

Chapter 6

Opening Neighborhoods to People with
Mobility Impairment:
Property, Disability and Inclusive
Design Housing

Robin Paul Malloy

Introduction

While much progress has been achieved in making *public/common* spaces more accessible, residential housing remains largely unable to be freely visited by people with mobility impairment. This is a significant problem because it truncates the socio-economic relationships of a large, diverse, and growing population within our community. The problem is not simply localized; it is national because barriers to accessible housing are present in the vast majority of “private” single-family residential housing units in the United States.

My own tri-level home, for instance, is difficult to access and navigate. Not only are all three entrances to my home subject to access barriers, once a person enters my home she has to deal with a sunken living room (two steps down from the entrance hall), a two step rise to my dining room, a small first floor powder room with a door and interior space too narrow for a wheelchair or walker, a seven step rise to an otherwise accessible master bathroom and a 14-step barrier to our lower level family and activity room. The exclusionary design that makes my home difficult to navigate for family, friends, and colleagues is replicated in the houses of most of my neighbors, and in residential communities across our country.

A significant reason for the failure to adopt nationwide standards of inclusive design for all residential housing, even while improved accessibility in public accommodations has become pervasive, is related to an erroneous framing of the situation in the discourse of legal institutions. For the most part, the legal system frames the discourse of accessibility to residential housing in terms of a false dichotomy between the private and public spheres, with the home understood as private space—a space of intimate relationships, a space easily hidden from public view, and a space carrying high expectations of privacy. In this context, law seems to view residential housing in terms that affirm the voluntary and contractual undertakings of numerous discrete and autonomous individuals;

individuals presumed to be empowered by market forces to bargain for socially optimal housing outcomes.

The underlying assumption of this viewpoint is that private parties bargaining in the marketplace can achieve results that simultaneously maximize both private and public benefits. This assumption traces its roots all the way back to Adam Smith and his famous metaphor of the invisible hand.¹ Adam Smith suggested that private individuals acting in their own self interest promote the public good even though it is no part of their original intention.² This means that private and public benefits are invariant.³ As we learn, however, from counter examples such as the tragedy of the commons, the prisoner's dilemma, and the problem of transactions costs more generally, variance between private and public interest is often observed.

Relying on this dominant frame of reference for addressing the need for inclusionary design in residential housing is problematic. It is problematic in several respects, including: the failure to understand that while a home may be private space, the housing unit (as a physical structure) is a quasi-public place; a failure to fully appreciate the imperfections of present market operations which result in variance between optimal private and social outcomes; and, a failure to comprehend mobility impairment as a disability with implications for families and communities, and not just for discrete and identifiable individuals.

By way of introduction, therefore, it is important to understand the current framework and to appreciate its shortcomings. The shortcomings produce harmful results by excluding people with mobility impairment from full participation in the everyday activities of community life, and market imperfections result in an undersupply of fully accessible units. Inadequate supplies of residential housing with inclusionary design limit choices for the mobility impaired and constrain their ability to safely visit and interact with family, friends, and community members. It also burdens the housing market for people seeking to relocate, and raises potential difficulty in responding quickly to emergency re-housing needs in the wake of disasters such as Hurricane Katrina.⁴ Emergency relocation is made more difficult than it could be because so few housing structures are currently accessible to people with mobility impairment. This makes it hard for families to exercise self help since many family members have houses without inclusive

1 ROBIN PAUL MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* 27-30 (2004).

2 *Id.*

3 *Id.* Thus, it is assumed that marginal private costs equal marginal public costs and marginal private benefits equal marginal public benefits. *See also* NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 14-19 (1997).

4 Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 *HASTINGS L.J.* 699, 736-38 (2009) [hereinafter *Inclusion by Design*].

design and their homes may pose problems for a relocated family member with mobility impairment.

With this in mind, this chapter discusses the public aspects of private single-family residential housing by considering the need for inclusive design and the idea of open and accessible neighborhoods. It does this in terms taking a narrowly tailored look at the need to reframe several underlying assumptions concerning the market for private single-family residential housing. While one might examine these issues in terms of civil rights and anti-discrimination law, this chapter takes a decidedly narrower view. In this context, I start by defining an open neighborhood as one in which everyone can safely visit any other person without confronting exclusionary barriers to use of the built environment. In pursuing this discussion the chapter proceeds in several steps. First, it identifies several factors suggesting a need to reframe the basic assumptions about the “private” in private single-family homes. Second, it addresses background information on inclusive design and demographics. And third, it discusses the nature of our national housing stock with implications for the inability of private parties to bargain for socially optimal design outcomes in the open marketplace.

Reframing Basic Assumptions

This part of the chapter suggests that the current legal framework for thinking about the requirements for inclusive design is less than satisfactory. The current framework excludes and minimizes inclusive design requirements in single-family residential housing because it predicates regulation on the degree of “publicness” attributed to a structure. Thus, for instance, a post office can be regulated for inclusive design as can a department store, as a place of public accommodation. It is the public aspect of such places, and of publicly funded housing that makes them easier to regulate. As a consequence, the private market for single-family housing is very weakly regulated with respect to inclusive house design.

