



PARK WATCH™ LEGAL DEVELOPMENTS NEWSLETTER

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July 2013 CASp Disclosure Not Applicable to Mobilehome Parks *CASp qua "Attorney Repellant" and Clarification of Statutory Schemes Amplifies the Duties of the Park Owner.*

By Terry R. Dowdall, Esq.

■ Upshot

SB 1186 provides some benefits to park owners. It is intended to provide California landlords, tenants and business owners with added protection against predatory lawsuits based on alleged violations of construction-related disability access laws. It also imposes some duties on lessors of commercial property. If you have commercial property (retail, research and development, warehouse, industrial, *i.e.* other than residential), let's provide the enclosed disclosure next time you enter a commercial lease, extend, re-lease, or amend it.



Mentor

■ The Bill Basics

The major thrust of SB 1186¹ was to tighten up on predatory lawsuits against landlords by unscrupulous counsel. Regrettably, it did not go far enough. The bill prohibits an attorney, or other person from issuing a demand for money to a building owner or tenant, or an agent or employee of a building owner or tenant, on the basis of one or more construction-related accessibility violations.

Of immediate interest, this bill requires a *commercial property owner*² to state on a lease form or rental agreement executed on or after July 1, 2013, if the property being leased or rented has undergone inspection by a certified access specialist and if so whether it "meets applicable standards."³

■ Discussion about July 1, 2013

Unless you are signing or modifying a commercial lease on July 1, 2013, there is no requirement for action today.

A CASp inspection⁴ provides owners with some protections against frivolous lawsuits. More

Creative Solutions,
 Efficient, Practical
 Representation,
 Profitable Parks



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¹ SB 1186 is codified at *Civil Code* §1938: (Steinberg) - Building Accessibility for the Disabled (Chapter 383). As discussed at the WMA New Laws seminar in October, 2012, SB1186 took effect immediately in 2012, and was entitled: "An act to amend, repeal, and add Section 6106.2 of the Business and Professions Code, to amend Sections 55.3, 55.52, 55.53, 55.54, and 55.56 of, to add Sections 55.31, 55.545, and 1938 to, and to add, repeal, and add Section 55.32 of, the Civil Code, to add Section 425.50 to the Code of Civil Procedure, to amend Sections 4459.8 and 8299.05 of, to add Chapter 7.5 (commencing with Section 4465) to Division 5 of Title 1 of, and to repeal and add Sections 8299.06, 8299.07, and 8299.08 of, the Government Code, and to add and repeal Section 18944.5 of the Health and Safety Code, relating to disability access, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately." There is no specification of penalty for violation; or measure of damages. Failure to provide disclosure would constitute an unfair business practice, and in addition to damages, might justify rescission of a lease by a lessee who is really disgruntled for other reasons.

² SB 1186 does not define "commercial property." One view is that it is any property other than residential. Residential property is generally defined as "private" and hence not a place of "public accommodation." This distinction is also reflected in dealing with service animals, where there are different provisions for service animals in the ADA and the Fair Housing Act, because housing is generally not deemed a place of public accommodation. But Commercial premises are. Leases are any conveyance of possession of the premises. Length of the term appears irrelevant.

³ "Meets applicable standards" means the site was inspected by a CASp and determined to meet all applicable construction-related accessibility standards pursuant to paragraph (1) of subdivision (a) of Section 55.53. A site that is "CASp inspected" on or before the effective date of the amendments made to this section by Senate Bill 1186 of the 2011-12 Regular Session of the Legislature means that the site "meets applicable standards."

⁴ "Inspected by a CASp" means the site was inspected by a CASp and is pending a determination by the CASp that the site meets

about that later. Commercial property lessors are also subject to the ADA, as are commercial tenants who have been delegated the responsibility to comply with the ADA as to the interior of the leased premises (this is the conventional and prudent approach to coping with the risk of predatory ADA claims for the commercial lessor).

The availability of some of the protections granted under SB 1186 turns on whether the subject property has been evaluated by a Certified Access Specialist (CASp) for compliance with applicable disability access requirements. Such inspection is not required. However, as the posting of a CASp inspection is like "ADA attorney repellent," a CASp inspection and follow up is advised. Addressing issues now prevents problems in the first instance, and avoids "copy cat" claims later.

Keep in mind that a CASp disclosure is also discoverable to the ADA predator in litigation.

