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LAND USE LAW AND DISABILITY

By Robin Paul Malloy¹

Land use planning and zoning are subject to the Americans with Disabilities Act (ADA), and related legislation.² Thus, land use professionals must be familiar with disability rights law in order to comply with its requirements. In particular, planning and zoning regulations are subject to additional scrutiny on review when an ADA violation is asserted. Much like situations involving a tension between zoning and the First Amendment, the standards of review when zoning collides with the ADA require additional considerations in order to be legally upheld.³ Moreover, good planning and zoning should go beyond compliance and address the ability of people to safely and easily navigate the built environment without regard to disability. To achieve this, communities need to think of accessibility as a land use and planning matter in addition to understanding it as a matter of civil and constitutional rights.

Accessible communities promote a high quality of life for all residents and seek to seamlessly integrate inclusive design features across the community. In this respect, it is important to use planning and zoning tools not simply to ensure inclusive design at property specific locations, but also to ensure the connectivity between and among particular locations so that people can move freely among the various venues within which community life takes place.

In this article, I address several key aspects of the relationship between local land use

¹Robin Paul Malloy, *Land Use Law and Disability: Planning and Zoning for Accessible Communities* (2015) (providing a basis for this article).



law and federal disability law. First, I provide some basic demographic information relevant to the need for making our communities more accessible, and I identify the key sources of federal law that govern disability rights in the land use context. Second, I discuss additional standards of review applicable to planning and zoning decisions that raise a disability rights issue. I explain that the concerns of land use law go beyond matters of design and involve issues related to permitted uses, and variances. Third, I touch on the problem of accessory uses. The issue of being able to conduct certain activities on a property as accessory uses is independent of the potential need for the accessory use to meet a different standard of review from that of the primary use under the ADA. Fourth, and finally, I address the action requested of the zoning board of appeal. In dealing with the ADA, it can sometimes be difficult to agree on the action required; a variance or an interpretation, for example.

Editorial Director
Michael F. Alberti, Esq.
Contributing Editors
Patricia E. Salkin, Esq.

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Editorial Offices: 50 Broad Street East, Rochester, NY 14614
Tel.: 585-546-5530 Fax: 585-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 800-340-9378

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In addressing all of these points, the focus is on land use law and regulation under the police power, rather than on matters of structural design.

Federal Law and Accessibility

In understanding the need for accessible communities, one must consider several factors. First, the scope of mobility impairment is much greater than typically recognized; impacting about 17% of American families.⁴ This number is significant and reflects the needs of our community better than the one percent number that is typically reported for the percentage of people using a wheelchair.⁵ Second, mobility impairment affects older people at a much higher rate than younger people, thus, our rapidly aging population presents us with a serious need to plan for enhanced mobility across the community. For example, some forty percent of people over age sixty-five have a disability, and by the year 2030 some twenty-five to thirty percent of the population is expected to be in that age group.⁶ Third, planning and zoning for accessibility involves matters of both design and of use. Inclusive design guidelines can regulate the size and shape of such things as entranceways, bathrooms, and crosswalks, but accessibility also effects the coordination of land uses. This may include making decisions about the location of such uses including; group homes, clinics, and drug rehabilitation centers. It can also involve design and location issues when dealing with such things as a request for a variance to add a ramp to the front of a residential home. In each case, one must evaluate the relationship between local land use law and federal disability law.

Planning for the needs of an aging popu-

lation and for the needs of people with mobility impairment begins with a general understanding of the relevant federal regulations regarding accessibility.

The primary sources of federal regulation are identified below.

- *Architectural Barriers Act of 1968*.⁷ It addresses construction based standards of accessibility for new and renovated buildings, and not the services or programs being provided in such buildings.
- *Section 504 of the Rehabilitation Act of 1973*.⁸ Section 504 prohibits discrimination based on disability in any program or activity receiving federal financial assistance.⁹
- *Fair Housing Amendments Act of 1988*.¹⁰ The Fair Housing Act (FHA) prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability, and applies to private housing as well as publicly supported housing.¹¹ The FHA requires zoning officials to make reasonable exceptions to policies and practices to afford people with disabilities an equal opportunity to obtain housing.¹²
- *The Americans with Disabilities Act of 1990 (ADA)*.¹³ The ADA prohibits discrimination against people with disabilities in employment, state and local government services, public accommodation, and telecommunications.
 - i) *Title I of the American with Disabilities Act of 1990*.¹⁴ Under Title I, employers must provide

