PUBLIC ENTITY GOLF COURSES ARE REQUIRED BY THE AMERICANS WITH DISABILITIES ACT TO PROVIDE ADAPTIVE GOLF CARS.

By Richard Thesing, JD

I. INTRODUCTION: GOLF IS MORE THAN A GAME.

Imagine you are in your early 20's and have just arrived home after spending six months in rehab after losing both legs due to an IED injury in Iraq or Afghanistan. You feel like your life is over. You watch TV all day and start to drink too much. You are embarrassed to go out in public or visit the friends you had before you went into the military. Then, a friend takes you to a driving range where there is an adaptive golf car and you start hitting golf balls. Pretty soon you are hitting it 200 yards and ready to go on the golf course. You start playing with your old friends and your family. You want to get better so you start going to a fitness center and working out. You feel good about yourself and you are getting stronger. You are getting your life back.

OR, imagine that you are 70 years old and have been playing golf every week for 20 years with the same foursome. They are your best friends. After golf, you have lunch in the clubhouse and then play cards. Then you develop a disease that affects your ability to walk and you stop playing golf. You no longer see your friends and you feel like your life is over. But, then your course gets an adaptive golf car and you can play golf again with your friends. Life is good again.

According to the U.S. Census, over 20 million persons can't walk or have difficulty walking. Most of these individuals fall into the two broad categories illustrated above: young adults who, in an instant, become a paraplegic, and seniors who have a progressive disease that make walking difficult. Many in the first group have never played golf before but it is one of the few sports that can be played by a paraplegic with friends and family. Many in the second group were avid golfers but have to give the game up due to a progressive disability.

The ability to play golf not only gets such people out of the house, it enhances their self-esteem. In turn, the motivation to try to hit a golf ball further often results in an exercise and fitness regimen that would otherwise not be undertaken. The end result is that golf can provide very positive physical and psychological benefits to those with a mobility disability.

Unfortunately, persons with a mobility disability are unable to play golf at 95% of golf courses due to the lack of an adaptive golf car. Luckily, there is a very simple and reasonable accommodation—an adaptive golf car.

An adaptive golf car is a golf car with hand controls for acceleration and braking and a swivel seat that permits the golfer to swing from a seated position. Some adaptive golf cars have a seat that not only swivels but also tilts so that the golfer can swing from a

semi-standing position that approximates a normal swing stance. [1]Adaptive golf cars are commercially available and in use at over 500 golf courses in the U.S. [2]

II. THE ADA REQUIRES PUBLIC ENTITY GOLF COURSES TO PROVIDE ADAPTIVE GOLF CARS.

A. The ADA Requires Public Entities to Make their Programs Accessible.

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(a)

Section 42 U.S.C. 12132 of the ADA mandates that: "no qualified individual with a disability shall, 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." This is commonly known as the "Program Access Requirement." The plain meaning of this provision is that a public entity golf course that does not provide an adaptive golf car is excluding disabled golfers from enjoying the benefits of the golf course in violation of the program access requirement.

B. Federal Agencies have Interpreted Title II to Require Adaptive Golf Cars.

1. The Department of Justice. Every year, DOJ audits several cities and counties across the country for compliance with the ADA. The end result of the audit is a settlement agreement entered into between the city or county and DOJ that lists specific actions the public entity agrees to take to bring the entity into compliance with the ADA.

In 2004, the U.S. Access Board issued guidelines for recreational facilities including golf courses. [3] Those guidelines required golf courses to permit golf cars used by disabled golfers to be driven any place on the golf course, including tees and greens. Thereafter, whenever a public golf course was part of an audit and the golf course did not have an adaptive golf car, the settlement agreement required that one be provided.[4]

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[1] A standup seat appeals to a greater number of potential users than a car that only permits the golfer to hit from a seated position. This is particularly true for avid golfers who slowly lose balance or mobility. With a standup seat they can use their regular golf swing rather than learn a new swing from a seated position. There is some indication that an adaptive golf car must have a standup seat in order to be ADA compliant. In Celano et al. v. Marriott Intern., Inc., 2008 WL 239306, 2008 U.S. Dist. LEXIS, the Court required Marriott to provide adaptive golf cars with "a seat that tilts to put the golfer into a standing or semi-standing position" See Permanent Injunction attached. Similarly, DOJ has described an adaptive golf car as having "a seat that both swivels and raises to put the golfer in a standing or semi-standing position." 75 FR No. 142, p. 43457

[2] Safety standards more rigorous than those for regular golf cars have been adopted for adaptive golf cars. ANSI/RESNA ASE-2-2012, RESNA Standard for Adaptive Sports Equipment-Volume 2: Adaptive Golf Cars: 9/17/2012

[3] 2004 ADAAG, 36 CFR part 1191. These guidelines were incorporated into the DOJ 2010 Standards for Titles II and III Facilities:2004 ADAAG.