Under SB 1186, Commercial lessors are required to disclose whether a CASp inspection has been made, in leases entered into (or modified) after July 1, 2013. If the CASp inspection has been made, a disclosure of whether the noted corrections have been made is also required; i.e., whether the leased property was found to comply with accessibility requirements. The law states:

"A commercial property owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CASp), and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53."

■ **Sample Notice for July 1, 2013:**

Accordingly, here is a sample notice for your consideration, as a starting place in order to comply with the code. Just do an add-on half page: you are not required to do a CASp inspection. If you decide to, well, you may be obligating yourself to a lot of updates. You may not want to do a CASp until you have a pre-inspection and clear up any problems. *E.g.:*

SB 1186 INSPECTION NOTICE DISCLOSURE

To: Tenant _____ and All Persons in Possession:

Please be advised as follows:

A commercial property owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CASp), and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53.

1. The premises ____ has ____ has not undergone inspection by a Certified Access Specialist (CASp)
2. If so, the property ____ has or ____ has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53.
3. () Please note: Under your lease, the tenant is responsible for ADA Compliance inside the leased premises. Lessor's inspection does not cover areas under Lessee responsibility.

Received: Lessee: _____ Dated: _____, 201__

Commercial tenants are *also vulnerable* to predatory ADA lawsuits. Lessors now commonly require the commercial lessee to assume the burden of complying with the ADA as to the interior and other areas of the leased premises. So, commercial tenants may have a concern about ADA compliance, as exterior violations may first attract a claimant and cause closer inspection including the interior of the leased business premises. Property management firms may find themselves in this situation, where offices are commercially leased.

However, the notification for the knowledgeable commercial tenant is likely superfluous, *as the commercial lessor will be the first one to prominently post the CASp inspection notice.* This notice repels ADA predators who then pursue greener pastures: the commercial tenant will likely see the CASp inspection notice. Absent such a posting the prospective tenant is likely to assume no CASp inspection has been done. In that case, the new tenant may wish to negotiate a demand for lessor to take on such an inspection; or, as it benefits both parties, the cost might be apportioned between lessor and lessee for exterior and interior. Or, lessor may require a CASp on completion of tenant improvements, and absent proof of compliance, allow lessor to place the inspection at tenant's cost as part of a pass-through. Lessor might even reserve the right to make the corrections if tenant fails to do so, or declare a material default of the lease.

... lessor may require a CASp on completion of tenant improvements, and absent proof of compliance, allow lessor to place the inspection at tenant's cost as part of a pass-through. . .

applicable construction-related accessibility standards pursuant to paragraph (2) of subdivision (a) of Section 55.53. A site that is "CASp determination pending" on or before the effective date of the amendments made to this section by Senate Bill 1186 of the 2011-12 Regular Session of the Legislature means that the site was "inspected by a CASp."

■ Are CASp Inspections Required?

A CASp inspection is *not* required. *Should you have an inspection just to disclose violations of accessibility requirements?* Be advised of the statutory duties of the CASp inspector once an inspection has been completed.

(a) For purposes of this part, a certified access specialist shall, upon completion of the inspection of a site, comply with the following:

(1) For a meets applicable standards site, if the CASp determines the site meets all applicable construction-related accessibility standards, the CASp shall provide a written inspection report to the requesting party that includes both of the following:

(A) An identification and description of the inspected structures and areas of the site.

(B) A signed and dated statement that includes both of the following:

(i) A statement that, in the opinion of the CASp, the inspected structures and areas of the site meet construction-related accessibility standards. The statement shall clearly indicate whether the determination of the CASp includes an assessment of readily achievable barrier removal.

(ii) If corrections were made as a result of the CASp inspection, an itemized list of all corrections and dates of completion.

(2) For an inspected by a CASp site, if the CASp determines that corrections are needed to the site in order for the site to meet all applicable construction-related accessibility standards, the CASp shall provide a signed and dated written inspection report to the requesting party that includes all of the following:

(A) An identification and description of the inspected structures and areas of the site.

(B) A statement that, in the opinion of the CASp, the inspected structures and areas of the site need correction to meet construction-related accessibility standards. This statement shall clearly indicate whether the determination of the CASp includes an assessment of readily achievable barrier removal.

(C) An identification and description of the structures or areas of the site that need correction and the correction needed.

(D) A schedule of completion for each of the corrections within a reasonable time-frame.

(b) For purposes of this section, in determining whether the site meets applicable construction-related accessibility standards when there is a conflict or difference between a state and federal provision, standard, or regulation, the state provision, standard, or regulation shall apply unless the federal provision, standard, or regulation is more protective of accessibility rights.