“reasonable” accommodations to qualified employees with a disability.¹⁵

- ii) *Title II of the Americans with Disabilities Act of 1990*.¹⁶ Title II prohibits discrimination based on disability in programs, services, and activities provided or made available by public entities.¹⁷
 - iii) *Title III of the Americans with Disabilities Act of 1990*.¹⁸ Title III prohibits discrimination based on disability in the provision of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person owning, leasing, or operating a place of public accommodation.¹⁹
 - iv) *Title IV of The Americans with Disabilities Act*.²⁰ This Title covers equal access to telecommunications systems.²¹
- *Executive Order 13217*.²² Executive Order 13217 requires federal agencies to evaluate their policies and programs to determine if any can be revised or modified to improve the availability of community-based living arrangements for persons with disabilities.²³

Regulating and Excluding Land Uses under the ADA.

Ever since *Euclid vs. Ambler Realty*, the ability of local government to use zoning to separate different types of uses has been

upheld as a valid exercise of the police power.²⁴ Under the ADA the issue arises as to how to classify certain uses when determining if the use should be permitted in a zone. There is also the matter of determining if a particular use should be permitted when it comes within the requirements for a special use permit. Two key cases that address these concerns are: *Innovative Health Systems v. City of White Plains* (“IHS”);²⁵ and *Wisconsin Community Services, Inc. v. City of Milwaukee* (“WCS”).²⁶

In IHS, the operator of an outpatient drug and alcohol rehabilitation treatment center sought to relocate within the City of White Plains, New York.²⁷ IHS identified a property downtown and sought a permit for its use. Opposition to the center was strong from homeowners in an adjoining residential cooperative building, and from the operator of a nearby retail mall. At a public meeting held by the zoning board of appeal, people expressed concern over the presence of the drug and alcohol dependency treatment center being located downtown.²⁸ Concerns were expressed regarding safety and the potential for a negative impact on the value of downtown properties. The Corporation Counsel for the City opined that the treatment center was a “professional office” use permitted within the downtown zone.²⁹ The opinion was not binding on the zoning board of appeal. After its review, the zoning board of appeal characterized the use as a “clinic” and classified it as a “hospital or sanitarium.”³⁰ On this determination the permit was denied because such use was not permitted in the zone.

IHS and five individual clients initiated

an action alleging that the denial of the permit by the zoning board of appeal constituted discrimination and differential treatment based on disability. The city denied the allegations on several grounds including an assertion that the ADA and related legislation did not apply to the determination of a use permit because zoning does not constitute a “service, program, or activity” under the ADA.³¹ On review, the court held that Title II of the ADA and section 508 of the Rehabilitation Act prohibit discrimination based on disability by a public entity; and, that planning and zoning each constitute a covered “service, program, or activity.”³² Among its findings, the court held that the zoning board of appeal failed to adequately address and make findings as to the reasoning supporting its classification of the use. In addition, the court held that in the wake of discriminatory comments made at the public hearings, the zoning board’s failure to affirmatively counter these comments made their decision suspect with respect to the allegation of discrimination.³³ Moreover, the court clarifies that the requirements of the ADA go not only to access and participation in the planning and zoning process but to the substantive decision itself.³⁴

WCS raised a similar issue with respect to an application for a special use permit.³⁵ WCS provides treatment to mentally ill patients and it was looking to move a mental health clinic to a new and larger facility located in an area of Milwaukee that had been identified for commercial revitalization.³⁶ The area in question was zoned “local business district” and health care clinics, except for nursing homes, were deemed “special uses” for this zone. WCS applied for the special use permit and

was denied.³⁷ WCS argued, on review, that its proposed use met the criteria for a special use permit and that even if it did not, a permit should have been issued as a reasonable accommodation under the ADA. As in IHS, testimony at the public hearing raised many negative comments directed at the patients that would be served at the treatment center.³⁸ WCS challenged the decision of the Board of Zoning Appeal for violating the requirements of the ADA, Fair Housing Act (FHA), and the Rehabilitation Act (RHA).³⁹ In rendering its opinion the court went over requirements of the ADA, FHA, and RHA as applicable to planning and zoning. It addressed the various tests related to discrimination and held that planning and zoning require consideration of reasonable accommodation. In addressing discrimination, it held that the tests in the ADA context are similar to those tests applied in an FHA situation.⁴⁰ It also outlined the requirements for reviewing the city's failure to accommodate WCS by making a special exception to its zoning requirements. In particular, it explained the need for the Board of Zoning Appeal to make specific findings as to the lack of necessity and the unreasonableness of a requested accommodation.

