligations under the ADA are clear. For example, the standards require that parking lots have a designated minimum number of disabled parking spaces, that each disabled space be served by an access aisle, and that all disabled spaces be located nearest to the facility they serve. A city that operates a parking lot is able to ensure compliance with the ADA by following these standards.

However, the standards do not necessarily translate to parking that is provided on a street. On a street, the parking may be intended to serve various facilities throughout the area. Additionally, the existing standards for parking lots do not address parallel parking. Without
enforceable standards, it is not clear what steps must be taken to provide adequate service under the ADA.

The Department of Justice is likely to eventually provide some guidance on this issue. The Department must adopt standards that are consistent with guidelines established by the Access Board, an independent federal agency that is charged with developing accessible design criteria for the built environment. The Access Board consists of 25 members. Twelve members are from federal agencies, and the other 13 are from the public at large. Half the public members must have some form of disability.

Since the adoption of the ADA in 1990, the Access Board and the Department of Justice have sought to develop specific standards for an increasing variety of public facilities. The Access Board developed the original ADA Accessibility Guidelines in 1991, and adopted an updated version in 2004. The updated version addressed a number of facilities for which no previous requirements existed, including recreation facilities, such as swimming pools, boating facilities and amusement rides. The Access Board’s 2004 ADA Accessibility Guidelines (ADAAG) were adopted by the Department of Justice in 2010.

The Access Board is currently in the process of developing additional guidelines for public rights-of-way, and the draft guidelines contain proposed requirements for on-street parking. The draft requirements are limited to public parking that is “marked or metered,” and therefore do not impose design standards on all public streets. In the draft guidelines, the number of required disabled spaces is based on the total number of parking spaces on each block perimeter. And there are design specifications for accessible parallel parking. Depending on the size of the adjacent right-of-way, parallel parking may be required to have an adjacent access aisle if the sidewalk is altered or newly constructed. Where the right-of-way is not large enough to accommodate an access aisle, or where the sidewalk is not altered, accessible parallel parking must be at the end of the block face.

The Access Board’s process for developing guidelines for public right-of-way began in 1999 and draft guidelines were originally proposed in 2002. Public comments on the guidelines were closed in 2012, and final adoption is imminent. However, the guidelines will not become enforceable standards unless and until they are adopted by the Department of Justice, and there is no timetable for the Department of Justice’s action.

Until there are enforceable standards adopted for on-street parking, the ADA’s requirements in this area will remain murky. The Ninth Circuit’s holding on the motion to dismiss was limited to determining that local governments were required to provide accessible on-street parking in the absence of regulatory design specifications for on-street parking facilities. At this procedural stage of the litigation, the Court did not consider whether the defendant city’s on-street parking facilities actually violated the ADA. Further, *Fortune* does not provide any insight into whether any particular on-street parking design satisfies the requirements of the ADA.

The City of Lomita has filed a Petition for Writ of Certiorari with the United States Supreme Court, seeking review of the Ninth Circuit’s opinion. The City has attempted to argue that on-street disabled parking should not be required until design standards are established. The
League of California Cities and the League of Oregon Cities have submitted an Amici Curie Brief in Support of the Petition.

Both before the Ninth Circuit and before the Supreme Court, the City of Lomita has argued that cities should not be required to install accessible on-street parking until enforceable standards are adopted. The City has argued that requiring accessible on-street parking without standards denies the City due process. The City has also argued that lower courts will not be able to establish a proper remedy because no standards can be identified for compliance. The Plaintiff has argued that on-street parking is a city program and therefore it must be accessible, regardless of whether technical specification have been adopted. The Plaintiff has argued that the ADA is violated if a plaintiff is excluded from participation in or denied the benefits of city programs regardless of whether standards for accessible design have been developed.

Interestingly, the Ninth Circuit did not apply a program access standard, looking at parking, but simply held that accessible on-street parking is required, without looking at the City’s other parking facilities. Generally, to state a claim under Title II of the ADA, a plaintiff must show he was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities. Duvall v. County of Kitsap, 260 F.3d 1124, 1135 (9th Cr. 2001); see generally 42 U.S.C. §§ 12131-12134. Where an individual is allegedly excluded due to inaccessibility of a public agency’s facilities, the DOJ’s implementing regulations only establish two standards that may apply.

First, if the facility was in existence at the time the ADA became effective, and the facility has not been altered, the “program access” standard applies. 28 C.F.R. § 35.150. Program access does not require each public facility to be accessible, but requires that each governmental service, program, or activity be made accessible when viewed in its entirety. Second, if the facility is newly constructed or altered, the facility must comply with specific design standards adopted by the DOJ. 28 C.F.R. § 35.151.

The regulations do not expressly contemplate the situation in the present case. Assuming that all of the City’s on-street parking facilities are newly constructed or altered, compliance with an established design standard is impossible. There are no design standards for on-street parking facilities. However, the DOJ issued a Technical Assistance Manual which explains how cities should apply the ADA in these circumstances:

In such cases the technical requirements of the chosen standard should be applied to the extent possible. If no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, including program accessibility.

1994 Supplement to TA Manual, ii-6.2100 (citation omitted). The Ninth Circuit referenced this language from the Technical Assistance Manual to conclude that on-street parking is subject to the ADA. However, the Ninth Circuit never considered how this standard should be applied to the facts of the present case. While the design standards do contain technical requirements for parking spaces on sites, there is no standard requiring that accessible parking be located on streets. Therefore, if the Ninth Circuit was going to impose any obligation for accessible on-
street parking, it should have analyzed this case under the second part of the DOJ’s framework: whether the program access standard requires cities to provide accessible on-street parking.

Under the regulations cities only have two methods of complying with the ADA. They can strictly comply with design standards if design standards exist or they can comply with the program access standard. By establishing a blanket rule that cities must provide accessible on-street parking without applying the program access standard, the Ninth Circuit has created a conundrum for cities. There is no way to comply with standards that do not exist.

Cities will be closely watching the Supreme Court to determine if review is granted. If not, cities will be left to determine how they can best comply with the ruling and which standards to attempt to use. The Ninth Circuit has suggested cities would look to the existing ADAAG standards for parking lots and draft guidelines for Public Rights-of-Way for guidance.