(c) Every CASp who conducts an inspection of a place of public accommodation shall, upon completing the inspection of the site, provide the building owner or tenant who requested the inspection with the following notice, which the State Architect shall make available as a form on the State Architect's Internet Web site.⁵

Since a CASp inspection is a *prudent* idea, it seems best to arrange to make all corrections as soon as the CASp inspection is completed to minimize the time that a disclosure will state that all the requirements for accessibility are not satisfied. Keep in mind that a CASp disclosure is also discoverable to the ADA predator in litigation. Perhaps you can eliminate such damning evidence immediately if not before the CASp inspection. Providing a disclosure which reveals defects may provide an ironclad claim for indemnity by a commercial tenant brought into a ADA suit against lessor.

Again, dealing with the cost of a CASp inspection prospectively, it seems that sharing of the cost of the CASp inspection is best to avoid claims between lessor and lessee and then to bullet proof the property against claims of the ADA predator.

In the meantime, whether or not a CASp inspection has been performed, it is important for the commercial lessor to have the right disclosure in or attached to commercial leases executed on or after July 1st. Second, the commercial lease should apportion the responsibility for ADA compliance, provide coordinate indemnification and contribution claims, resolution by arbitration, and right to seek costs of inspection as a further rent where lessor wishes to undertake an ADA inspection for lessee and require the lessee to comply once tenant improvements are installed.



Mentor

■ How Do I Avoid ADA Lawsuits in My Park?

SB1186 was widely hailed as a “bipartisan” effort, which is superficially correct. Truth is, however, that the business lobby alone could *not* have succeeded in this endeavor (*proof?* State legislators could not change our State’s version of the ADA for years). Plainly, SB1186 would not have been possible if not prompted by Senator Dianne Feinstein. Senator Bob Dutton introduced the bill with Senate President Darrell Steinberg. The new law is proclaimed to squelch a serious problem caused by “unscrupulous attorneys . . . filing shakedown lawsuits against businesses in an effort to gain an easy payday with no intention of improving access for the disabled community.” Strong words.

⁵ “NOTICE TO PRIVATE PROPERTY OWNER/TENANT: ¶ YOU ARE ADVISED TO KEEP IN YOUR RECORDS ANY WRITTEN INSPECTION REPORT AND ANY OTHER DOCUMENTATION CONCERNING YOUR PROPERTY SITE THAT IS GIVEN TO YOU BY A CERTIFIED ACCESS SPECIALIST.”

“IF YOU BECOME A DEFENDANT IN A LAWSUIT THAT INCLUDES A CLAIM CONCERNING A SITE INSPECTED BY A CERTIFIED ACCESS SPECIALIST, YOU MAY BE ENTITLED TO A COURT STAY (AN ORDER TEMPORARILY STOPPING ANY LAWSUIT) OF THE CLAIM AND AN EARLY EVALUATION CONFERENCE.”

“IN ORDER TO REQUEST THE STAY AND EARLY EVALUATION CONFERENCE, YOU WILL NEED TO VERIFY THAT A CERTIFIED ACCESS SPECIALIST HAS INSPECTED THE SITE THAT IS THE SUBJECT OF THE CLAIM. YOU WILL ALSO BE REQUIRED TO PROVIDE THE COURT AND THE PLAINTIFF WITH THE COPY OF A WRITTEN INSPECTION REPORT BY THE CERTIFIED ACCESS SPECIALIST, AS SET FORTH IN CIVIL CODE SECTION 55.54. THE APPLICATION FORM AND INFORMATION ON HOW TO REQUEST A STAY AND EARLY EVALUATION CONFERENCE MAY BE OBTAINED AT www.courts.ca.gov/selfhelp-start.htm.”

“YOU ARE ENTITLED TO REQUEST, FROM A CERTIFIED ACCESS SPECIALIST WHO HAS CONDUCTED AN INSPECTION OF YOUR PROPERTY, A WRITTEN INSPECTION REPORT AND OTHER DOCUMENTATION AS SET FORTH IN CIVIL CODE SECTION 55.53. YOU ARE ALSO ENTITLED TO REQUEST THE ISSUANCE OF A DISABILITY ACCESS INSPECTION CERTIFICATE, WHICH YOU MAY POST ON YOUR PROPERTY.”