In IHS, WCS, and other cases dealing with issues at the intersection of land use law and disability, including variance requests, the courts have made it clear that planning and zoning activities are subject to federal legislation protecting people with disability.⁴¹ On review of a local zoning action where a disability issue is raised, the courts will do a standard review of the zoning process to evaluate the decision of a zoning board under a rationality standard, based on substantial

competent evidence on the record. They will also conduct a second layer review of the decision to determine if there is substantial competent evidence on the record to support a decision not to make a requested reasonable accommodation for the applicant, and to assess the presence of discrimination or differential treatment based on disability. This means that planning and zoning officials must know the requirements of disability law and that they must make affirmative findings on the record to support a decision with respect to criteria established by federal disability law.

In establishing an appropriate record for review, planning and zoning officials must address four basic issues when a disability right is raised.⁴² These include:

- 1) Make a determination that any adverse decision is not the product of discrimination; that the service, product, or activity of the local government (zoning and planning) is not denied by reason of the applicant having a disability. This may include direct evidence of discrimination based on comments made during a hearing, and by way of other evidence indicating disparate treatment; or, by disparate impact analysis in those Circuits where disparate impact analysis is permitted to prove discrimination under the FHA (ADA discrimination analysis uses a similar approach as that used under the FHA). The antidiscrimination provisions apply to requests made pursuant to the code, as well as to a request for a reasonable accommodation in seeking an exception to the code.

- 2) Make a determination that the person asserting protection under disability law is in fact a protected person under the statute. This involves three key criteria: 1) does the person have a condition that is definable as a physical or mental impairment; 2) does such impairment effect one or more major life activities; and 3) does the impairment substantially limit the identified major life activity.
- 3) Make a determination as to the *reasonableness* and the *necessity* of a requested accommodation. Reasonableness can include a cost and benefit analysis, and necessity asks whether an accommodation is necessary for the applicant to obtain an equal opportunity to benefit from the service, product, or activity provided by the local government. This is a “but for” test; but for the accommodation the person will be unable to obtain equal opportunity to enjoy the benefits provided by the planning and zoning process. When addressing reasonableness and necessity, it is appropriate to consider the extent to which an asserted difficulty with the code is different in kind from that experienced by the public generally. If it is not different in kind then this weighs against needing to make an accommodation.
- 4) Make a determination as to whether the requested relief would make a “fundamental change” in the scheme of the comprehensive plan and the zoning ordinance. An accommodation is not required if making a requested accommodation will fundamentally

change the planning and zoning program of the community.

Courts seem to take a “hard look” when reviewing the actions of local planning and zoning boards after a disability claim is raised. The hard look doctrine is frequently associated with environmental regulation and it requires the government to provide satisfactory explanations for its proposed actions.⁴³ Generally, this means explaining, on the record, the reasons and justifications for a proposed action. This includes clarification of the method of analysis and the quality of the information used to evaluate the situation. The hard look doctrine can be applied to raise the level of scrutiny applied to a review of the underlying decision. In the land use context, the statutory standards for review applicable under the ADA are often higher than the Constitutional standards established under *City of Cleburne v. Cleburne Living Center, Inc.*,⁴⁴ and this is the reason that many plaintiffs sue under provisions of the relevant statutes.

Accessory Uses

Accessory uses present an additional land use problem. For example, under the provisions of a zoning ordinance, a home office may be permitted in a single-family residential zone as an accessory use. While such a use may comply with the zoning code, it may also “transform” that part of the home used as an office into a place of public accommodation under the ADA. If the office is used to meet members of the public it should be considered a place of public accommodation and as such would need to meet ADA design guidelines for accessibility even if the residential home was otherwise compliant with the minimal

standards applicable to private single-family houses.⁴⁵ The issue here is one of determining the obligation of local planning and zoning officials to inform such property owners of the potential need to comply with the ADA when it is known that a property owner will be making a use of the property that requires greater ADA compliance than the primary use. Being a permitted accessory use does not mean that such a use will comply with the ADA, and zoning officials should condition approval on compliance with the ADA and related legislation.

