RHODE ISLAND

by Frank A. Lombardi, Esq.

Handicap Pool Access

Do it Right, Do it Now

Since the cold weather is either here or just about to arrive, talk of pools is wistful at best. But when it comes to factoring in costs for new construction or capital improvements, the discussion is anything but seasonal.

We've recently run into interesting issues concerning pools in condominiums. Many condominium projects built in the early 1980s are starting to show their age. In particular, pools around the state are in need of capital repairs — replacement of liners, cement aprons and the like. Thirty years ago, big pools were the rage, now not so much. Also, with this economy, boards are looking to shrink pool size to save maintenance costs. When management is asked to consider shrinking or modifying or even removing the pools, we are asked whether they should install handicap access ramps and chairlifts into the pool. We've received related questions from developers who plan to install pools on the condominium property as an additional amenity. Should they also consider installing the handicap access to the pool? The answer is "yes" to both questions. Do it right from the start, and do it now.

Requests for Accommodation

The question was posed to us when an association had planned extensive capital improvements to its pool. The plan was to shrink the pool's footprint. They applied for a permit and the city's building inspector required them to install a handicap access ramp and chairlift. Our first question was: Had a unit owner requested access for himself or his family?

If so, then the FHA would require the installation, as the law requires condominiums to make reasonable accommodations to a person's dwelling, condo unit and associated facilities. Specifically, the Fair Housing Act (Title V of the Civil Rights Act of 1968, as amended (42 USC 3601-3631) makes it unlawful to "discriminate against any person ... in the provisions of services or facilities in connection with (his) dwelling, because of a handicap" of that person or any person associated with that person. Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 USC Section 3604 (f)(3)(B). We believe this would apply to not only the unit owners, but to their family as well. Essentially, any person that could be reasonably related to using the dwelling (unit) would be covered by the FHA.

The answer is not quite as easy when the condo's board is modifying the pool and needs to decide whether to spend the extra $10-$20,000 or so to install a chair lift, even though no unit owner has requested it. To be sure, the condo may modify the pool without the accessibility and essentially wait for the request, but the cost of retrofitting the ramp or lift may be twice as much as doing it right the first time.

But, the board indicates: We've never received a unit owner request, why should we consider it now? In our opinion, it is not a question of "if" they ask, but of "when." Further, since the cost of installing it during new construction or during major capital repairs, (i.e. shrinking the footprint of the pool) would be cheaper than retrofitting a lift after installation, we recommend doing it right and doing it now.

Public Accommodation Considerations

The issue is also simple if the pool is a public accommodation, i.e. a hotel pool or even a residential condominium if access to the pool is open to the public. For example, if the condominium rents out the facility to a local high school for swim meets or has charitable events for non-residents, etc. Then, at that point, the ADA kicks in and handicap accessibility will be required.

Specifically, the Americans with Disabilities Act (ADA) was enacted in 1990 with the expressed purpose of making life easier for people with disabilities. Being able to use a pool would fall into that category. In 2008, the ADA Amendments Act (ADAAA) was passed. Its purpose is to broaden the definition of disability, which had been narrowed by U.S. Supreme Court decisions. Title III of the Act concerns Public Accommodations, which would include facilities open to the public such as restaurants, hotels, grocery stores, retail stores, gyms, zoos, a bank or bakery and the like. Title III requires that all new construction and modifications must be accessible to individuals with disabilities. For existing facilities, barriers to services must be removed if "readily achievable." Presumably, the requirement would be realized when applying for a building permit and the building official for the state or city comes in to

inspect the project.

We have been successful in arguing that since the pool is not a place of public accommodation, there would be no need for the accessibility. The state code can impose stricter conditions on the accessibility requirements, but it cannot establish a new type of covered facility. Presently condominium pools privately owned are not covered.

State Law vs. Federal Mandate

While state law may in fact impose a higher accessibility requirement than what is minimally mandated by federal law, the requirements must only implicate facilities that are already covered by the existing restrictions. For example, §308(b)(1)(A)(ii) of the ADA states:

Attorney general certification. On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or **local building code** or similar ordinance that establishes accessibility requirements **meets or exceeds the minimum requirements of this Act** for the accessibility and usability of **covered facilities** under this title. (emphasis added).

In other words, the State or local municipality can create or increase restrictions to covered facilities, but they cannot simply add a new definition to covered facility. Accordingly, at this point, a pool in a private condominium is not a covered facility or a public accommodation, and, in our opinion, a building inspector cannot force the installation in regards to condominium pools. We successfully put this to a local building inspector: What would happen if the ADA considered private pools in condominiums a public accommodation, what would be next, private pools in single standing homes? Fortunately, the building inspection agreed that the condominium pool is not an ADA covered facility and did not require the association to install the chairlift.

Just because the ADA at present does not require the accessibility, given the possibility of an amendment making condominium pools a covered facility, and of course the ever present possibility that one of its own unit owners may request it, in my opinion, the accessibility should be done automatically for new construction and when performing capital improvements to the pool i.e. major repairs, shrinking the size, etc. We think it's best if the association simply install the accessibility. Do it right from the start and do it now.

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