2010 ADA Standards and Draft Guidelines

The 2010 ADAAG, Section 208. Parking Spaces, clarifies the minimum number of parking spaces and the following section provide guidance on the design of the parking spaces in parking lots. This standard could be adapted to use for public rights of way. The standards are as follows and the Department of Justice has available technical assistance on creating accessible parking:

<table>
<thead>
<tr>
<th>Total Number of Parking Spaces Provided in Parking Facility</th>
<th>Minimum Number of Required Accessible Parking Spaces</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 25</td>
<td>1</td>
</tr>
<tr>
<td>26 to 50</td>
<td>2</td>
</tr>
<tr>
<td>51 to 75</td>
<td>3</td>
</tr>
<tr>
<td>76 to 100</td>
<td>4</td>
</tr>
<tr>
<td>101 to 150</td>
<td>5</td>
</tr>
<tr>
<td>151 to 200</td>
<td>6</td>
</tr>
<tr>
<td>201 to 300</td>
<td>7</td>
</tr>
<tr>
<td>301 to 400</td>
<td>8</td>
</tr>
<tr>
<td>401 to 500</td>
<td>9</td>
</tr>
<tr>
<td>501 to 1,000</td>
<td>2 percent of total</td>
</tr>
<tr>
<td>1,001 and over</td>
<td>20 plus 1 for each 100, or fraction thereof over 1,000</td>
</tr>
</tbody>
</table>


The United States Access Board published draft guidelines on Public Rights-of-Way also provide guidance on the design and number of spots for on-street parking which could be used by cities. The draft guidelines provide the following parameters requiring marked on-street parking spaces that comply with ADA guidelines be provided on the block perimeter in accordance with Table R214.
### R214 Requirements

<table>
<thead>
<tr>
<th>Total Number of Marked or Metered Parking Spaces on the Block Perimeter</th>
<th>Minimum Required Number of Accessible Parking Spaces</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 25</td>
<td>1</td>
</tr>
<tr>
<td>26 to 50</td>
<td>2</td>
</tr>
<tr>
<td>51 to 75</td>
<td>3</td>
</tr>
<tr>
<td>76 to 100</td>
<td>4</td>
</tr>
<tr>
<td>101 to 150</td>
<td>5</td>
</tr>
<tr>
<td>151 to 200</td>
<td>6</td>
</tr>
<tr>
<td>201 and over</td>
<td>4% of total</td>
</tr>
</tbody>
</table>

### Recommendations

Based on the decision in *Fortyune*, cities must review their current on-street parking. Attempts should be made to develop a plan, like cities have done with sidewalks, to make their “parking program” accessible, if steps have not already been taken. Arguably, a city’s parking program may be broader than just on-street parking if the city also maintains parking lots, and accessible parking in lots may assist a city in demonstrating that its “parking program” is accessible. Cities should look to the ADAAG draft guidelines available at [http://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines](http://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines) and to the 2010 Standards available at [http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm](http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm), to assist in the development of their accessible parking plan and the design specification to be applied.

### References


Robin K. Fortyune vs. City of Lomita, 766 F.3d 1098 (9th Cir. 2014).

ACCESSIBILITY OF TEMPORARY EVENTS

Public agencies are generally aware of their obligations to construct permanent facilities in compliance with the Title II regulations and ADAAG standards for new construction. 28 C.F.R. § 35.151. However, cities must also consider the accessibility of temporary events which must also be accessible. ADAAG Section 201.3 specifically provides that its specification apply to temporary new construction, with very limited exceptions. In Advisory 201.3 a list of temporary buildings and facilities covered include bleachers, stages, platforms and exhibit areas. Facilities which are constructed, even on a temporary basis, must be accessible and should comply with the design standards for accessibility. Additionally, cities must consider the program accessibility of temporary events. City sponsored events must be accessible to disabled members of the community even when they do not involve construction. Those events which are not city sponsored but which occur on city streets or in city parks or other facilities must also be accessible. While the primary responsibility to make those events accessible rests with the organization which is putting on the event, cities also have an obligation and are likely to face claims and litigation for events which are not accessible which are conducted on city property. The ADAAG standards do not address all barriers that may be faced on temporary events, but provide guidelines which are helpful even in those circumstances.

Individuals with disabilities must be able to enjoy the same goods, services and benefits as other members of the public. Some common areas that should be addressed for temporary events include the following:

- Accessible parking—particularly if lots and streets are being closed
- Accessible portable bathrooms and any other public amenities offered
- Accessible routes to the goods, services and activities being offered
- Accessible routes from parking, public transportation and drop-off areas
- Accessible communications about the event
- Assistive listening devices and sign language interpreters at events
- Accessible transportation from off-site parking

Streets And Sidewalks: Blocked By Temporary Events

In Cohen v. City of Culver City (9th Cir. 2014) 754 F.3d 690, the Ninth Circuit held that a city may violate the ADA if it allows third parties to obstruct disabled access points (e.g., sidewalk ramps). The plaintiff in Cohen, an elderly man who used a cane and suffered from dementia, walked through an outdoor car show on city streets. A vendor's display blocked a curb ramp that provided access to the sidewalk. The plaintiff tripped while trying to walk around the display and step up on the sidewalk. He filed an action alleging violations of the federal ADA and seeking damages. The District Court granted the city's motion for summary judgment. The Court of Appeals reversed.

Title II of the ADA requires local government to provide equal access to city programs, e.g., sidewalks, to disabled persons. To prove an ADA violation, the plaintiff must prove he or she is a qualified individual with a disability; he or she was excluded from, or denied access to,
an agency program; and the exclusion or denial was by reason of the disability. 28 CFR § 35.150 governs existing facilities, requiring, for example, agencies to implement a plan to install disabled access curb ramps at intersections. 28 CFR § 35.151 requires that facilities public agencies begin to build or alter after January 1992 be readily accessible unless it would be structurally impracticable.

The District Court reasoned that the plaintiff could have accessed the sidewalk by a nearby curb ramp and thus was not denied access to the sidewalk. The District Court relied on precedents concerning public agencies' obligations when they modify existing facilities. (28 CFR § 35.150.) However, the Ninth Circuit found those cases were not instructive because the city was in compliance with the ADA, but allowed elimination of the disabled access it had built. The Court reasoned that 28 CFR § 35.151 was more applicable than section 35.150 because the matter involved alteration of existing sidewalks. "When the City has already built a direct route that is accessible to disabled persons, it is reasonable to require the City not to force disabled persons to look for and take even a marginally longer route."

The City allowed the sidewalks to be used by private vendors but failed to take action to ensure continued ADA compliance (e.g., to prevent blockage or to provide temporary signage directing pedestrians to the nearby ramp). Thus, the Court held the jury could conclude that the City violated the ADA, including provisions requiring facilities to be readily accessible and to be kept free of obstructions.

**Bleachers/Seating**

In another recent case, the Ninth Circuit ruled that the ADA does not require a public entity to structurally alter existing bleacher seating at high school football games where the seating was constructed prior to the effective date of the ADA standards (1992) and there are alternative ADA accessible seating locations. In *Daubert v. Lindsay Unified School District*, Lindsay High School offered bleacher seating within its football stadium – constructed before 1992 and unaltered since then – without constructing additional wheelchair access. Nonetheless, the Ninth Circuit found the school complied with the ADA by offering accessible field-level locations where patrons in wheelchairs could have an unobstructed view of the football games.