Action Requested

Sometimes it is difficult to determine the type of action that a zoning board should take. For example, when a property owner seeks an exception to a code requirement based on a reasonable accommodation, should the zoning board be making a determination with respect to granting or denying a variance, or should it simply be answering a question with respect to the proper interpretation of the code given the request for an accommodation? If a variance is granted it will run with the land and continue to be applicable even after the person being accommodated leaves the property. Therefore, it might be better to address the matter as one of interpreting the code in light of a request for a reasonable accommodation. This way the accommodation can be granted without having it run with the land, as would be the case if it were granted as a variance.

Concluding thoughts

Communities need better planning to be safely and easily navigated by people with mobility impairment and to facilitate

intergenerational aging in place. To achieve this, communities will need to think of mobility impairment and accessible design as land use and planning issues, in addition to understanding them as matters of civil and constitutional rights. Although much has been written about the rights of people with disabilities, little has been said about the interplay between disability and land use regulation. This paper has explained the special legal requirements for planning and zoning when a disability issue is raised; including the requirements for regulating use, special use permits, variances, and accessory uses.

ENDNOTES:

²See generally *id.* at 104-81; *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 23 A.D.D. 197 (2d Cir. 1997); *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006); *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011).

³E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); see generally Robin Paul Malloy, *Land Use Law and Disability: Planning and Zoning for Accessible Communities* 8, 11, 16 18, 49-52 (2015).

⁴Qi Wang, U.S. Dep't of Commerce., Report No. CENSR-23, *Disability and American Families: 2000* (2005), available at www.census.gov/prod/2005pubs/censr-23.pdf.

⁵*Id.*

⁶*Id.*

⁷Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151-4157 (2006)).

⁸29 U.S.C. § 794 (2014).

⁹Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2014)); see generally

Laura L. Rovner, Disability, Equality, and Identity, 55 Ala. L. Rev. 1043 (2004); Bonnie P. Tucker, Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future, 1989 U. Ill. L. Rev. 845 (1989).

¹⁰Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. § 3601 (2006)) (amending Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 (2006))). Id.

¹¹Id.

¹²Id.

¹³Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101-12213 (2006)).

¹⁴Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 stat. 327 (codified as amended at 42 U.S.C. § 12111-12117 (2006)).

¹⁵Id.

¹⁶Id. at §§ 12131-12161.

¹⁷Id.

¹⁸Id. at §§ 12181-12189.

¹⁹Id.

²⁰Id.

²¹Id.

²²Exec. Order No. 13,217, 3 C.F.R. 774 (2002), reprinted in 42 U.S.C. § 12131 (2006).

²³Id.; see U.S. Dep't of Hous. & Urban Dev., Delivering on the Promise: U.S. Department of Housing and Urban Development Self Evaluation to Promote Community for People Living with Disabilities, Rep. to the President on Exec. Order 13217 (2002), available at <http://www.hud.gov/offices/fheo/images/DPromise.pdf>.

²⁴47 S.Ct. 114 (1926).

²⁵117 F.3d 37 (2d Cir. 1997).

²⁶465 F.3d 737 (7th Cir. 2006).

²⁷Innovative Health Systems, Inc., 117

F.3d at 40.

²⁸Id. at 41.

²⁹Id. at 40-1.

³⁰Id. at 41.

³¹Id. at 44.

³²Innovative Health Systems, Inc., 117 F.3d at 44.

³³Id. at 48-9.

³⁴Id.

³⁵Wis. Cmty. Servs. Inc., 465 F.3d at 740-41.

³⁶Id. at 741.

³⁷Id. at 742.

³⁸Id. 742-43.

³⁹Id. at 746-53.

⁴⁰Wis. Cmty. Servs. Inc., 465 F.3d at 746-53.

⁴¹See generally *Mastandrea v. North*, 361 Md. 107, 760 A.2d 677 (2000).

⁴²Robin Paul Malloy, *Land Use Law and Disability: Planning and Zoning for Accessible Communities* 120-81 (2015).

⁴³*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) ("The scope of review under the "arbitrary and capricious" standard is narrow, and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made.") (citing *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962); see generally, Patrick M. Gary, *Judicial Review and the Hard Look Doctrine*, 7 Nev. L.J. 151 (2006); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review* 58 Admin. L. Rev. 753 (2006).

⁴⁴473 U.S. 432 (1985).

⁴⁵28 C.F.R. § 36.207 (2013).