

RULES COMMITTEE: 12/01/21

ITEM: G.3



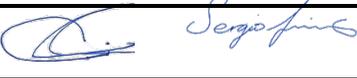
Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Vice Mayor Chappie Jones,
Councilmember Sergio Jimenez,
Council Member Pam Foley

SUBJECT: ADA Compliance

DATE: November 24, 2021

Approved   Date *November 24, 2021*

RECOMMENDATION

Direct City Manager to ensure all businesses, specifically small, minority-owned businesses, are educated about the [American with Disabilities Act](#) (ADA) Compliance requirements at the state and federal level, and have access to resources and tools, to ensure the City of San José is barrier free, inclusive, and accessible to all residents and visitors through the following actions.

1. Provide and improve multi-language education through:
 - 1) A new City webpage that includes information about ADA compliance tools, resources, and access to local and state services to help business owners and non-resident landowners comply with ADA requirements.
 - 2) Mailers/flyers to be distributed to San José certified businesses in the zip codes listed in Attachment A, providing them education about the obligation to comply with state and federal ADA laws and access to resources and tools.
 - 3) City-sponsored webinar in partnership with ADA compliance subject expert(s) providing overview and education on state and federal laws, local and state resources for assistance in ensuring places of business are accessible, and protection against accessibility lawsuits.
2. Include distribution of work between Office of Economic Development and the Planning Division's Business Ally Program/Coaching Center to utilize existing resources and workplans such as:
 - a. OED's current efforts towards redesign of the Business Owner Space website and creation of a Virtual Business Center as a "one-stop-shop" in alignment with the [Mayor's Budget Message](#) in June 2021.

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- b. Planning Division's "Disability Access and Education Revolving Fund;" this is a state mandated program that has created a local revenue stream for training and certification of municipal CASp inspectors, and education, outreach, and grants to facilitate ADA compliance for small businesses.
3. Increase promotion of the City's [Disabled Access Improvement Grant Program](#), which was launched in 2020 to facilitate ADA compliance for small businesses; partner with third party organizations specialized in providing technical assistance and support for small businesses.
4. Report on appropriation of funds collected through the state mandated Disability Access Education Revolving Fund; expand use of funds to include the "Accessibility & Legal Guidance Fund Program" to provide financial assistance grants and guidance to qualifying small businesses with:
 - a. Correcting construction-related physical access violations per a completed [Certified Access Specialist](#) (CASp) inspection report, specifically to cover the top three violations reported statewide:
 - 1) Noncompliant existing parking spaces, e.g. excessive slopes/cross-slopes, improper dimensions, striping, etc.;
 - 2) Access heights within public facility, e.g. heights of surfaces such as counters, bars, or tables are not compliant;
 - 3) Noncompliant or nonexistent Parking for Van-accessible and/or loading zones;
 - b. Navigating through remediation of accessibility violations and litigation.
5. Ensure the City's "Al Fresco Forever" initiative includes education about ADA compliance requirements and guidelines on access solutions for businesses to implement in order to adequately serve customers with disabilities and prevent violations that may place businesses at risk for lawsuits.
6. When considering establishment of the new Office of Disability Affairs as part of the budget process, include a forum or point of contact for citizens to submit communication regarding access and barriers at public spaces and places of businesses within the City so that these issues may be potentially addressed proactively and outside of the litigation process.
7. Direct Office of Intergovernmental Relations to:
 - a. Work with City's State lobbyist and/or Assembly Members Alex Lee, Evan Low, Ash Kalra, and Senator Dave Cortese to:

- i. Advocate for maintaining the state mandated “Disability Access and Education Revolving Fund” fee at \$4 and retention of the fees collected at 90% for local municipalities before it reverts to a \$1 fee and 70% retainment in 2023. This will allow the City to continue with providing funding for training of CASp inspectors, the City’s [Disabled Access Improvement Grant Program](#), and other potential programs as proposed at the local level that may serve as tools for small businesses to utilize and ensure accessibility for individuals with disabilities; and
 - ii. Request allocation in the state budget to establish grants for small businesses in order to upgrade their premises to be administered through the California Commission on Disability Access (CCDA); in addition to working with members representing the Bay Area, consider also working with members representing the Central Valley, which historically has also been hard hit by these lawsuits.
 - b. Advocate for federal legislative reforms that make it more difficult to file predatory ADA lawsuits in federal court, especially considering the 45% increase in the number of ADA lawsuits against small businesses in California through the federal courts since 2017.¹
8. Collaborate with the State’s California Commission on Disability Access (CCDA) and Disability Rights California to explore best practices in other cities throughout the State, increase education, and promote available state resources and tools to ensure businesses are accessible by individuals with disabilities.
 9. Report Back to Council with an Information Memorandum on Recommendations 1 – 6, and 8; report back to Council on Recommendation 7 at the next IGR Quarterly Report.