The ADA requires public agencies to provide disabled access to all of their services, programs and activities, but it does not require public agencies to retrofit or upgrade existing facilities if there are other suitable means of providing access. This requirement is meant to shield public agencies from the costs of retrofitting, but it is not always clear whether an alternative method will provide a legally sufficient level of access. In particular, many school districts do not have the funding available for the potentially substantial costs necessary to construct additional stadium/bleacher improvements and therefore face uncertainty as to whether they are in violation of the ADA.

As the first published case addressing whether a public agency must retrofit its bleacher seating, *Lindsay Unified* clarifies school districts' and other agencies' obligations under the ADA when hosting community events. Because the court found that Lindsay Unified School District complied with the ADA, other government agencies can use this case as a blueprint for providing access to events that occur within small, local stadiums.
Even though the existing bleacher seating was inaccessible to wheelchair users, Lindsay High School provided field-level seating locations with several key features, including:

- an unobstructed view of the event,
- the opportunity to sit with other friends and family,
- an accessible route allowing for unassisted ingress to and egress from the locations, and
- unassisted access to concessions and other amenities of the event.

By considering these key features, public agencies can develop a plan to provide access to events that is consistent with Lindsay Unified and thus will likely satisfy the requirements of the ADA.

As a final caveat, Lindsay Unified only applies to bleacher and stadium seating that was constructed prior to the enactment of the ADA (i.e., prior to January 26, 1992) and that has since never been altered. Any newly constructed or altered seating arrangement must strictly comply with ADA design standards, regardless of any alternative seating arrangement.
EFFECTIVE COMMUNICATIONS

Title II of the ADA provides: “[N]o 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.” 42 U.S.C. § 12132. Under Title II, when viewed in their entirety, a public entity’s services, programs and activities are to be readily accessible to and usable by individuals with disabilities (“program accessibility”). (28 C.F.R. § 35.149.) The ADA implementing regulations require public agencies to take appropriate steps to ensure that communications with applicants, participants and members of the public with disabilities are as effective as communications with others. 28 C.F.R. §35.160(a) to effectuate the mandate of making programs, services and activities accessible. These appropriate steps include the provision of “appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity….” 28 C.F.R. §35.160(b)(1). The key to communicating effectively is to consider the nature, length, complexity, and context of the communication and the person’s normal method(s) of communication. The rules apply to communicating with the person who is receiving the covered entity’s goods or services as well as with that person’s parent, spouse, or companion in appropriate circumstances.

Effective communication may require the provision of auxiliary aids and services that are necessary and the type of auxiliary aid that is appropriate will depend on the length and complexity of the communication involved. When “determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.” 28 C.F.R. §35.160(b)(2); see Duffy v. Riveland (9th Cir. 1996) 98 F.3d 447. The public entity shall honor the choice of the individual with disabilities unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not otherwise be required. Appendix A to the ADA Title II regulations provides that “[d]eference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.” 28 C.F.R. Pt. 35, App. A.

Among the auxiliary aids listed for individuals with hearing disabilities are: “Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.” 28 C.F.R. §35.104(1). For people who are blind, have vision loss, or are deaf-blind, auxiliary aids include providing a qualified reader; information in large print, Braille, or electronically for use with a computer screen-reading program; or an audio recording of printed information. Generally a companion may not be relied upon to interpret, except in limited circumstances. A “qualified” reader means someone who is able to read effectively, accurately, and impartially, using any necessary specialized vocabulary. See, Vandermolen v. City of Roosevelt Park (W.D. Mich. 1997) 1997 W.L. 853505 (holding that provisions of tape recordings of minutes of City Council meetings
would be a sufficient accommodation if accommodation was required). Public entities may not charge the individual to cover the costs to provide auxiliary aids.

Generally, whether effective communication has been achieved is a highly fact-specific inquiry, based on the circumstances of any individual situation. See Bircoll v. Miami-Dade County, 480 F.3d 1072, (11th Cir. 2007); see also Loye v. County of Dakota, 647 F.Supp. 2d 1081, 1090-1094 [communication deemed effective based on one’s ability to understand and respond to the messages being exchanged]. A public entity is not required to make a modification that would fundamentally alter the nature of its service, program or activity or result in undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3). In determining whether a particular aid or service would result in undue financial and administrative burdens, a cities should take into consideration the cost of the particular aid or service in light of all resources available to fund the program, service, or activity and the effect on other expenses or operations. A finding of undue burden must be made as to the reasons for reaching that conclusion, by the head of the public entity or his or her designee. This undue burden “defense” does not excuse the public entity from taking any other action to ensure the accessibility of benefits and services. As set forth in the Preamble to the Title II Regulations, unlike Title III (which applies to private businesses) which requires only readily achievable barrier removal, Congress intended the Title II “undue burden” standard to be significantly higher. “…[T]he program access requirement of Title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases. The decision of an undue burden requires a written statement of the reasons after considering all of the resources available for use in the program, service or activity.”

In Memmer v. Marin County Courts (9th Cir. 1999) 169 F.3d 630, the court considered whether the municipal court system had provided reasonable accommodation to a visually impaired litigant during her civil trial. The municipal court system had offered a Spanish-language interpreter who worked with the court and was familiar with court proceedings. The plaintiff refused this assistance, demanding instead to use an individual known to be disruptive and a vexatious litigant, which the court allowed, but with limitations. The court found that the interpreter offered by the municipal court was a reasonable accommodation for a visually impaired individual. The court relied on two important principles: First, the plaintiff bears the burden of establishing an ADA violation and therefore must establish the existence of specific reasonable accommodations that she was not provided, and, second, that since plaintiff’s suit was for monetary damages (against everyone involved in her matter), she had to show intentional discrimination. The court concluded plaintiff failed on both grounds and that the municipal court was not required under the ADA to make “substantial modifications” in the way it runs its court system.

The DOJ, in a 1996 policy letter, explained that entities subject to Title II or Title III of the ADA that use the Internet to provide information regarding their programs, goods or services must provide effective communication to individuals with disabilities unless doing so would result in a fundamental alteration to the program or service or in an undue burden. The letter explained that the Internet provides valuable information and people with disabilities should have access to it as effectively as people without disabilities. However, the letter also recognized

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that entities might be able to provide information from a website through other alternative accessible means, such as in large print-format or in Braille.

