HYATT & STUBBLEFIELD, P.C.

The Client Letter

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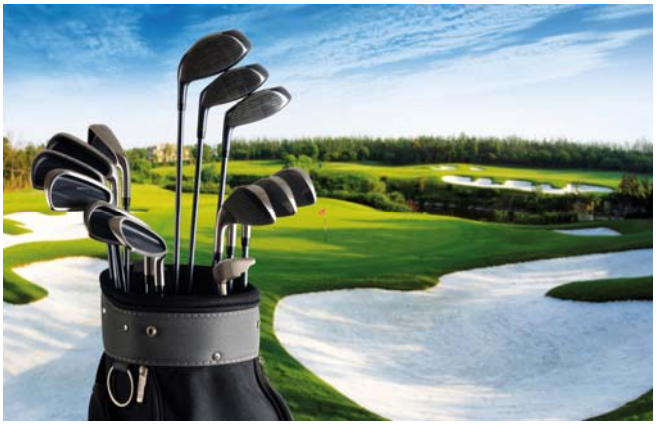
This newsletter addresses current issues and developments in the law relating to development of planned communities. It is published periodically for distribution to clients and friends of Hyatt & Stubblefield, P.C., Attorneys and Counselors. The information presented is not intended as specific legal advice to any person. Principles of law expressed in this newsletter are subject to change from time to time.

New ADA Regulations May Affect Recreational Facilities of Master Planned Communities



For almost 20 years, the Americans with Disabilities Act ("ADA") has prohibited the discrimination against people with disabilities. As most developers are now aware, the ADA prohibits discrimination by privately-owned businesses in the areas of employment and public accommodations. This impacts the development of master-planned communities in that the ADA requires sales offices, recreational amenities and clubs to provide "full equal enjoyment" of the facilities to people with disabilities if they are deemed to be a "public accommodation." While the ADA does not apply to a truly "private club," courts have limited the definition of a private club to clubs which do not hold their facilities open to the public and which evidence a genuine plan or purpose of exclusiveness. "Clubs" associated with master-planned communities and their associated facilities are generally deemed to be open to the public since, in most instances, potential purchasers of real estate are often entertained by sales personnel at the club's facilities.

Even clubs within master-planned communities which have long ago been sold out are at risk of the facilities being deemed "public accommodations" due to the activities held at these facilities. For example, private golf courses that permit public play, private golf courses that host tournaments which are open for public play, swimming pools that host swim meets open to the public, and gyms or exercise areas that open or offer classes to the general public may be deemed to be "public accommodations." It is the public aspect of these type events that brings what would normally be considered a private facility into the ambit of the public accommodation classification under the ADA.

In the Fall of 2010, the U.S. Department of Justice issued revised regulations for the ADA that includes new accessibility standards (the "2010 Standards"). Previously, the rule was that new construction and alteration of existing construction had to meet the applicable building codes and standards at the time of construction or modification. The owner of the facilities did not have to "retrofit" or comply with newer standards unless they were building new facilities or modifying the existing facilities. Under the new regulations, however, recreational facilities that are deemed open to the public and considered public accommodations may have to comply with the barrier removal requirements of the 2010 Standards if it is "readily achievable" to do so. While there is no hard and fast rule, "readily achievable" means easily accomplished without much difficulty or expense.

(Continued on page 2)

In this Issue…

There is a "safe harbor" provision with respect to the obligation to modify some facilities, but the 2010 Standards provide that facilities for which no previous standards existed do not fall within the "safe harbor" provision. Specifically identified as not falling with the 2010 Standard's include golf facilities, swimming pools, wading pools, and spas, exercise machine and equipment, boating facilities, play areas, saunas and steam rooms, and shooting facilities.

The 2010 Standards "urge" the owner of such recreational facilities to take measures to comply with the barrier removal requirements in accordance with the following order of priorities:

(1) Access from sidewalks, parking and public transportation (by installing entrances ramps, widening entrances, and providing accessible parking);

(2) Access to the area where the facilities are located;

(3) Access to restroom facilities; and

(4) Access to the facilities themselves.

Under the 2010 Standards, golf courses are obligated to provide access for golf carts to all of the necessary elements of the golf course to ensure that persons with mobility disabilities can fully and equally participate in the activity of playing golf. This includes providing unobstructed golf cart access onto the teeing ground, putting greens, golf car rental or pick-up areas, bag drop areas, and any weather shelters.

Swimming pools with 300 or more linear wall feet must have at least two accessible means of entry, and smaller pools must have at least one accessible entry. The new standards require that at least one entry be a sloped entry or a pool lift; the other entry could be a sloped entry, pool lift, transfer wall, or transfer system.

The new standards for exercise machine and equipment primarily deal with providing an access route to exercise machines and equipment by persons with disabilities. Generally, there has to be access routes and floor space for a person seated in a wheelchair to use at least one of each type of exercise machine and equipment.

Those recreational facilities that fall within the public accommodation classification have until March 15, 2012 to remove barriers to the extent readily achievable and into compliance with the 2010 Standards.

If you would like more information about the 2010 Standards or would like to discuss whether the uses within your community could meet the public aspect requirement under the ADA, we would be happy to help.

