

ADA ACCESSIBILITY RULES FOR ALTERATIONS TO EXISTING FACILITIES

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As illustrated by the case described, herein, there are two sets of rules for determining whether a public facility complies with the accessibility requirements under the Americans with Disabilities Act (ADA). Public facilities in which construction was completed prior to the effective date of the ADA (January 26, 1992) are subject to less stringent program accessibility requirements than ADA accessibility standards for new construction and alterations to existing facilities.

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990. Congress intended this legislation "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II regulates state and local governments operating public services or programs. Under Title II of the ADA, a "qualified individual with a disability" cannot, "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."

An individual is excluded from participation in or denied the benefits of a public program if a public entity's facilities are inaccessible to or unusable by individuals with disabilities. 28 C.F.R. § 35.149. In defining accessibility, Title II's implementing regulations distinguish between newly constructed or altered facilities, which are covered by 28 C.F.R. § 35.151, and existing facilities, which are covered by 28 C.F.R. § 35.150.

An existing structure or facility is defined as a facility constructed prior to January 26, 1992. The ADA standards for existing facilities provide that "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 and usable by individuals with disabilities." 28 C.F.R. § 35.150 (a)(1).

Title II's emphasis on "program accessibility" rather than "facilities accessibility" for existing facilities was intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access available. The overall policy of the ADA is to require relatively few changes to existing buildings, but to impose extensive design requirements when buildings are modified or replaced.

HISTORIC "GRAPE BOWL" STADIUM

In the case of *Smith v. City of Lodi*, 2016 U.S. Dist. LEXIS 75512 (E.D. Calif. 6/9/2016), the issue was whether renovations to an existing facility required the entire facility to be accessible. The City of Lodi owned, operated, controlled, and maintained a facility known as the Lodi Grape Bowl Stadium (Grape Bowl) located in Lodi, California. The Grape Bowl is a historic building that was originally built in approximately 1940. The Grape Bowl topography is formed by 2 earth berms on the North and South side of the field. The City is a public entity within the meaning of Title II of the ADA.

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Beginning in approximately 2010, the City began a series of renovations that included installation of a new scoreboard and sound system, upgraded lighting, installation of synthetic turf, and significant alterations to the south side of the stadium, including new ramps, seating, and parking stalls.

Pedestrian entry to the Grape Bowl is from the West side of the stadium; public restrooms, a ticket window, and a concession stand are provided in a common building just inside the pedestrian entrance. The City spent between three and five million dollars on the alterations. According to the City, these renovations were completed in 2013.

The Grape Bowl facility is rented out by local high schools for sporting events. Lodi High School uses the Grape Bowl for their home football games. Fans of the home team sit on the South side of the stadium. During high school football games, the North side of the stadium is primarily used by the visiting team and their supporters.

MEANINGFUL SEATING FOR DISABLED VISITORS

Plaintiff James Smith suffers from multiple disabilities including arthritis, fibromyalgia, and diabetes. He also has metal prosthetics in his leg and requires a walker for mobility. He cannot walk long distances because of his disability, and he sometimes uses a wheelchair.

Smith had visited the Grape Bowl an estimated eight times since 2010. One specific visit to the Grape Bowl was a football game between Amos Alonzo Stagg High School and Lodi High School on or about September 20, 2013. As the visiting team, Stagg was considered the visiting team, and thus the team and its supporters sat on the North side of the stadium. Smith claimed it was "significant and meaningful" for him "to be able to sit with his alma mater's team."

Smith filed a lawsuit alleging violations of Title II of the Americans with Disabilities Act (ADA). Specifically, Smith alleged he was prevented from returning to the Grape Bowl due to ADA violations associated with the North side seating, as well as parking, and paths of travel on both the North and South side of the facility. In response, the City claimed that the facility was compliant with the ADA.

Under the circumstances of this case, there was no dispute that Smith was an otherwise qualified individual with a disability. As a result, the issue before the federal district court was whether Smith was excluded from participation in the City's program and whether such exclusion was due to discriminatory barriers.

Smith and the City both filed motions for summary judgment. Accordingly, at this preliminary stage of the proceedings, the federal district court would determine whether or not the pretrial evidence was sufficient to conclusively rule in favor of either the City or Smith. If not, the federal district court would deny the motions for summary judgment and allow the case to proceed to trial for further proceedings to determine whether or not the City had indeed discriminated against Smith by violating the applicable ADA accessibility requirements for the Grape Bowl.

EXISTING FACILITY ACCESSIBILITY

The Grape Bowl was originally built in approximately 1940. Thus, for the purposes of ADA legislation it is deemed an existing facility since it was constructed prior to January 26, 1992. 28 C.F.R. § 35.151(a)(1). Any subsequent alterations made to the existing facility after January 26, 1992 were required to meet the applicable ADA accessibility requirements in existence at the time of the alteration. Alterations are defined as a "change in a building or facility that affects or could affect the usability of a building or facility or a portion thereof." (ADA Standards Section 202.3).

The City had adopted a transition plan which included plans to make the Grape Bowl compliant with the ADA. Improvements to the Grape Bowl were not made to the facility until 2010, when the City of Lodi embarked upon extensive projects to make the facility ADA compliant.