However, in *Martin v. Metropolitan Atlanta Rapid Transit Authority* (N.D. Geo. 2002) 225 F. Supp. 2d 1362, 1377, where plaintiffs sought injunctive and declaratory relief due to numerous alleged acts of noncompliance with the ADA, the plaintiffs, who were visually impaired, alleged a failure to provide them with scheduling and route information in accessible formats violated the ADA. On its website, the Metropolitan Atlanta Rapid Transit Authority (MARTA) provided the general public with extensive information on routes and schedules for its fixed route services, but it was not formatted in such a way that it was uniformly accessible to persons who were blind. “The information could not be read by persons who are blind but capable of using text reader computer software for the visually impaired.” MARTA submitted evidence that the information was available by telephone, that customers could request alternative formats by telephone, and that it was in the process of developing accessible formatting for its website. The court nevertheless held that “this is not the equivalent to what MARTA provides to the general public. MARTA can do a better job of making information available in accessible formats to the visually impaired…” Therefore, the court held that MARTA was “violating the ADA mandate of ‘making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service’.”

While Title II and its implementing regulations and standards do not currently contain specifications for accessible websites, cities must ensure that communications with disabled members of the public are equally effective as communications with the public in general and provide program access. In addressing information which is provided to the public, alternative formats may sometimes be equally effective. However, as demonstrated by the decision in *Martin*, because of the unique qualities of the Internet, it would be difficult to equal its effectiveness through any other means. Website access is available seven days a week and 24 hours a day. Materials are also readily accessible for downloading and printing. There is no practical other means to provide this level of communication with the public, except through the Internet.

In addition, standards requiring website accessibility have been proposed under Title II, but the Department of Justice has never taken final action to adopt any standards. Therefore, while no regulatory provision yet specifically requires that websites of cities be modified to make them accessible, to meet their obligation to provide equally effective communications and provide program access, any City-constructed website should be accessible to the public.

Cities should review all of their communications with the public to ensure that they are equally effective. Not only do public council meetings need to be addressed, but communications at special events, routine communications and emergency communications must be equally effective. The key for cities is to consider the possible nature, length, complexity, and context of the communication in determining what auxiliary aid or service may be required. For example, for complex and important communications like an interview or public hearing, sign language interpreters may be required. For routine and on-the-spot unplanned communications, like asking for a permit or city form, exchanging written notes may be sufficient. Cities must also ensure that public notices and written materials, provide notice that alternate formats are
available, and be ready to make information available in alternate formats. As technology advances, cities should also be aware of the options available including video relay service and video remote interpreting.
I. OVERVIEW — TITLE II OF THE ADA

A. General Standard.

“Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.” 28 CFR § 35.149.

Title II of the ADA is intended to protect disabled individuals from being excluded in participating in a public entity’s services, programs or activities.

Services, programs, and activities are broadly construed by courts to cover virtually everything a public entity does. Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002) (“Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II, however, we have construed ‘the ADA's broad language [as] bring[ing] within its scope ‘anything a public entity does.’”)

B. Obligations for Existing Facilities.

1. Program Accessibility.

“A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.” 28 CFR § 35.150.

This standard is commonly referred to as the “program accessibility” requirement. To determine whether existing facilities comply with the ADA’s program accessibility requirement, courts “look at the accessibility of the facilities as a whole.” Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 861 (10th Cir. 2003); Ass’n for Disabled Ams. v. City of Orlando, 153 F.Supp.2d 1310, 1320 (M.D. Fla. 2001). Showing that particular access barriers exist is not sufficient to establish liability, but each barrier can be considered a building block for a finding that the program, when viewed in its entirety, is not readily accessible. Pascuiti v. New York Yankees, 87 F.Supp.2d 221, 224 (S.D. N.Y. 1999). Courts then consider whether the individual elements that are not accessible add up to a wholesale exclusion of disabled individuals from that service, program, or activity. Chaffin, 348 F.3d at 861. Assessing program accessibility is “fact specific, and to an extent is a subjective inquiry.” Greer v. Richardson Indep. Sch. Dist., 2010 WL 3025530, *3 (N.D. Tex. Aug. 2, 2010).

Courts must also consider the possible mitigation of access barriers through alternatives. A public entity is not required to make structural changes in existing facilities when other methods are effective in achieving compliance. 28 CFR § 35.150. For example, a paratransit service or a program allowing requests to remove particular barriers.


“In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.” 28 CFR § 35.150.

“If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or
other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

The plan shall, at a minimum --

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
(ii) Describe in detail the methods that will be used to make the facilities accessible;
(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
(iv) Indicate the official responsible for implementation of the plan.” 28 CFR § 35.150.


In Lonberg v. City of Riverside, 571 F.3d 846, 851-852 (9th Cir. 2009), the Ninth Circuit held that the ADA did not provide a private right of action or remedy based on a violation of a transition plan regulation:

“[N]othing in the language of § 202 indicates that a disabled person’s remedy for the denial of meaningful access lies in the private enforcement of section 35.150(d)’s detailed transition plan requirements. The existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity’s services, nor does it remedy the denial of access…We do not suggest that section 35.150(d) is invalid or an otherwise improper exercise of agency discretion. We simply conclude that under Sandoval, it is not enforceable through § 202’s private right of action because the obligations it imposed are nowhere to be found in § 202’s plain language.”

The Ninth Circuit noted that the issue the district court needed to decide was not whether the City of Riverside had complied with the transition plan regulations, but whether it had complied with its obligation to remove access barriers pursuant to the program accessibility requirement.
C. **Obligations for New Construction and Alterations.**

1. **New Construction.**

   “Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.” 28 CFR § 35.151.

   There is an exception when a public entity can demonstrate that it is “structurally impracticable” to meet accessibility requirements such as when the unique characteristics of terrain prevent the incorporation of accessibility features. Id.

2. **Alterations.**

   “Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.” 28 CFR § 35.151.

3. **Standards.**

<table>
<thead>
<tr>
<th>New construction and alterations</th>
<th>Applicable standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before September 15, 2010</td>
<td>1991 ADA Standards or UFAS.</td>
</tr>
<tr>
<td>On or after September 15, 2010 and before March 15, 2012</td>
<td>1991 ADA Standards, UFAS, or 2010 ADA Standards.</td>
</tr>
<tr>
<td>On or after March 15, 2012</td>
<td>2010 ADA Standards.</td>
</tr>
</tbody>
</table>

The draft accessibility standards for public rights of way have still not been adopted.
II. POTENTIAL EXPOSURE

In 2010, Caltrans reached a settlement agreement with wheelchair users to spend over $1 Billion to repair sidewalks and curb ramps.

On April 1, 2015, the City of Los Angeles reached a settlement agreement with disabled residents to spend over $1 Billion to repair city sidewalks. Among other things, the settlement calls for the City of Los Angeles to spend over $30 Million a year for 30 years to install curb ramps and fix sidewalks and crosswalks. The amount to be spent each year gradually increases to $63 Million to adjust for rising costs.

