

# **Americans with Disabilities Act: Ensuring that Renovations and Alterations Comply with ADA Regulations**

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Commercial construction clients, including residential and commercial associations charged with maintaining and upgrading common elements and building infrastructure, are often faced with a confusing array of regulations, ordinances and laws. The regulatory landscape can present a conflicting patchwork quilt of local, state and federal construction proscriptions and mandates. As a result, the additional expenses that can be required to ensure compliance can dramatically outpace the initial scope of the project itself, calling its very viability into question. The Americans with Disabilities Act figures prominently in these considerations.

This article attempts to explain the substance, scope and practical requirements of this federal legislation, along with its impact on the typical commercial client, including residential and commercial associations.

## **The American Disabilities Act**

The Americans with Disabilities Act (the “Act” or “ADA”) was signed into law on July 26, 1990 by President Bush to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>1</sup> The Act has four main chapters: employment (Title I); government entities and public transportation (Title II); public accommodations and commercial facilities (Title III); and telecommunications (Title IV).<sup>2</sup>

This article focuses on Title III, which prohibits discrimination “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” by persons with disabilities.<sup>3</sup> Title III applies to all new construction after the Act was passed in 1990, but also places substantial requirements on existing buildings, especially buildings that are being renovated. Concerning facilities that pre-date the Act, Title III broadly defines prohibited discrimination during renovation as follows:

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<sup>1</sup> 42 U.S.C. § 12101(b)(1).

<sup>2</sup> Title I, 42 U.S.C. § 12111 – 12117; Title II 42 U.S.C. § 12131 – 12165; Title III 42 U.S.C. § 12181 – 12189; Title IV, Amendments to the Communications Act of 1934, 47 U.S.C. § 225.

<sup>3</sup> See 42 U.S.C. § 12182.

*[W]ith respect to a facility . . . that is altered by . . . an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner so that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.*<sup>4</sup>

It may also be considered discriminatory if a party fails to “remove architectural barriers” if the removal is “readily achievable.”<sup>5</sup>

The Department of Justice was charged with issuing regulations to further define the standards of compliance required under the ADA. The compliance standards differ for new construction as opposed to alteration of existing infrastructure, which is defined to include new additions to existing property. The DOJ issued “Accessibility Guidelines” (codified at 28 C.F.R. 36) and defined alterations accordingly:

*Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.*<sup>6</sup> (emphasis supplied)

The DOJ essentially reworded the text of the Act to lay out the compliance standards that apply to such alterations:

*Any alteration . . . shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.*<sup>7</sup>

On September 15, 2010, the Department of Justice, ostensibly to clarify and refine ADA compliance issues, updated and amended the standards for “accessible design.” The new standards will be effective for all new construction as well as alterations to existing structures starting on or after March 15, 2012.<sup>8</sup> The authors of this article do not intend to comment on the 2010 guidelines, except to say that they appear to add additional layers of complexity to an already complex and unclear regulatory matrix, one that can trap the unwitting client.

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<sup>4</sup> 42 U.S.C. § 12183(a)(2).

<sup>5</sup> Id. at § 12182(b)(2)(a)(iv).

<sup>6</sup> 28 C.F.R. § 36.402(b)(1) (emphasis added).

<sup>7</sup> Id. at § 36.402(a)(1).

<sup>8</sup> DOJ’s 2010 ADA Standards for Accessible Design, available at, [http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards\\_prt.pdf](http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf). See also, DOJ’s Guidance on the 2010 ADA Standards for Accessible Design, available at, [http://www.ada.gov/regs2010/2010ADAStandards/Guidance\\_2010ADAStandards\\_prt.pdf](http://www.ada.gov/regs2010/2010ADAStandards/Guidance_2010ADAStandards_prt.pdf)

## **Case law relating to the ADA**

The federal Fourth Circuit Court of Appeals (which has jurisdiction in Virginia over federal trial courts and persuasive effect on state courts) developed law on alterations to buildings – rather than new construction - in a case where a wheelchair-bound plaintiff brought suit against a night club claiming ADA violations.<sup>9</sup> In *Laird v. Redwood Trust, LLC*, the defendant owner had recently remodeled and renovated its three-level building into a restaurant, nightclub and bar. The plaintiff, who was confined to a wheelchair, brought suit because Redwood Trust had not included an elevator in its renovation design. The Fourth Circuit upheld the trial court’s findings in favor of the defendant, Redwood Trust.

While the case cannot be considered definitive on the issue, it holds interest because of the Fourth Circuit’s approach and analysis. The Court decided that the third floor of the defendant’s building was to be considered a “mezzanine” rather than a “story.” Since the building accordingly had fewer than three stories, the club fell within an exception to the ADA, which only requires elevators for buildings of three or more stories.<sup>10</sup> The court made other findings and rulings that favored the defendant building owner, making the case an example of legal precedent indicating that courts in Virginia may strive to find ways to avoid imposing ADA obligations in renovation (as opposed to new construction) projects.

The *Laird* opinion is only one of innumerable fact-specific cases that have interpreted and applied the ADA. Clients faced with construction projects may be subject to other legal opinions that would govern based on the facts and circumstances of those projects.

## **Maintenance or material alteration?**

By the plain language of the regulations under the ADA, painting, wallpapering or other “normal maintenance” activities would not bring a project within the purview of the ADA, while something more extensive that could be classified as an alteration would. The simplest test is whether the alteration affects “usability” of the facility.<sup>11</sup> However, ADA regulations only require that the *altered* portion be brought into compliance. For example, if someone were altering only the first floor of a building, they may be required to add ramps or hand rails to the first floor, but would not be required to do so on the second floor (assuming no alterations were being made to the second floor). There are many exceptions within the regulations, such as the one noted in the *Laird* case above, where an elevator is not required in a building less than three stories. Many cases come down to a facts-and-circumstance analysis---but certainly something purely cosmetic does not bring the party within the ADA.

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<sup>9</sup> *Laird v. Redwood Trust, LLC*, 392 F.3d 661 (4th Cir. 2004).

<sup>10</sup> See *Laird* at 666.

<sup>11</sup> See DOJ’s Common Errors, available at, <http://www.ada.gov/errors.pdf>.

### **What should the client do?**

In any relatively substantial project in which the ADA might be implicated in any way, a client should be advised to seek out the advice of competent professionals – engineers, qualified contractors and architects – before embarking headlong. If a bucket of paint, a couple of rolls of wallpaper and new carpeting is the extent of the repairs, a client need not fear a knock on the door by an inspector, or worse yet, a plaintiff's attorney claiming damages due to lack of ADA compliance. In short, every project must be evaluated on its own merit; the best advice is to use common sense in your initial analysis of these issues and to take the time to talk to an experienced industry professional.