DISCUSSION:

According to the [California Commission on Disability Access 2020 Annual Report](#), the City of San José has the highest number of reported alleged disability access violations across the State. The CCDA received a total of 3,621 ADA Title III state and federal complaints. Two-hundred and-thirty-seven of those complaints are in San José neighborhoods, according to ranked zip codes, and include Almaden Valley, Alviso, Evergreen, Mayfair, Naglee Park, and Willow Glen. Twenty seven percent of them are in the zip code 95112 in District 3 and the remaining are occurring throughout the City, primarily in Districts 2, 7, 9, 5, and specifically in zip codes 95123, 95111, 95124, and 95116. According to the data provided in Attachment A - 2020 San

¹ California Commission on Disability Access, 2020 Annual Report, November 12, 2021, <https://www.dgs.ca.gov/CCDA/News/Page-Content/California-Commission-on-Disability-Access-News-List-Folder/CCDA-2020-Annual-Report-is-now-available>.

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Jose Top Zip Codes for Alleged ADA Violations, provided by the CCDA - not one district in San Jose is untouched. This shocking report and finding calls for urgent action by our City to mitigate the devastating impact this has had on our small businesses, often leading to their closure, to ensure that we create an inclusive, barrier free, and accessible space for all of our residents and visitors, and to create an environment where our businesses can prosper.

We propose a multi-pronged strategy that includes:

- increasing education about ADA state and federal requirements;
- increasing outreach and promotion to small businesses about local and state resources and tools available;
- a new grant program that could potentially cover construction-related ADA violation corrections and navigation through accessibility violation remediation and lawsuits; and
- advocacy.

At the Small Business Advisory Task Force Meeting of October 14, 2021, we heard from a number of stakeholders, including small business owners, State Assembly Members Alex Lee and Evan Low, and disability advocates, regarding the impact that ADA Compliance litigation has had on our small businesses, as well as the impact of not having equal access to public facilities has had on our community members with disabilities. A summary of legislation and litigation to enforce ADA laws was provided for the Task Force's review and consideration (Attachment B). In an ADA "drive-by" lawsuit, plaintiffs will file lawsuits against businesses who are not ADA compliant, typically amounting between \$75,000- \$120,000. Often the cases get settled for anywhere between \$4,000- \$20,000. As shared by Assembly Judiciary Committee Chief Counsel Alison Merilees, small and local businesses are the main targets of these type of lawsuits, particularly minority-owned businesses that do not have much capital, access to resources, or knowledge regarding how to correct the violations. Additionally, many of these businesses are in non-English speaking neighborhoods. For the Bay Area, there are two firms/plaintiffs that are filing a majority of ADA lawsuits against small businesses. The articles about the recent trend of ADA lawsuits being filed mention that California's Unruh Act provides a civil fine of \$4,000 per violation. But federal rules provide that such statutory damages are not recoverable if and when the underlying ADA violation is corrected. So, if a violation was corrected, the business would not be responsible for the penalty. Unfortunately, small businesses are not aware of their rights; they don't know that if they hire a private CASp inspector to issue a report that outlines the structural violations that need to be corrected and a feasible schedule of completion plan, this step alone provides protection. It provides a grace period of 120 days, in which a business cannot be sued for minimum statutory damages, and they can make the required corrections to be ADA compliant.

Also important to note, State law requires the owner/lessor to disclose whether or not a CASp inspection was completed and in the event it was completed, to include the results. However, current State law does not require the owner/lessor to conduct a CASp or correct violations if

they exist. In fact, it is common for the lessor to include language in the lease agreement that places the burden of correcting accessibility violations on the business owner leasing the space. At the same time, small businesses should know that they are not responsible for all accessibility repairs. A landlord is generally responsible for common areas outside a business (maintenance of parking lots, including outdoor signage, ramps to front doors, etc.). It is important for small business owners to understand their responsibilities and be aware of the potential risk or negotiating opportunities when they sign lease agreements.