III. LITIGATION STRATEGIES

A. General.

1. Mooting Plaintiff’s ADA Claim.

The ADA is limited to prospective injunctive relief. Remove that relief by fixing the alleged access barriers and the ADA claim becomes moot and there is no longer federal court jurisdiction even if it is undisputed that the barriers existed at the time of the plaintiff’s encounters.

Under federal law, even if the defendant fixed the alleged barriers in direct response to the plaintiff’s lawsuit, the plaintiff is not deemed a “prevailing party” and thus is not entitled to attorney’s fees. Federal law does not recognize the catalyst theory for purposes of awarding attorney’s fees. *Buckhannon Board & Care Home, Inc. v. W. Va. Dep’t of Health & Human Resources*, 532 U.S. 598, 605 (2001).

2. Case Citations:

“Mootness is a jurisdictional defect that can be raised at any time by the parties or the court *sua sponte.*” *Parr v. L&L Drive-Inn Restaurant*, 96 F.Supp.2d 1065, 1087 (D. Haw. 2000). A case is moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001). “Past exposure to illegal conduct does not in itself show a present case or controversy…if unaccompanied by any continuing, present adverse effects.” *Renne v. Geary*, 501 U.S. 312, 320-321 (1991). “This requisite ensures that the courts are able to grant

“The only remedy available for a violation of the Americans with Disabilities Act under a private right of action is injunctive relief. Accordingly, if no ADA violations exist at the time the court is asked to provide injunctive relief, the ADA claim is moot because there is no basis for relief and there is nothing for the court to order the facility to change.” Gasper v. Marie Callender Pie Shops, U.S. Dist. LEXIS 96929, *4 (C.D. Cal. 2006).


Martinez v. Longs Drug Stores Corp., 2008 WL 2329712 (9th Cir. 2008) (upholding district court’s dismissal of ADA claims as moot because defendant had remedied all alleged barriers); Pickern v. Best Western Timber Cove Lodge Marina Resort, 194 F.Supp.2d 1128, 1130 (E.D. Cal. 2002) (“Plaintiff concedes, as she must, that defendant’s latest remedial efforts have rendered her ADA claim for injunctive relief moot”); Wilson v. PFS, 2007 WL 2429391 (S.D. Cal. 2007) (holding that McDonald’s modifications to its restaurants rendered the plaintiff’s ADA claims moot).

3. Limiting the Scope of Plaintiff’s ADA claim.

In Oliver v. Ralphs Grocery Co., 654 F.3d 903 (9th Cir. 2011), the Ninth Circuit held that all alleged access barriers must be identified in Plaintiff’s complaint in order to give the defendant fair notice under Rule 8.
In that case, the plaintiff intentionally failed to disclose known barriers to prevent the defendant from mooting his ADA claim by fixing all alleged barriers. The plaintiff identified some barriers in his complaint, others in a proposed amended complaint, others in an ENE statement, and still others in his expert report. Consequently, the Ninth Circuit adopted a bright-line rule that all barriers must be set forth in the complaint:

“Plaintiff’s counsel later explained that his delays in identifying the barriers at the facility were part of his legal strategy: he purposefully ‘forces the defense to wait until expert disclosures (or discovery) before revealing a complete list of barriers,’ because otherwise a defendant could remove all the barriers prior to trial and moot the entire case…[F]or purposes of Rule 8, a plaintiff must identify the barriers that constitute the grounds for a claim of discrimination under the ADA in the complaint itself; a defendant is not deemed to have fair notice of barriers identified elsewhere.” *Id.* at fn. 7, 909.

After *Oliver*, a good strategy is to ask for a short deadline to amend pleadings at the scheduling conference before Plaintiff has the opportunity to conduct a site inspection with his expert. Once that deadline has passed, it is a lot more difficult for the plaintiff to amend his complaint to allege new access barriers found by his expert because he has to meet the “good cause” standard under Rule 16(b) rather than the liberal “leave to amend shall be freely given” standard under Rule 15(a).

4. **Standing.**

The legal requirement of “standing” can be also be used to further limit the scope of an ADA claim.

To show standing, “a plaintiff has the burden of proving: (1) that he or she suffered an ‘injury in fact,’ (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

To satisfy the “injury in fact” element of standing in a disabled access case, “an ADA plaintiff must demonstrate that he is ‘likely to return to patronize the accommodation in question.’” *Wilson v. Kayo Oil Company*, 535 F.Supp.2d 1063, 1067 (S.D. Cal. 2007).
In determining whether a plaintiff has satisfied the “intent to return” requirement, courts typically look at past patronage, proximity of the subject property to the plaintiff’s home, and business or personal connections to the area. *Chapman v. Pier 1 Imports (U.S.), Inc.*, 870 F.Supp.2d 995, 999 (E.D. Cal. 2012); *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2nd Cir. 2008).

Generalized plans to visit or “some day” intentions are insufficient to establish standing. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (“‘some day’ intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the ‘actual or imminent’ injury that our cases require”); *Moslki v. Kahn Winery*, 405 F.Supp.2d 1160, 1168 (C.D. Cal. 2005) (holding that general plans to return in ADA barrier cases are insufficient to confer standing); *Wilson v. Kayo Oil Company*, 535 F.Supp.2d 1063, 1067, 1070 (S.D. Cal. 2007) (“Concern over ADA litigation abuse is amply warranted…[A]n ADA plaintiff cannot manufacture standing to sue in federal court by simply claiming that he intends to return to the facility”).

Typically, serial plaintiffs have a hard time meeting this standard.

5. **Burden of Proof.**

The plaintiff bears the burden of proof to show that a public entity fails to provide program accessibility when viewed in its entirety. Depending on what the particular program, service or activity is, this can be a huge undertaking.

A good strategy is to use the plaintiff’s burden of proof to your advantage. Rather than producing a limited amount of documents in response to a plaintiff’s document requests, consider responding that all construction and public documents associated with a particular program, service, or activity are responsive and that the plaintiff is free to request and copy those documents at the planning/building/public works department during City Hall hours. Also, consider revising your transition plan to incorporate by reference all such documents.

In response to a plaintiff’s motion for summary judgment or at trial, you can then point out that the plaintiff has only introduced a small subset of relevant documents and thus has failed to meet his burden to show that the program, service, or activity is not readily accessible when viewed in its entirety.
In addition, since there are no specific guidelines for existing facilities, keep in mind that the plaintiff bears the burden of showing that their current condition makes them inaccessible. The standards for new construction may be relevant, but are not determinative of, program accessibility and should not be viewed as requirements for what must be done to address alleged barriers that existed before the ADA went into effect. *Brown v. County of Nassau*, 736 F.Supp.2d 602 (E.D. N.Y. 2010); *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 435 F.Supp.2d 1217 (N.D. Ga. 2005).