[4] http:/www.ada.gov/civicac.htm

The cities and counties that have been required to provide an adaptive golf car include:

- Kansas City, MO 7/5/12
- Madison, IN 7/26/11
- Norfolk County, MA 7/26/11
- Des Moines, IA 3/2/11
- Fairfax County, VA 1/28/11
- Wyandotte County and Kansas City, KS 4/7/10
- Santa Rosa, CA 12/16/09
- Atlanta, GA 12/8/9
- Port St. Lucie, FL 8/10/9
- Pike County, KY 9/25/08
- Birmingham, AL 7/25/05
- Hartford, CT 7/25/05
- Memphis, TN 7/25/05
- Amarillo, TX 7/25/05
- Hutchinson, KS 1/13/05
- San Luis Obispo, CA 12/14/04

In addition to the above settlement agreements entered into after a DOJ audit, in November 2002, DOJ required the City of Indianapolis to purchase and maintain two adaptive golf cars in response to a complaint from a disabled golfer. [5]

2. The Department of Interior. The Department of the Interior (DOI) has been designated by regulation as the federal agency with authority to interpret Title II access to golf courses. 28 CFR 35:190(b)(5). For over a decade, DOI has ruled that a public golf course which provides golf cars on a rental basis must also make adaptive golf cars available for rent, stating that providing an adaptive golf car is a required "reasonable modification."

In response to a complaint that a municipal golf course of the city of Columbus, Ohio, did not provide an adaptive golf car, DOI stated:

> It is a reasonable modification to provide specialized golf cars for Individual players with disabilities when cars are made available to other players without disabilities. In fact, with recent design developments for modified and single rider golf cars, there may be less wear and tear on tees, fairways, and greens than that caused by conventional cars and tires. … Unless it can be demonstrated that to do so would change the fundamental nature of the game of golf or cause an undue burden when the total resources of the entity are considered, we believe that public entities, which rent golf cars, must provide modified cars to golfers with disabilities for the same rental fee charged for conventional cars. [6]

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[5] www.usdoj.gov/crt/foia/indianapoliseaglecreek.html

[6] A letter from DOI to Mobility Golf setting forth the same opinion regarding Title II golf courses in general is attached.

C. Numerous Regulations Require a Public Golf Course to Provide Adaptive Golf Cars.

The ADA directed DOJ to issue regulations to "implement" Section 12132. (42 U.S.C. 12134) Those regulations are found at 28 C.F.R §35.130 and contain the following:

A public entity shall not

- "Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;" [7] The failure to provide an adaptive golf car denies a person with a mobility disability the opportunity to use the public golf course.
- "Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;" [8] Offering a regular golf car to a person with a mobility disability "is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others" since the golfer with a mobility disability is not able to swing a golf club while using a regular golf car.

And, a public entity shall:

- "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[9] Adding an adaptive golf car to the courses golf car fleet is a "reasonable modification" required by the ADA.

D. Federal Courts Are Required to Follow Agency Regulations, Interpretations and Enforcement Activities in Implementing the ADA.

In Thomas Jefferson Univ. v. Shalala, 512 U.S. 504,512 (1994), the Supreme Court stated, "The 'agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" See also, Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

See also, Olmstead v. L.C. by Zimring, 527 U.S. 581, 598 (1999) ("the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (internal quotation marks and citations omitted.) Hahn ex rel. Barta v. Linn County, I*A*, 130 F.Supp.2d 1036 (2001) (requiring "substantial deference" to an agency's interpretation), Marcus v. Kansas Dep't of Rev*enue*, 170 F.3d 1305, 1307, n.1 (10th Cir.1999)), Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir.1996) (giving the agency's view "considerable weight").

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[7] 28 CFR 35:130(b)(1)(i)

[8] 28 CFR 35:130(b)(1)(iii)

[9] 28 CFR 35:130(b)(7)

In Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944), the Supreme Court relied on an agency's amicus brief in that case. In Bragdon v. Abbott, 524 U.S. 624, 646 (1998), the "administrative guidance" from DOJ that the Supreme Court relied on included a Response to an inquiry from a Congressman and another Response to an inquiry. In Auer v. Robbins, 519 U.S. 452, 462 (1997) the Supreme Court relied on an interpretation in an amicus brief from the Secretary of Labor. In Thomas Jefferson Univ. v. Shalala, the Supreme Court relied on an interpretation contained in the brief filed in the case by the Secretary of Health and Human Services. In Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002), the court relied on an amicus brief in that case for the DOJ's interpretation of its regulations.

In Independent Living Resources v. Oregon Arena Corp, 982 F.Supp. at 708, fn. 9., the court stated, "Although DOJ has not issued any formal interpretive regulations regarding this issue, its position has been articulated through **enforcement activities**…" (Emphasis added.)

Thus, the DOJ regulations and the enforcement activities of DOJ and DOI requiring public entity golf courses to provide adaptive golf cars must be followed by the courts.