Smith claimed that these improvements to portions of an existing facility required the "entirety of the Grape Bowl" to meet or exceed the 2010 ADA accessibility guidelines (ADAAG). In failing to do so, Smith argued the City had created a "discriminatory barrier" in violation of the ADA. The federal district court rejected this argument.

While acknowledging the ADA accessibility guidelines (ADAAG) "must be met by any alterations that occurred after January 26, 1992," the court noted ADAAG requirements "do not apply to existing structures." Further, the federal district court found Smith had not offered "any case law or statute to support the position that any alterations to an existing facility then ushers the facility as a whole" under existing 2010 ADAAG requirements. 28 C.F.R. § 35.151(b).

On the contrary, the federal district court found "alterations commenced after the ADA's effective date, must to the maximum extent feasible, be made in such a manner *that the altered portion of the facility is readily accessible* to and usable by individuals with disabilities." (*Emphasis of Court*) As a result, the court found the "program accessibility" standard, not the 2010 ADAAG requirements, would apply "to those parts of the Grape Bowl that have not been altered."

PROGRAM ACCESSIBILITY

As cited by the federal district court, program accessibility discrimination within the context of existing facilities would include "a failure to remove architectural barriers where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv)). Moreover, for existing facilities, the federal district court noted "a public entity need only provide program access" when the facility "viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a).

That being said, under this "lesser standard" of program accessibility for existing facilities, the court acknowledged "mere physical access is not sufficient." Rather, the court found "Title II requires public entities to provide "meaningful access" to their programs and services." Further, in providing such meaningful access, the court found the ADA would require public entities to "give priority to those methods that offer services, programs, and activities to qualified

individuals with disabilities in the most integrated setting appropriate."

As described by the federal district court, Title II's emphasis on "program accessibility" rather than "facilities accessibility" for existing facilities was "intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access available." Accordingly, for existing facilities, the court emphasized "[a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance." 28 C.F.R. § 35.150(b)(1)).

As cited by the federal district court, the U.S. Supreme Court had characterized the ADA "program accessibility" requirement for existing facilities as follows:

[T]he reasonable modification requirement can be satisfied in a number of ways. . . . In the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites ...

Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

FOOTBALL GAME SEATING & PARKING

In his complaint, Smith had alleged that there were "no wheelchair seats available on the North side of the stadium and only 14 seats available on the south side." According to Smith, ADA standards would require 36 wheelchair seats for an assembly area with more than 5,000 total seats, plus one additional wheelchair seat for each 200 additional seats over 5,000.

Smith had also argued the parking was deficient on the North side of the facility. In so doing, Smith acknowledged there were "four apparently ADA-compliant parking spots servicing the south side of the Stadium," but there were "no comparable spots servicing the north seating area." As cited by Smith, Section 208.3.1 of the 2010 Americans with Disabilities Act Standards ("ADAS") would require "parking spaces serving a particular building or facility be on the shortest accessible route to the facility entrance."

In response, the City argued it did "not have to follow the strict technical guidelines applicable to post-1992 facilities under 28 CFR §35.151 on the north side of the Grape Bowl" because "ADA improvements have not been completed on the north side of the Grape Bowl." Having provided "ADA accessible disabled seating at the Grape Bowl at specific locations," the City contended "the Grape Bowl meets the program accessibility standard of an existing facility." Specifically, the City claimed "ADA seating exists on the south side of the stadium where disabled individuals have 'program access' for football games in their entirety." The federal district court agreed.

As noted by the court, "the seating and parking on the North side of the facility have not been

altered and thus fall under the existing facility framework":

Although some electrical work has been updated on the North side of the building, Plaintiff has not presented this Court with case law to support that this upgrade requires all of the seating and parking on the North side of the facility to be altered in order to meet the 2010 ADA building requirements. Without case law to support this leap, the Court is unwilling to interpret the myriad of statutory provisions before it to mean that updating a facility's lighting requires the entire North side to be remodeled to current ADA standards.

According to the court, the City had provided "program access" on the South side of the stadium where disabled guests are provided with parking and seating to watch a football game in its entirety." Moreover, in the opinion of the court, "the fact that Mr. Smith traveled to the North side of the Grape Bowl to have the experience of sitting with the visiting team did not establish an ADA violation."

As characterized by the court, Smith's "program access" argument would require "more than just the ability to watch the football game at the stadium, but the ability to have access to his desired area of the stadium." In this particular instance, the court found the seating was simply "part of the facility." More importantly within the context of program accessibility for an existing facility, the court found "the football game is the program offered, not the seating."

As a result, while "sympathetic" to Smith's circumstances, the federal district court rejected Smith's broad interpretation of the applicable ADA law. In the opinion of the court, Smith's argument "would render the 'program access' standard meaningless because it would require that public entities modify existing facilities whenever the general public seating area was not accessible or ADAAG compliant." According to the court, "the mere fact that an existing facility does not comply with the ADAAG does not render the program inaccessible." Further, the court noted: "assessing a program's accessibility is a subjective evaluation that entails viewing the program in its entirety."