**B. Case Examples.**

1. **Lonberg v. City of Riverside.**

   (a) Plaintiff’s Allegations and Demands.

   Originally, Lonberg challenged all city facilities and programs, but subsequently limited his claims to the city’s public rights of way (“PROW”) based in part on our standing arguments. The city’s PROW included hundreds of miles of sidewalks, thousands of curb cuts, and tens of thousands of curb side flares, curb lips etc.

   Lonberg wanted an injunction ordering the city to adopt a compliant transition plan, fix all alleged barriers within a few years, and allowing him to monitor and supervise compliance. He also wanted more than $1 Million in statutory damages under the Disabled Persons Act, i.e. $1,000 for each and every encounter with a noncompliant feature over many years. Finally, he requested over $1 Million in attorney’s fees including a fee multiplier under the public attorney general statutes.

   (b) Transition Plan.

   The city’s transition plan was drafted before the Ninth Circuit decision in *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002) where the court held that sidewalks themselves are a “service, program, or activity” within the meaning of Title II of the ADA. Under the Ninth Circuit’s ruling, public entities have a duty to ensure that their sidewalks are accessible even if they are not connected to a particular service, program, or activity.
The city’s transition plan was good, but it was based on programs, not features, and thus did not include a survey of sidewalks, curb ramps etc. unless they were part of a city program.

Although the DOJ found the city’s transition plan to be complaint, the district judge found it to be noncompliant because it did not address features in the PROW.

Ultimately, the city prevailed on this issue on appeal when the Ninth Circuit held that there is no private right of action to enforce transition plan regulations. Lonberg v. City of Riverside, 571 F.3d 846 (9th Cir. 2009).

(c) Trial -- Program Accessibility

Prior to trial, the city revised its transition plan and surveyed the PROW. The city also fixed as many sidewalks and curb cuts as it could while still being financially responsible.

The trial took place in 2011. After trial, the district court made the following findings of fact:

(1) The city covers 88 square miles and has approximately 5,100 street intersections, 1,100 miles of sidewalk, and 20,000 curb returns.

(2) The city is responsible for the system of streets, sidewalks, roads, and walkways in the PROW.

(3) Plaintiff regularly uses numerous city sidewalks and streets and has encountered physical obstacles making it difficult for him to navigate in his wheelchair.

(4) In 2000, the city prepared three surveys of its streets and sidewalks. The surveys indicated that the city had (i) 5,000 curbs that did not meet new construction standards; (ii) 1,309 curb cuts missing from arterial street intersections; and (iii) 6,011 curb cuts missing from local street intersections.

(5) Plaintiff still encounters obstacles, such as missing curb ramps, excessive cross-slopes, and upraised pavement sections, when traveling the sidewalks of a number of different streets.
The district court made the following conclusions of law:

(1) Plaintiff was not entitled to any injunctive relief whatsoever. Plaintiff failed to meet his burden to show that the city’s streets and sidewalks were not accessible when viewed in their entirety. The district court concluded that Plaintiff’s evidence was flawed.

- City surveys: The district court found that the city’s surveys did not help Plaintiff meet his burden. Even though 5,000 curb ramps were found not to be compliant with new construction standards in 2000, that was not the relevant standard for existing facilities and Plaintiff had not established that any defects constituted barriers. Although Plaintiff had shown that certain deviations from specific standards, such as a running slope of 9.3%, may be barriers to him, those deviations did not automatically apply to the city’s survey since the specifications were different. Furthermore, even if the defects were considered “barriers,” Plaintiff had not shown how many of those 5,000 curb ramps were still noncompliant in 2011. Likewise, the district court found Plaintiff’s reliance on the other city surveys problematic because they were outdated and did not reflect the current condition.

- Plaintiff’s surveys: The district court also concluded that Plaintiff’s own surveys were flawed because they were limited to less than 2% of the city’s curb returns. There was no evidence that the areas surveyed were a statistically valid sample and could be properly extrapolated to the city as a whole.

- Mitigation: Plaintiff failed to adequately address possible mitigation of barriers through alternatives, such as the city’s 311 call number, a paratransit service, and a program allowing requests to fix or build additional curb cuts.

- Evidence viewed as a whole: Plaintiff merely introduced individual strands of evidence without showing how they interacted with one another to demonstrate that the City’s PROW were inaccessible, when viewed in their entirety.

In the end, the district court dismissed Plaintiff’s ADA claim and the entire case with prejudice.

2. Skaff v. City of Sausalito.

Skaff is challenging not only the accessibility of the city’s buildings and sidewalks, but also the accessibility of property owned by private entities. Skaff
alleges that the City of Sausalito, as the local building official, is violating the ADA by not requiring private businesses to make their properties accessible.

We are currently in the process of revising the city’s transition plan and making fixes to the alleged barriers to moot Skaff’s ADA claim. We are also going to file a motion to dismiss his claims relating to private property since there is no private right of action to enforce a city’s duties as local building official and he failed to join the private owners who are indispensable parties.

As in the *Lonberg v. City of Riverside* case, we also believe that Skaff will have significant burden of proof problems should the case proceed to trial.
UNDERSTANDING THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT AND STATE LAW TO CALIFORNIA CITIES.

Prepared by Neil Okazaki
Deputy City Attorney, City of Riverside

The ADA under Title II requires all state and local governments to provide equal opportunity to individuals with disabilities to participate in and benefit from public programs. Simply stated, state and local governments cannot keep persons with disabilities from participating in programs and activities because of their disabilities. Despite this basic principle, the ADA presents many challenges to City Attorneys who are not experts in this specialized area of law. The purpose of this paper and accompanying program is to make the ADA more accessible (understandable) to the City Attorney who is not an expert in this area of law. Hopefully, this will serve to demystify the law so that ADA compliance is less intimidating when issues arise.

This paper does not address the application of the ADA and the Fair Employment and Housing Act to the myriad of issues facing cities in their role as public employers.