E. An Adaptive Golf Car Requirement Does Not Result in a Fundamental Alteration Nor Does it Impose an Undue Burden.

The DOJ regulations specify that a public entity is not required to "take any action that it can demonstrate would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens." (28 C.F.R. §35:150(a)(3))

Numerous courts have held that the public entity has the burden of proof to demonstrate that the suggested modification would fundamentally alter or result in an undue burden. Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 670 (3d Cir. 1999), Barta v. Linn County, IA, 130 F.Supp.2d 1036, 1056 (2001).

The provision of an adaptive golf car does not result in the fundamental alteration of the activity of the golf course. The only difference between an adaptive golf car and the standard golf car, from a golf course operator's standpoint, is that one car accommodates one person and the other accommodates two. Moreover, the Supreme Court in PGA Tour, Inc. v. Martin, 532 U.S. 661(2001) held that the use of a golf car does not fundamentally alter the activity of the golf course.

The only other defense is undue financial burden. With regard to an undue financial burden, the regulations state:

- The burden of proof is on the public entity.
- The decision that there is an undue financial burden must be made by the head of the public entity or his or her designee after considering all resources available.
- The decision must be accompanied by a written statement of the reasons for reaching the conclusion that there is an undue financial burden.

The expense of an adaptive golf car is minimal when compared to the revenue of a golf course or the revenue of the public entity. Adaptive golf cars range in price from $7000 to $10,000. It is hard to imagine that the purchase of an adaptive golf car would be an undue financial burden. However, if it was, there are at least three ways to mitigate the cost.

- The adaptive golf car can simply be added to the master lease of the golf car fleet.
- The adaptive golf car can be separately leased. The most expensive adaptive golf car can be leased for approximately $240 per month for five years, after which the course operator owns the car.
- The adaptive golf car can be put in the regular golf car fleet rotation and rented to single players when it is not being used by mobility impaired golfers and thereby pay for itself.

F. A Public Entity Is Liable for Title II Violations Even If The Golf Course Is Managed By A Private Entity.

Often golf courses are owned by a public entity and managed by a private management company. In such instances, both the Title II public entity and the Title III private management company will be held responsible for ADA violations. See, Johanson v. Huizenga Holdings, Inc., 963 F.Supp. 1175 (S.D. Fla. 1997) and the ADA Title II Technical Assistance Manual at www.us-doj.gov/crt/ada/taman2.html.

III. CONCLUSION.

In sum, the Title II Program Access Requirement mandates that public entity golf courses provide an adaptive golf car to accommodate golfers with a mobility disability:

- A golf course is a "service, program or activity" within the plain meaning of Section 12132.
- The failure to provide an adaptive golf car denies a disabled golfer the benefits of a public golf course and is therefore a denial of "program access."
- The failure to provide an adaptive golf car is a violation of numerous DOJ regulations.
- DOJ and DOI have required public entities to provide adaptive golf cars.
- The use of an adaptive golf car does not fundamentally alter the game of golf.
- The minimal expense of an adaptive golf car does not constitute an undue financial burden.

Therefore, public entity golf courses are required to provide adaptive golf cars under the same terms and conditions as it offers regular golf cars to non-disabled golfers.

RICHARD THESING

- JD from Stanford Law School in 1966.
- Joined a five-person law firm in 1968 and retired in 1999 as managing partner when the firm had 400 lawyers across the country.
- 2000-2004. Appointed by President Clinton to the U.S. Access Board and served a four-year term. Participated in deliberations regarding the Recreation Guidelines, which include the access rules for golf courses.
- 2005. Served on the board of the National Alliance for Accessible Golf.
- 2005. Formed Mobility Golf, a non-profit corporation with a mission to improve access to golf courses for those with a mobility disability.
- 2005. Initiated a website, www.mobilitygolf.com, that contained, among other things, a database searchable by zip code or state of golf courses with adaptive golf cars.
- 2005. Organized a class action lawsuit against Marriott International that resulted in a judgment requiring Marriott to provide two adaptive golf cars at every golf course it owned or managed.
- 2005 to 2008. Organized an effort with Congressman Sam Farr that resulted in the Department of Defense providing two adaptive golf cars at each of its 174 golf courses in order that disabled veterans, and other disabled golfers, could play the courses.
- 2009. Formed Mobility Fitness, a non-profit corporation with a mission to have fitness facilities provide accessible exercise equipment.
- 2011. Organized and coordinated public comment letters to DOJ from 25 disabled golfers in support of DOJ's proposal to require golf courses to provide adaptive golf cars.
- 2011. Wrote model comments used by the disability community in support of DOJ's proposals to require adaptive golf cars and accessible exercise equipment.
- 2010-present. Developing international design standards for accessible exercise equipment as a member of an ASTM committee.
- 2010-2012. Certified by ANSI as a standards developer. Organized a consensus committee. Became secretary of the committee that developed the safety standard for adaptive golf cars.