EXISTING FACILITY POLICY

As described by the federal district court, "required structural modifications for existing facilities is what Congress meant to avoid when it created different standards for facilities built or modified before and after the enactment of the ADA." Further, the federal district court noted this policy for existing facilities was articulated as follows in the ADA Technical Assistance Manual:

Unlike private entities under Title III, public entities are not required to remove barriers from each facility, even if removal is readily achievable. A public entity must make its "programs" accessible. Physical changes to a building are only required when there is no other feasible way to make the program accessible. Department of Justice, Technical Assistance Manual to Title II of the ADA, (1994) § 5.2000 available at <http://www.ada.gov/taman2.html#II-5.2000>.

Applying this policy to the facts of this particular situation, the federal district court found "the program—the viewing of the football game—was accessible in its entirety on the South side of the Grape Bowl." As a result, the court concluded the City's "failure to provide wheelchair seating and parking on the North side of the stadium does not constitute an ADA violation."

EXISTING FACILITY ALTERED?

Smith had also alleged that he had encountered architectural barriers in the path of travel to the North side of the facility. On this point, the federal district court found "contradicting information." On one hand, the City claimed no alterations had been made to "the seating, paths of travel, or parking that services the north side of the stadium." However, the City's parks and recreation director had stated Phase II improvements to the facility had included installation of "new steps and ramps from the field to the bleacher area, an 18 inch concrete curb, and a sidewalk path of travel along the north and south sides of the field and to the handicapped parking area."

In light of such conflicting information, it was unclear to the court "whether this alteration was in fact made and if so whether it was constructed according to the applicable regulations." As a result, the federal court denied the City's motion for summary judgment on this particular issue. Further trial proceedings would, therefore, be necessary to determine whether the path of travel to the North side of facility had indeed been altered in this particular portion of the existing facility. If so, such alterations would have to comply with applicable ADA accessibility requirements.

OVERALL PROGRAMMATIC ACCESS

Similarly, Smith had also claimed the south side paths of travel to the facility violated the ADA. Specifically, Smith alleged that the concrete ramp that leads from the Southwest side of the Stadium to the upper concourse of the South seating side required edge protection along the sides pursuant to the 2010 ADAS Section 405.9. Smith claimed this could be rectified by welding on a metal plate to the inside face of the noncompliant portions of the handrail and that the cost would range close to \$50 per linear foot plus labor. Smith also claimed the asphalt ramp from the East parking lot to the upper South side concourse level had slopes that exceeded the maximum 8.33% as allowed by ADAS section 405.2, and lacked handrails on both sides as required by ADAS section 405.8 as well as level landings for each 30" of vertical rise, as required by ADAS 405.6.

In response, the City noted Smith had stated that he had not returned to the Grape Bowl because the North side was not accessible. Since Smith only wanted access to the North side of the stadium, the City claimed Smith could not show any alleged discrimination against him was "caused by any barrier on the South side of the Stadium."

While Smith conceded he was "not seeking a fix of the south side," Smith claimed noncompliance of the south side was "relevant to overall programmatic access" to the Grape Bowl. The federal district court agreed. In the opinion of the court, it was appropriate for Smith to cite barriers to access on the south side to demonstrate the overall program in the Grape Bowl

when viewed in its entirety (i.e, viewing the football game) was not readily accessible to individuals with disabilities.

CONCLUSION

Based on this pretrial evidence, the federal district court found neither the City nor Smith had conclusively proven their case under the ADA. The federal district court, therefore, denied the City's motion for summary judgment, as well as Smith's motion for summary judgment. As a result, this case would proceed to trial for further proceedings to more fully consider whether the North side of the Grape Bowl had complied with ADA compliance as an existing facility and whether alterations to the South side of the facility in 2010 complied with the ADA requirements for alterations and new construction in an existing facility.

NOTE: On October 14, 2015, the *Lodi News-Sentinel* reported, the City had decided to "close the whole north side of the stadium to spectators" as a result of Smith's ADA lawsuit. Use of the Grape Bowl by the Lodi school district was subject to a joint use agreement between the Lodi school district and the City through the Lodi Parks, Recreation and Cultural Services Department.

http://www.lodinews.com/news/article_48fcd4e2-7308-11e5-8d2b-b3903a910cb1.html

Links to Youtube videos with views of the "Grape Bowl" in Lodi, California:

<https://www.youtube.com/watch?v=VGv2mq0iejE>

<https://www.youtube.com/watch?v=Gp5QtL4rYms>

<https://www.youtube.com/watch?v=aL3seJfSNWg>

SEE ALSO:

State Fair Fails ADA Accessibility Test For Existing Facilities

James C. Kozlowski. *Parks & Recreation* . Sep 2004. Vol. 39, Iss . 9

<http://cehdclass.gmu.edu/jkozlows/lawarts/09SEP04.pdf>

ADA Requires Wheelchair Areas to Be Integrated Into General Seating

James C. Kozlowski. *Parks & Recreation* . Jan 2005. Vol. 40, Iss . 1

<http://cehdclass.gmu.edu/jkozlows/lawarts/01JAN05.pdf>

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