The time had come for SB1186. While only twelve percent (12%) of disabled people live in California, forty percent (40%) of ADA lawsuits are filed here. The new law is intended to reduce damages, costs of litigation, extortionate demands, and inserts the State Bar Association in the stream of communication between plaintiff's counsel and the defendant business owner.

Conversely, the law incentivizes owners to comply with the ADA. And as I have previously written, early inspection and compliance provides park owners with a *de facto* immunity to ADA lawsuits. Community owners and businesses constantly face unrelenting hikes in operational expense. These increasingly harsh burdens drive up the costs to the consumer and homeowner. This is a tough economy where a "mom and pop" is barred from selling affordable housing in their own park (without needless and costly federal intervention, licensing, testing, and registration, even when no bank will take the risk they will). Well, this is a welcome nod toward real progress against ADA predators and the greedy victimization of simple people serving the public and providing jobs, while upholding the spirit and intent of the ADA's noble purpose.

How Do I Avoid ADA Lawsuits?

Let's talk about parks for a moment: For most park owners, comply with the ADA in three areas of the park, and obtain an inspection followed by a posting of notice of compliance. The **three areas of potential public accommodation** are the **park office**, the **parking lot** adjacent to the park office, and the **path between the office and parking lot**. A Certified Access Specialist ("CASp") can inspect the property and issue the notice.

The **park office** is open to the **public**. The owner impliedly invites the public into the park office. While the ADA does not apply to the park generally, the park office *does* constitute a public accommodation; modifications are required to the extent readily achievable. The path to the office is also required to be compliant with ADA standards. Therefore, the path to the office and doorway to the office must be modified to comply with the ADA.

And finally, disabled parking must be provided for any common parking lot. Disabled parking requires a sufficient number of spaces, with satisfactory surface, slope, markings and signage. The requirements for ADA compliance are set forth in Title 24 of the California Building Code. A copy can be reviewed here: http://www.dowdalllaw.com/dowdall-CaliforniaAccessibility-Title_24_regulations-12-8.pdf.

If the community owner does not comply with the ADA in these respects, it is like advertising to be sued. Of course, a community owner may wait to be sued, then hire counsel, run up a bill for defense costs, and then make the modifications (ordered by the court or required as a condition of settlement). Suit will also entail payment of the plaintiff's attorney's fees. There is a robust industry of lawyers who prosecute these claims, and they are in your community looking for new cases. **Thus, if the decision is made to comply early, a lawsuit may be avoided from the ADA predators.**

We still have residents to be concerned with. Together with the **FHAA**, the **MPA** and the **MRL**, all such claims should be subject to **federal arbitration**, heard and determined individually without joinder of claims. This is now possible as I have written numerous occasions since April of 2011 when the dream became reality.

The New Law and a CASp Inspection?

CASp inspectors are licensed by the state in order to provide guidance on ADA compliance. After inspection of the property and completion of readily achievable modifications, a certificate is posted in plain view at the office which advises the public that the property has been inspected and in compliance. That is like ADA attorney repellant. The list of inspectors is published on line.

If a business is in a location that was completed after January 1, 2008 or any business in California that has received a Certified Access Specialist (CASp) inspection, that business will have 60 days to fix that violation and their statutory damages may be reduced from \$4,000 to \$1,000 – a 75 percent reduction.

Small businesses with 25 or fewer employees that have not had a CASp inspection will have 30 days to fix a violation and can see their statutory damages reduced from \$4,000 to \$2,000 – a 50 percent reduction.

SB 1186 ends "demand for money" letters from attorneys. Letters can still be sent to a business alerting them of a potential violation or infraction, but that letter can't include a "demand for money". Attorneys sending those letters will be required to also send a copy of the letter to the California State Bar, who will examine the letter to make sure it meets the requirements of the law.

Attorneys will also be required to send a copy of letters sent to businesses to the California Commission on Disabilities (CCDA). They will be required to compile a "Top 10" list of violations to be posted on their website by July 1, 2013 and also a list of those attorneys and law firms who are filing the bulk of the lawsuits.

SB 1186 provides an avenue for local cities and counties to expand the CASp program in their communities, to help bring local businesses into ADA compliance and develop tools to help educate the business community in expanding ADA access.

Highlights of the New Law:

Demand letters can still be sent, but without a "demand for money." Copies of such letters must also be sent to the California State Bar. Attorneys also must send a copy of letters sent to businesses to the California Commission on Disability Access (CCDA).

