

## **Findings regarding a potential path through Pioneer Cemetery and compliance with the Americans with Disabilities Act**

### **OVERVIEW**

The connection through Pioneer Cemetery identified in the January 11, 2021, staff report would enter the Fairmount neighborhood from the northwest corner of the cemetery. At this location there is an elevation difference between approximately 24 and 30 inches. If ADA compliance is required—an assumption made in the January report—the path cannot exceed a certain slope. Excavation into cemetery grounds would therefore be necessary to meet the grade at the northwest end of the cemetery.

If excavation is to be conducted, an archeological permit must be issued by the Oregon State Historic Preservation Office (SHPO). A permit cannot be issued by SHPO without written consent of three tribal nations: The Confederated Tribes of the Grand Ronde, The Confederated Tribes of Siletz Indians, and The Confederated Tribes of the Warm Springs Reservation. If permission is granted, costs will be incurred related to historic design, review, permitting, surveying, sampling, monitoring, analysis, and reporting. To avoid excavation in the cemetery, an abutting residential property would have to be purchased and ADA compliance-related construction would have to occur on that property in lieu of work on cemetery grounds.

Hence, the costs and complexities of any City project connecting the two neighborhoods are highly dependent on whether ADA compliance is required.

To address the ADA issue, the City Attorney's Office contracted with the Portland-based law firm Beery Elsner & Hammond, LLP, to review the issues and answer questions regarding ADA compliance. Below is a summary of their work.

**LEGAL REQUIREMENTS** The ADA requires that all programs and new facilities built by public entities be accessible to and usable by people with disabilities. Further, any alterations to existing facilities must also be made accessible. The 2010 ADA Standards for Accessible Design (2010 Standards) set out the minimum accessibility requirements for newly constructed facilities. Under the 2010 Standards, a “facility” is defined as all or any portion of buildings, structures, site improvements, elements, and pedestrian routes or vehicular ways located on a site.

The U.S. Access Board (the independent federal agency entrusted with creating and implementing ADA standards) has confirmed that any pedestrian trail or shared-use path that is created or facilitated by a local government is a “facility” subject to Title II of the ADA and is required to be “accessible.” However, pedestrian trails are not covered in the 2010 Standards, which means there are no set standards for how to make them accessible. So, in effect, state and local governments are required to make those routes accessible, but there are no current enforceable standards to follow.

There are, however, guidelines for trails/paths that the City can use as a benchmark. These guidelines can be used to ensure paths are “accessible” under the ADA.

After consulting with the Access Board, the type of path the City is considering constructing through the cemetery would likely be considered a “shared-use path.” Shared-use paths are multi-use paths designed primarily for use by bicyclists and pedestrians, including pedestrians with disabilities, for transportation and recreation purposes. Shared-use paths differ from more traditional sidewalks or nature trails as they are physically separated from motor vehicle traffic by an open space or barrier. As noted above, there are no adopted standards for shared-use paths. However, there are proposed accessibility guidelines that have been noticed by the Access Board for public rights-of-way, which include guidelines for shared-use paths (Public ROW Accessibility Guidelines). The Public ROW Accessibility Guideline rulemaking was put on hold during the last administration, so while they have been drafted and proposed for a long period of time, the Access Board has only just begun work on finalizing them. The Public ROW Accessibility Guidelines for shared-use paths are as follows:

- Require the full width of a shared-use path to comply with the proposed technical provisions for the grade, cross slope, and surface of pedestrian access routes (see R302.3.2);
- Permit compliance with the proposed technical provisions for the grade of pedestrian access routes to the extent practicable where physical constraints or regulatory constraints prevent full compliance (see R302.5.4 and R302.5.5);
- Prohibit objects from overhanging or protruding into any portion of a shared-use path at or below 8 feet measured from the finished surface (see R210.3); and
- Require the width of curb ramps and blended transitions in shared-use paths to be equal to the width of the shared-use path (see R304.5.1.2).

The Public ROW Accessibility Guidelines are also consistent with the design criteria for shared-used paths in the American Association of State Highway and Transportation Officials (AASHTO) “Guide for the Development of Bicycle Facilities” (2012) (hereinafter referred to as the “AASHTO Guide”).

Title II allows individuals to file complaints if they believe they are being discriminated against in violation of Title II, and DOJ can also initiate an investigation itself. Individuals can also file suit against a local government in federal court (without going through the complaint process). Typically, the complaint process results in a settlement agreement with the entity, with provisions/timelines to remedy violations. Compensatory damages can be awarded if there is no resolution of the issue and a violation is found. Finally, a prevailing party is also allowed to recover attorneys’ fees in any claim or administrative proceeding under Title II, which is probably the more significant liability area for the City in terms of monetary damages.

## **QUESTIONS AND ANSWERS**

The law office of Beery Elsner & Hammond, LLP, answered five questions regarding the potential path and ADA requirements.

Question #1. If the City creates a path designed for pedestrians to traverse Pioneer Cemetery between the Candalaria and Fairmount neighborhoods, does that path need to meet ADA standards?

*Answer: Yes. Here, the City would be creating a facility/program that would be covered by Title II of the ADA. This specific type of path would likely be considered a “shared-use path.”*

Question #2. Must the surface of the path be ADA compliant or can it be, for example, grass, loose gravel, bark, or compact soil?

*Answer: Yes, the surface of the path must be ADA complaint.*

*Note that there is no set design standard that currently applies, but the path would need to be firm, stable, and slip resistant. Under the 2010 Standards and Guidance on those standards (which apply to sidewalks), the U.S. Access Board has noted that while a paved path is not required, concrete, asphalt, and other paved surfaces are reliably compliant. The Access Board has also noted that grass, loose gravel and loose bark are likely not compliant. Other materials (such as wood) and construction methods can also be used to provide firm and stable surfaces. Loose material like gravel will not perform adequately unless it is sufficiently stabilized by binders, compaction, or other treatments and will likely require repeated maintenance. Please note this is for sidewalks. There are no surface suggestions listed in the Public ROW Accessibility Guidelines for shared-use paths.*

Question #3. If the City creates a path designed for pedestrians to traverse Pioneer Cemetery between the Candalaria and Fairmount neighborhoods and a gate is installed on the north boundary of the cemetery, does the gate need to be ADA accessible from both sides?

*Answer: Yes, the gate needs to be usable by a disabled person from both sides. However, installing the gate does not trigger a requirement to construct a path to the gate. The City can install the gate and then create a path at a later date (that is ADA compliant).*

Question #4. In lieu of an ADA acceptable path and gate through the cemetery, would the 3,000-foot detour around the cemetery using the sidewalks of Hoyt Street S to Commercial Street SE to Rural Avenue SE be considered a “reasonable” alternative?

*Answer: No. In effect, the City would be creating a facility (the path or even just the gate) that could not be used by disabled individuals and would force them to go an alternate*

*route. The sole reason disabled individuals could not use the path and/or gate is because they are disabled.*

Question #5. If the City simply replaced one of the northern fence panels with a gate and made no other improvements related to a path or access, is that legal under the ADA?

Answer: *No. Because the City is installing the gate, likely manning the gate in terms of locking it for security purposes, it would also need to make the gate accessible and ADA compliant.*