Last, ADA compliance is not only required in our structural environment, but it is also required in web content and mobile phone applications. According to the CCDA, there were 21 website violations in 2020, known as non-construction-related physical violations. These violations included concerns regarding alleged issues of large print, sign language interpreters, access to screen readers, screen caption options, and reasonable accommodation policies (including those for service and therapy animals). Hotels are the targets of these type of litigations and are known as “click-by” lawsuits².

Education & Outreach

Small businesses in San José should be educated about the law, their rights, and their responsibility to correct ADA violations. Unfortunately, many are often unaware of state and federal ADA compliance requirements and existing nuances. And if they are aware, they are unsure of what compliance looks like. The proposed Education & Outreach effort seeks to raise awareness of access issues and the availability of tools to support accessibility improvements. In addition to providing education to businesses through the proposed webpage and webinar, it is important that this effort is targeted to the business areas that have been most impacted through distribution of multi-language flyers/mailers.

City’s Disabled Access Improvement Grant Program

San Jose’s “Disabled Access Improvement Grant Program,” also known as the CASp grant program, is overseen in the Department of Planning, Building, and Code Enforcement through their Business Ally/Business Coaching Center. It provides up to \$8,000 credit grants to help qualifying small businesses achieve compliance with accessibility requirements under the ADA and the California Building Code. This program is made possible through the state mandated Disability Access and Education Revolving Fund. A total of \$40,000 was appropriated for the grant program in FY 2020-21; however, since its launch in February 2020, only one applicant applied and was awarded the grant. Due to focus on surviving the pandemic, it is common knowledge that our small businesses have been consumed with keeping their business afloat and are now shifting to recovery mode. However, given the high number of ADA violations reported in our City, it is evident that we can do better, not only in providing education, but by increasing promotion of this program through partnerships with third party organizations that work closely with small businesses in providing technical assistance and support. It may also be beneficial to

² CBS 5 KPIX San Francisco, April 30, 2021, <https://sanfrancisco.cbslocal.com/2021/08/30/update-ada-plaintiffs-filing-multiple-lawsuits-targeting-hotel-websites/>.

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evaluate best practices from other cities that have similar programs, such as San Francisco, San Diego, and Fresno. Completing CASp inspections are a key step to correcting violations and creating a barrier free City. There may be more optimal strategies that could provide incentives for businesses to make the corrections outside of the litigation process, or more resources may need to be directed to providing guidance on completing a CASp inspection and proceeding beyond completion of the CASp inspection.

Proposed Accessibility & Legal Guidance Fund Program

To further assist our small businesses in complying with ADA requirements and staying in businesses, the proposed Accessibility & Legal Guidance Fund Program is designed to provide incentive for qualifying small businesses to comply with ADA laws as an effort to create an accessible and barrier free environment for all of our citizens. It will provide the guidance business owners are missing on how to navigate through an ADA lawsuit, potentially create an accessible development plan, and financial grants to help cover the costs of correcting accessibility violations. Based on the number of ADA violations occurring in San Jose, with several of them resulting in business closures or relocations, it is evident that complying with ADA laws can place an enormous financial burden on small businesses, especially as they are recovering from the impacts of COVID-19 and the pandemic. This program is meant to alleviate that burden utilizing the funds collected and available through the state mandated Disability Access and Education Revolving Fund.

Specific structural violations that are prevalent statewide would be eligible for coverage under the current proposal. Staff is encouraged to evaluate this proposal and come back with additional suggestions and recommendations for the total grant awards per applicant.

Advocacy

We commend the Office of Intergovernmental Relations for adding ADA Compliance as a priority within its 2022 Legislative Program and urge advocacy at both the state and federal level of governments. We recommend establishing a state grant program, and to maintain the fees currently collected through the state mandated program in accordance with SB 1186 and AB 1379. The current fee and collection rate is scheduled to revert to a significantly lower level of funding in 2023. The current level of funding has made it possible for our City to implement the CASp Grant Program. In addition, it is important to note that recent state law reforms added new procedural requirements for ADA lawsuit filings in California state courts. These requirements help small businesses avoid litigation and minimize their exposure to liability. But plaintiffs can avoid these requirements by filing their claims in federal court. This has led to a corresponding increase in ADA federal court filings within California. State law cannot impose new federal court ADA filing requirements. IGR should therefore advocate for federal legislative reforms to help align ADA lawsuit filing requirements in state and federal courts.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.