Social Host Alcohol Liability

If someone has too much to drink at a social function hosted by a community association or private club and then the person causes property damage or injury or death to a third party due to his or her intoxicated state, can the association or club (the host) be liable for the injury or damage? The answer may vary depending upon whether the host is licensed to sell alcohol. Persons and establishments that are licensed to sell alcohol may have liability under what are called "dram shop" laws. Licensed vendors are generally well aware of the rules that govern their business, so dram shop liability is not the subject of this article. Instead, the focus is on the social host that does not sell alcohol but serves alcohol at a social function.

The laws vary from state to state, but the prevailing thought is a social host should not be liable for injuries to a third party since the act of the host serving the alcohol was not the cause of the injury but rather was the act of the intoxicated person. The intoxicated person may be liable to the third party for the injury he or she caused, but the social host is generally not liable to the third party.

There are two common exceptions to this general rule, however. In many states, the social host may be liable for third party injuries if alcohol was served or otherwise made available at the event to a minor or to a person that had obviously had too much to drink. At least one state will not impose third party liability unless the social host knew that the intoxicated person would soon be driving, but most states do not make that distinction. So what can an association do to protect itself from social host liability for serving alcohol? Here are a few recommendations:

1. Adopt association rules prohibiting:

(a) any person from bringing alcoholic beverages onto the common areas without the prior approval of the association;

(b) any person from using the common property while intoxicated;

(c) any person under the age of 21 from consuming alcoholic beverages on the common property; and

(d) any person from giving any alcoholic beverage to a person under the age of 21 for consumption at an association-sponsored event;

2. Check with the association's insurance agent to determine the extent of the association's liability insurance coverage with respect to the selling or serving of alcohol at association-sponsored events and obtain additional coverage if required (this may be available on a single-event basis);

3. Check applicable state, city, or county statutes and ordinances to determine if the association or any caterers or other vendors are required to have a special event permit or other permit for vendors to sell or serve alcohol at the association-sponsored event;

4. Provide each vendor with rules for selling or serving alcohol and require vendors to sign them, agreeing to comply with those rules and to indemnify the association against any claims arising out of the vendor's (or its employees') breach of the rules. The rules for vendors should require, at a minimum, that the vendor:

(a) have a current liquor license and all required permits to sell and serve the types of alcohol beverages they propose to sell or serve (permits may distinguish between beer/wine and liquor);

(b) comply with all state and local laws relating to the selling and serving of alcoholic beverages;

(c) have liability insurance, including liquor liability coverage and contractual liability coverage, with at least a $1,000,000 limit per occurrence, have the association named as an additional insured on such policy, and provide evidence of such insurance to the association prior to the event;

(d) not have anyone under the age of 21 serving or selling alcohol;

(e) require every guest to show identification and check the identification to verify the age of every guest before the sale or serving of alcohol to the guest;

(f) not sell or serve alcohol to anyone under the age of 21 or sell or serve it to any person if the vendor believes the guest intends to provide the beverage to someone under the age of 21;

(g) not sell or serve alcohol to anyone who appears to be intoxicated; and

(h) discontinue selling and serving alcohol at least 90 minutes before the end of the event;

5. Be sure there are also non-alcoholic beverages and food available;

6. Be sure all advertisements for and announcements of the event encourage guests who choose to drink to drink responsibly and not drink and drive;

7. Encourage guests who drive to the event to designate a driver on arrival at the event and give them a "designated driver" wristband; have vendors agree not to serve alcoholic beverages to designated drivers and consider offering free non-alcoholic beverages to designated drivers; and

8. Have a committee of people monitoring the crowd throughout the event to:

(a) identify anyone who appears to have had too much to drink and assist them in getting home safely; and

(b) look for and dispose of cups, bottles, or cans containing alcoholic beverages that may be left sitting unattended or in trash cans or other places within easy reach of minors.

A little prevention can go a long way in limiting liability for a social host and may also prevent injuries or even death to someone else.

HUD Charges Homeowners Association with Discrimination

The U.S. Department of Housing and Urban Development ("HUD") filed charges against a homeowners association and its property management company for refusing to accommodate a veteran who required an emotional support dog due to a disability resulting from his war service. The Fair Housing Act makes it unlawful to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford persons with disabilities equal opportunity to use and enjoy a dwelling.

According to the HUD charges, the association required the disabled resident to pay a $150 registration fee for the dog, provide proof of liability coverage, and sign a medical release for the association to obtain his medical records. The resident provided medical documentation of his need for the assistance animal and obtained liability insurance, but he refused to give the association access to his medical information or to pay the registration fee. The association then began levying fines against the unit for non-payment of the registration fee. HUD asserts that the Fair Housing Act requires that reasonable accommodations be made to no-pet rules for persons with disabilities who need support animals. HUD also asserts that requiring a disabled person to pay a registration fee for a service animal, obtain liability insurance, or provide access to medical records is prohibited by the Act. The case is currently pending.

Inside News

- Jo Anne Stubblefield will be one of a panel of speakers presenting a program on the **Interstate Land Sales Full Disclosure Act** entitled, "ILSA: New Cases, New Homes, New Direction" for the American Law Institute - American Bar Association. The speakers will review a number of recent cases arising under the Act which have had a significant impact on application and interpretation of, and compliance with, the Act. The 90-minute program will be taped and available for purchase and viewing through the ALI-ABA website at www.ali-aba.org later this year.

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