I. Background on Title II of the ADA.

The Americans with Disabilities Act (“ADA”)1 is a broad remedial civil rights law enacted to address the historic and pervasive discrimination against people with disabilities in all areas of public life. To achieve these goals, Congress provided “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”2

Title II of the ADA covers programs, activities, and services of public entities.3 The language of this statute is brief: “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity.”4 The ADA requires the Department of Justice (DOJ) to promulgate regulations implementing Title II.5

Title II is divided into two subtitles. Subtitle A of Title II is implemented by the Department of Justice's Title II regulation. Subtitle B covers public transportation (which is not addressed in these materials).6

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1 42 U.S.C. §§ 12101-12213 and scattered sections of 47 U.S.C.
2 42 U.S.C. § 12101(b)(1).
5 42 U.S.C. § 12134(a).
6 Although not addressed in these materials, Subtitle B applies to many cities since it applies all public entities that provide public transportation, whether or not they receive federal financial assistance. The Department of Transportation is responsible for the implementation of this subtitle of Title II.
Subtitle A is intended to protect qualified individuals with disabilities\(^7\) from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It additionally extends the prohibition of discrimination on the basis of disability established by section 504 of the Rehabilitation Act of 1973\(^8\), as amended, to all activities of State and local governments, including those that do not receive federal financial assistance. By law, the Department of Justice's Title II regulation adopts the general prohibitions of discrimination established under section 504, and incorporates specific prohibitions of discrimination from the ADA.

Title II requires the following of state and local governments:

- May not refuse to allow a person with a disability to participate in a service, program, or activity simply because the person has a disability.
  - For example, a city may not refuse to allow a person with a disability to play in a City-sponsored golf tournament at a City golf course that involves walking the course and carrying their own clubs. Additionally, though, the City would need to provide the golfer with reasonable accommodations. For example, if walking the course would cause the golfer pain, fatigue, anxiety, and a risk of hemorrhaging and developing blood clots, the golfer should be accommodated by allowing the use of a golf cart.\(^9\) Failing to do so would be tantamount to denying access to a City-sponsored activity.

- Must provide programs and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity.

- Must eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy their services, programs or activities unless "necessary" for the provisions of the service, program or activity.
  - Requirements that tend to screen out individuals with disabilities, such as requiring a driver's license as the only acceptable means of identification, are also prohibited.
  - Safety requirements that are necessary for the safe operation of the program in question, such as requirements for eligibility for drivers' licenses, may be

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\(^7\) An individual is considered to have a “disability” if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

\(^8\) Section 504 of the Rehabilitation Act of 1973 is a federal civil rights law that prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance. The ADA extended this prohibition on discrimination to cities for all of its programs, services, and activities regardless of whether federal funding is involved.

\(^9\) See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). Although this decision was decided under Title III of the ADA in the context of fundamental alterations of a public accommodation, this author believes the same result would come about under a Title II analysis.
imposed if they are based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

- Are required to make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration in the program would result.

- Must furnish auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.

- May provide special benefits, beyond those required by the regulation, to individuals with disabilities.

- May not place special charges on individuals with disabilities to cover the costs of measures necessary to ensure nondiscriminatory treatment, such as making modifications required to provide program accessibility or providing qualified interpreters.

- Shall operate their programs so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities.

Public entities do not have to make reasonable modifications in policies and practices when it would “fundamentally alter” the program.¹⁰ Nor do they have to take action that would make programs accessible to and usable by people with disabilities, if it would “fundamentally alter” the nature of the program or if it would result in “undue financial and administrative burdens.”¹¹ (See Section VI infra.)

II. Interrelationship with Title III.

While public entities are not subject to Title III of the ADA -- which covers only private entities -- public entities often have close relationships with private entities that are covered by Title III. The result is that certain activities may be at least indirectly affected by both Titles.

The following are examples outlined in the Title II Technical Assistance Manual.

**ILLUSTRATION 1:** A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to Title III and must meet those obligations. The State department of parks, a public entity, is subject to Title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its Title II obligations, even though the restaurant is not directly subject to Title II.

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¹⁰ 28 C.F.R. § 35.130(b)(7).
ILLUSTRATION 2: A city owns a downtown office building occupied by its department of human resources. The building's first floor, however, is leased to a restaurant, a newsstand, and a travel agency. The city, as a public entity and landlord of the office building, is subject to Title II. As a public entity, it is not subject to Title III, even though its tenants are public accommodations that are covered by Title III.

ILLUSTRATION 3: A city engages in a joint venture with a private corporation to build a new professional sports stadium. Where public and private entities act jointly, the public entity must ensure that the relevant requirements of Title II are met; and the private entity must ensure compliance with Title III. Consequently, the new stadium would have to be built in compliance with the accessibility guidelines of both Titles II and III. In cases where the standards differ, the stadium would have to meet the standard that provides the highest degree of access to individuals with disabilities.

ILLUSTRATION 4: A private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities. These particular homes provide a significant enough level of social services to be considered places of public accommodation under Title III. The State agency must ensure that its contracts are carried out in accordance with Title II, and the private entity must ensure that the homes comply with Title III.

III. Interrelationship With California Title 24.

Prior to the passage of the ADA, California was considered to have the most comprehensive standards regarding accessibility, as accessibility laws were enacted in California in 1978. The standards are contained in the published California Title 24.

California entities have long struggled to comply with both the ADA and Title 24 accessibility standards because the guidelines differed in many respects. Compliance challenges came about from inconsistencies between federal and state design standards. While some of the inconsistencies were eliminated due to the passage of the 2013 California Building Code, there are still many differences between the 2010 ADA design standards and the 2013 California Building Code.

Although local building agencies can only enforce Title 24 provisions, California law states that a violation of ADA is also a violation of the California Civil Code. Therefore, complying with Title 24 does not preclude a potential violation of the federal ADA standard. Therefore, cities should always take care to comply with both, or if the standards conflict, with the stricter – meaning the standard which provides greater access.

IV. New Construction and Alterations.

Under the ADA, facilities or parts of facilities built by or for the use of public entities must be designed and built so that they are “readily accessible to and usable by” people with

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12 Civil Code § 54(c).
disabilities if construction began after January 26, 1992. When a public entity undertakes alterations to an existing building, it must also ensure that the altered portions are accessible to the maximum extent feasible. The ADA does not require retrofitting of existing buildings to eliminate barriers, but does establish a high standard of accessibility for new buildings. The only situation where full compliance with these requirements is not required is where a public entity can demonstrate that it is structurally impracticable to meet the requirements.

An alteration is a change that affects or could affect the usability of all or part of a building or facility. Alterations of streets, roads, or highways can include activities such as reconstruction, rehabilitation, resurfacing, and widening. (These actions are contrasted with maintenance such as filling potholes, which is not considered an alteration.) Such qualifying alterations would trigger the obligation to provide curb ramps where pedestrian walkways intersect the resurfaced streets. As technology develops, however, it remains unclear whether the application of newly developed varieties of road surface treatments would qualify as an alteration. For example, treatments that serve solely to seal and protect the road surface are generally considered to be maintenance whereas a new layer of asphalt is considered to be an alteration. The analysis will center on whether the actions significantly affect the public’s access to or usability of the road.

