

LOCAL ENFORCEMENT OF ACCESS REGULATIONS

By

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Building Officials, design professionals, building owners and business owners all understand that the built community must provide accessibility. There are two key vehicles for enforcing compliance; the California Statutes and Building Code and the Americans with Disabilities Act and Standards. Building Officials want to have clarity on what they should or should not enforce.

This article will clarify that Building Officials and their staffs should enforce only the CBC and not the new 2010 ADA Standards (ADAS). While there is current consensus among most building officials, there have been questions, unclear direction and lack of established precedents that answer this issue. This article provides a brief explanation of why there have been questions and why, according to key government officials, that building officials should enforce only the CBC regulations. It documents both verbal and written opinions in this article and in the attachments.

To provide background and to summarize the issue, the ADAS is a federal regulation that applies to all public accommodations and is enforced only by the federal government. The Standards were developed, and opinions are rendered by, the United States Access Board. Enforcement is by the U.S. Department of Justice and the U.S. Attorney General through federal courts. Building Officials may advise or opine on the ADA and ADAS, however, their opinion is not binding.

The CBC is a state regulation that applies to all public accommodations and is enforced by the local building official. The regulations were developed by DSA. Enforcement is through California courts and the State's Attorney General oversees regulation and interpretation. The CBC has very nearly mirrored the ADA so when the local officials enforce the CBC, Chapter 11-B, many in the design/development community feel they are complying with the ADA.

The new 2010 ADAS has some changes which substantially impact design requirements and could cause the owners of a newly constructed building built in compliance with the CBC to be subject to a lawsuit in federal court, or even in state court under the Unruh Civil Rights Act. This brings the key question; shouldn't building officials enforce both CBC and ADAS since Section 1.9.1 CBC states "it is the intent of this code "...to incorporate standards at least as restrictive as those required by the federal government for barrier-free design under (1) Title III (Public Accommodations and Commercial Facilities)"...

The first resource who was gracious enough to discuss and put in writing her opinion was Marsha Mazz, Director of Technical Standards with the U.S. Access Board. She stated that in her opinion, Section 1.9.1 CBC is a "statement of intent" and is not a mandate to the local official or a regulation for them to enforce. In order for a local official to enforce the provisions of the ADAS they would have to "interpret and enforce" the ADAS which is clearly not expected or allowed by the federal government. She did add that if the State adopted the ADAS by reference that it could do so, as have a number of states, since federal laws are owned by the citizens and are not proprietary. Her document attached is in a Q & A format which consists of two questions she had already answered and two which I posed. She

concluded by suggesting that the Building Standards Commission be consulted on the 1.9.1 “intent” language.

Please see the two excerpts from Ms. Mazz’s document which is an attachment to this article.

Question: Are the 2010 ADA Standards a proprietary or copyrighted document?

Answer: No. The Standards are available free of charge and they may be copied or reprinted.

Question: The California Building Code includes a statement to the effect that it is the intent of the CBC to incorporate standards at least as restrictive as the federal regulations for new construction and alterations. If the building code is in some way less stringent than the 2010 ADA Standards, would this mean that a code official must enforce the more stringent provisions of the ADA Standards in lieu of the building code?

Answer: Generally, a statement of intent does not convey an enforceable requirement. Building Officials typically only enforce the law they are authorized to enforce by the state or local authority having jurisdiction.

The question was posed, and the Q & A’s were provided to, the California Building Standards Commission. Mr. Jim McGowan, Executive Director, responded by acknowledging the question and forwarding a request for the Division of the State Architect to respond since they are the agency which promulgates Chap. 11-B as well as enforces the regulations for State jurisdiction buildings. Mr. Dennis Corelis, Deputy State Architect responded by taking time to explain the DSA staff’s opinion. He followed up by providing a thorough opinion by the State’s Attorney General. Mr. Corelis was clear that 1.9.1 is an “intent” statement and there is no expectation by the State for the local building official to enforce anything other than the CBC, even with the new 2010 ADAS being more restrictive. When reviewing the attached State’s A.G opinion, particularly note that paragraphs checked on pages 4 and 5.

Please see the excerpts from the State’s A.G. brief which is an attachment to this article.

Neither chapter 913 nor the ADA has changed the access enforcement responsibilities of local building departments. They continue to be charged only with enforcement of those access requirements which appear as part of the CBSC or local building codes. The ADA does not provide for the enforcement of federal law by local building officials. This is true even when the officials are enforcing a state or local code certified by the United States Attorney General. The ADA’s enforcement mechanism is the traditional case-by-case method of civil rights enforcement which depends on the filing of complaints rather than a system of government inspection.

Chapter 913...It does not mandate local building officials to enforce the federal access requirements, nor could it; rather, it directs the State Architects to adopt those ADA requirements which prescribe a greater degree of accessibility and usability than that provided by existing state law while preserving state standards which exceed the level of accessibility and usability afforded by the ADA.

When local building officials review construction activity... their role is to enforce the terms of the state and local building regulations. They may not elect to assume greater or different enforcement powers than those specifically or necessarily implied under California law.

Chapter 913 does not contain a provision which could be viewed as an implied grant of authority to interpret, apply, or directly enforce ADA accessibility requirements. ...but the "code" utilized by local building officials in this regard continues to be the CBSC as revised, and the local building code, if any.

We therefore conclude that local building departments are not responsible for enforcing the access requirements of the ADA; however, they are required to enforce state and local building codes which have incorporated the federal requirements. Local building departments are not authorized to elect to enforce the federal access standards apart from the CBSC and local codes. These conclusions render moot the question as to whether chapter 913, in conjunction with the ADA, affects the traditional immunity from financial liability granted to local building officials who are engaged in the performance of their official duties.

In summary, the local official should continue to enforce only the CBC. As enforcement officials which hold the public's trust to monitor construction in a manner which complies with the law, it would be good for us to advise design professionals of the new 2010 ADAS and some of the differences.