If you have a CASp inspection, you will have 60 days to remediate violations and if successful, statutory damages (per violation) may be reduced from \$4,000 to \$1,000.

If you have 25 or fewer employees and no more than \$3.5 million in annual gross receipts, and have not yet received a CASp inspection, you will have 30 days to remediate, with per violation damages reduced from \$4,000 to \$2,000.

Property owners who promise to remediate may also seek an early evaluation, which freezes the lawsuit and avoids attorneys fees. This can be a huge savings for property owners to avoid needless expense from their attorneys. The immediate mandatory stay of the proceedings is similar to the litigation protections already given to an owner who has a CASp inspection.

To prevent "stacking" (repeat visits to allege multiple violations), courts can assess reasonableness including the duty to "mitigate damages," thereby potentially limiting application of the \$4,000 statutory minimum damage award. The intent language states that multiple claims for the same violation may also may make any mitigation futile or impossible.

The intent is to incentivize property owners to correct violations rather than to settle and fix nothing. This law gives owners a chance to be proactive in the avoidance of lawsuits from total strangers testing their properties and from disabled applicants and residents alike.

\$118,458 to Prevailing Defendants Against ADA Claim

■ Facts

In *Jankey v. Lee*, decided in December, plaintiff sued the owner of K&D Market, a small grocery store in San Francisco's Mission District. Plaintiff, a wheelchair user, sued a grocery store owner, contending that a four-inch step located at the entry of the market was an architectural barrier that prevented him and other wheelchair-bound individuals from wheeling into the store and asserting four state and federal law disability access claims.

The Plaintiff lost on summary judgment. Defendant store owners sought attorney's fees. Plaintiff argued that state law requiring fee awards to prevailing parties was preempted by the ADA (a federal law).

■ Holding

The court concluded fees for a prevailing defendant under Civil Code §55 were mandatory and awarded \$118,458. The court of appeal affirmed. The Supreme Court affirmed.

The Supreme Court ruled that California law makes an award of fees to any prevailing party mandatory, and "the ADA does not preempt this part of the state's attorney fee scheme for disability access suits." So Defendant, as the prevailing party, was entitled to costs and appellate attorney fees as well. The plain language of section 55 makes an award of fees to any prevailing party mandatory; and (2) the federal Americans with Disabilities Act does not preempt this part of the state's attorney fee scheme for disability access suits.

One-sided attorney's fees generally make settlement prudent. Defendants had no incentive to fight a claim in court because even if they prevailed they would still have to pay their own attorney's fees. This may even the playing field some.

Dowdall Receives Freedom Fighter Award

■ **Upshot** The 25th Annual California Mobilehome Parkowners Alliance Symposium was recently held at the Treasure Island Hotel in Las Vegas. Terry was awarded this year's Freedom Fighter Award.

■ **Bio** Terry has practiced mobilehome park law since 1978. His practice includes all phases of representation of park owners and management. Since 1996, he has served as legal advisor to the WMA legislative committee. As legal advisor, he has drafted many pro-owner changes in state law. Recently, he was also appointed legal advisor to the MHET Board.

Terry has represented owners in fighting rent controls across the state for decades, most recently knocking out the: (1) *San Mateo* rent control ordinance and (2) before that, *Chula Vista's* law and (3) *Colton's* law which impaired leases.

His *amicus* brief in the 1984 *Oceanside* case was the very first attack on vacancy controls as a taking of park owners' property.

He and partner *Brent Swanson* took the City of Carson to the Cal. Supreme Court and represented owners in many other cities and counties. Terry also been involved in many other industry challenges. He set the precedent in defending the constitutionality of 'older persons' housing in the Ninth Circuit in *Taylor v. Rancho Santa Barbara*. He defeated a massive class action attack in the discrimination case in *United States v. Plaza*, involving a dozen parks sued by the U.S. Justice Department across 3 states.

Setting several precedents in regard to 'familial status' housing and limiting damages claims of thousands down to just one family, he is involved in fighting local park zoning fights, recently suing Yucaipa on behalf of park owners on a pro bono basis.

He has represented the WMA and CMPA as *amicus curiae* in numerous other appellate cases.

As to education, Terry attended the University of Southern California for his undergraduate degree. He received a fellowship for doctoral study at U.S.C. before entering the law school. He graduated in 1977 and immediately started working with Brent Swanson, suing cities to stop rent controls. Terry opened his own practice in 1993, now celebrating 20 years of hard work and dedication to the industry.



Terry

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