Prior the 2010 amendments, public entities could choose between two technical standards for accessible design: The Uniform Federal Accessibility Standard (UFAS), established under the Architectural Barriers Act, or the Americans with Disability Act Accessibility Guidelines, adopted by the Department of Justice for places of public accommodation and commercial facilities covered by Title III of the ADA. For new construction and alterations beginning on or after March 15, 2012, public entities must comply with the 2010 Standards for new construction and alterations.

V. Program Accessibility.

A central area of importance under the ADA is the concept of “program accessibility.” A program will be viewed in its entirety for purposes of determining compliance with program accessibility. A public entity is not necessarily required to make each of its existing facilities accessible if alternative, accessible locations are available. However, where distance between facilities create barriers to program accessibility, structural changes may be necessary at additional sites in order to achieve program accessibility.

Program accessibility is now measured by reference to the 2010 Standards. If a facility needs to be accessible for program accessibility purposes, it should be brought up to the Standards by the 2012 compliance date.

For example, the 2010 Standards list fixed pool lifts as a feature for accessible swimming pools. Program accessibility applies to all pool-related programs, services, and activities

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13 28 C.F.R. § 35.151(a).
14 28 C.F.R. § 35.151(b).
15 28 C.F.R. § 35.151(a)(2)(i).
16 28 C.F.R. § 35.151(b)(1).
(swimming programs). This would not typically require that every pool be made accessible. However, where a city has only one existing pool, it must take steps to ensure that its swimming program at that pool is accessible.

1) Facilities For Which Standards Existed Prior to 2010

Safe Harbor Applies: There is a general “safe harbor” under which elements in covered facilities that were built or altered in compliance with the 1991 Standards or the UFAS would not be required to be brought into compliance with the 2010 Standards until the elements were subject to a planned alteration. Therefore, if a facility was built or altered to become compliant with the 1991 Standards, a City does not have to make further changes to those elements even though the new standards have different requirements.

*Example:* The 2010 Standards lower the mounting height for thermostats from 54 inches to 48 inches. However, if a facility’s thermostats are already installed at 54 inches in compliance with the 1991 Standards, a city is not required to lower them to 48 inches. A city, however, must use one standard for every architectural change it makes in this facility. The city cannot use the 1991 Standards for the lobby, and the use the 2010 Standards for the entrance.

2) Facilities For Which No Standards Existed Prior to 2010

Safe Harbor Does Not Apply: For facilities where the 2010 Standards establish specific requirements for the first time, these need to be accessible for program accessibility. The DOJ lists these in the 2010 Regulation at section 35.150(b)(2)(ii). For cities, the most common facilities are play areas and swimming pools.

VI. Exceptions to Program Accessibility Requirements.

A few exceptions exist.

1) Undue Financial or Administrative Burdens

This is not an absolute defense relieving a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

The Department of Justice has opined that program accessibility would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service,

17 28 C.F.R. § 35.150(a)(3)
program, or activity should be considered. The burden of proving that compliance with program accessibility requirements would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.

The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion.

The intention is that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.

As an example, a federal district court held that providing hepatitis inoculations for staff and residents, which would cost $4,600 - $6,500 plus $500-1600 each year, was not an undue burden for a residential program with a $4 million annual budget, and one-time cost of $500-1,500 plus $400-600 each year was not an undue burden for school with $1.1 million annual budget.

2) Fundamental Alteration

A public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

VII. Barden v. Sacramento.

In Barden v. City of Sacramento, 292 F.3d 1973 (9th Cir. 2002), the Ninth Circuit determined that sidewalks constitute “programs” under the ADA. This ruling was consistent with the 2000 guide by the Access Board, a federal agency devoted to accessibility for people with disabilities, which stated the following: “A public pedestrian circulation network is both a ‘program’, i.e., a service delivered by a government to its citizens, and a set of ‘facilities,’ e.g., the sidewalks, curb ramps, street crossings, and related pedestrian elements that are instrumental in providing the service.”

18 Id.
19 Id.
20 Id.
21 Id.
23 Id.
Subsequent to this decision, the Fifth Circuit in the *Frame v. Arlington*, 657 F.3d 215 (5th Cir. 2011) determined that sidewalks are “facilities” rather than “programs.” That notwithstanding, cities in the Ninth Circuit remain subject to the *Barden* decision. Furthermore, California law since 1971 has required construction of new sidewalks to be accessible.

VIII. ADA Coordinator.

If a local public entity has 50 or more employees, it is required to designate at least one responsible employee to coordinate ADA compliance. A government entity may elect to have more than one ADA Coordinator. Although the law does not refer to this person as an “ADA Coordinator,” this term is commonly used in state and local governments.

IX. Notice of ADA Provisions.

A local public entity must provide public notice about the ADA. The target audience for public notice includes applicants, beneficiaries, and other people interested in the state or local government’s programs, activities, or services. The audience is expansive, and includes everyone who interacts – or would potentially interact – with the local agency. While the notice need not be overwhelming, it must state at least the basics of the ADA and include the name and contact information for the ADA Coordinator. A model notice from the Department of Justice can be found at [http://www.ada.gov/pca toolkit/chap2toolkit.htm#Anchor-58521](http://www.ada.gov/pca toolkit/chap2toolkit.htm#Anchor-58521). The information must be presented in accessible formats so that it is accessible to all.

X. Grievance Procedure.

If a local public entity has 50 or more employees, it is required to adopt and publish procedures for resolving grievances arising under Title II. Grievance procedures set out a system for resolving disability discrimination complaints in a prompt and fair manner.

Although Title II nor its implementing regulations describe what ADA grievance procedures must include, the Department of Justice has stated that the grievance procedure should include the following:

- a description of how and where a complaint under Title II may be filed with the government entity;
- if a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative;
- a description of the time frames and processes to be followed by the complainant and the government entity;

26 28 C.F.R. § 35.107(b).
27 28 C.F.R. § 35.106.
• information on how to appeal an adverse decision; and

• a statement of how long complaint files will be retained.

A model grievance procedure from the Department of Justice can be found at http://www.ada.gov/pcatoolkit/chap2toolkit.htm#Anchor-58521.

XI. Self-Evaluation/Transition Plans.

The ADA and subsequent interpretations by the Department of Justice require cities to prepare a plan detailing how they will make their programs, services, and activities accessible to disabled individuals. This begins with a self-evaluation which identifies barriers in programs and activities that prevent persons with disabilities from access.

The transition plan should then set forth the steps necessary to complete modifications identified through the self-evaluation process. It is recommended that the plan identify and prioritize disabled access projects, estimate project costs, highlight an implementation schedule and funding strategy, and grievance and monitoring programs.
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