In this section of the chapter I explore several initial reasons for identifying a significant public aspect to private residential housing.

First, I address the mistaken view of residential housing as a simple private and local undertaking. While residential construction is local, housing markets are not. Just because we see housing units constructed on local lots, the market supporting this construction is national and international in scope. The funding for construction and for residential home mortgages is funneled through fully integrated and global financial markets.⁵ America would be greatly under-housed but for the financial resources that are brought into local markets by complex secondary mortgage market and financial market operations. Realtors and a variety of other service providers for locally built housing construction also operate on a national scale. Likewise, the production of the construction supplies

⁵ *Id.* at 705-07.

and equipment needed for building residential housing is national in scope and not simply local. Understanding the integrated nature of housing is important to appreciating the macro-economic scale of residential housing markets. Local construction activities are fully integrated into non-local markets and are heavily dependent upon institutions expressing strong public characteristics, such as banks, mortgage markets, and networks of interstate commerce.

Second, despite assumptions to the contrary, our residential housing stock should be considered a quasi-public good for two primary reasons. The first relates to government support and subsidy of housing markets, and the later to the durability of housing that stays in service long beyond the occupation of the first resident owner.

Housing in the United States is heavily subsidized, indirectly, if not directly.⁶ There would be far less private housing in the United States if the public did not subsidize and support it. Government and government related entities support mortgage markets and the development of uniform mortgage documentation. The government also supports programming such as VA (Veterans Administration) and FHA (Federal Housing Administration) lending, and the government built the infrastructure needed for a strong and efficient primary and secondary mortgage market. In addition, homeowners are assisted in their efforts by subsidies extended via the mortgage interest rate deduction on their federal income tax returns. Private housing markets also benefit from government bailouts of lenders. The most recent example of this being the current sub-prime mortgage disaster,⁷ and another not so distant example includes the bailout of the savings and loan industry in the 1980s.⁸ All of this suggests a strong public element to so-called private housing in the United States.

Another significant reason for finding the idea of private housing to be a misnomer is that housing units stay in the housing stock much longer than the occupation time of any given owner. While an average home owner may occupy a home for seven to ten years, the average age of a unit in our national housing stock is 30-40 years old, with some 25% of housing being in excess of 70 years old.⁹ This means that the individual home buyer, contracting in his or her own self interest with a private developer, fails to account for the long-term social consequences of personal design choices, primarily because these costs and benefits will accrue to others in a later time period. Thus, private parties, acting out of self interest in the housing market, miscalculate the costs and benefits of inclusive design housing, and such housing ends up being under produced.

Third, the impact of mobility impairment is underestimated in a system that frames the matter in terms of the number of discrete individuals with such

⁶ *Id.*

⁷ Robin P. Malloy, *Mortgage Market Reform and the Fallacy of Self-Correcting Markets*, 30 PACE L. REV. 79, 80 (2009).

⁸ *Inclusion by Design*, *supra* note 4, at 705-07.

⁹ *Id.* at 723-29.

a disability.¹⁰ People with mobility impairment do not live and should not live lonely and isolated lives, even if those lives are lived out in individual housing units equipped to meet their needs. People have relationships, people visit other people, people have friends and families, and people connect with others outside of the workplace and outside of places of public accommodation. The proper way to think about accessible housing is not in terms of how many individual units need to be built to match the number of individuals with mobility impairment but rather to think in terms of all units being accessible to the extent that every individual can at least visit the home of any other individual. Mobility is a family and a community issue, not simply a private and individual one.

Fourth, housing accessibility is a public concern for at least two additional considerations. The first being that we need a housing stock that is more capable of providing re-housing during a major emergency.¹¹ In an emergency situation we need to be able to quickly re-house people without having to sort out people with special needs and expend valuable time figuring out which housing units will meet their needs. A more fungible design strategy on questions of accessibility will make emergency response time more effective and efficient. It will also make it possible for more friends and families to assist in self help efforts at providing shelter and re-housing. And, second, we have to look at the issues of accessibility in terms of our national policy in favor of inclusion. We would not exclude people from residential housing on the basis of race, religion, or ethnicity, for example, yet we permit easily corrected design features to serve as a proxy to prevent people with mobility impairment from having equal access to neighborhoods.

The barriers to civic participation in residential neighborhoods are invisible because the barriers are expressed within seemingly private space; the private residential home. The invisibility of these barriers, however, makes them no less exclusionary, and their location within a housing unit makes them no less subject to public scrutiny. Residential housing does not naturally feature exclusionary design elements such as multiple steps rather than ramps leading to the entranceway, and doorways and hallways too narrow for wheelchair accessibility — in housing construction, exclusion is by design, and we can readily change it; just as we do with building codes and other structural regulations.

In suggesting a need to rethink the legal framework on private homes to include recognition of housing units as quasi-public places, I do not want to be misunderstood. This chapter does not suggest that people must let uninvited guests into their homes to further a policy of inclusion of people with mobility impairment, but rather argues in favor of requiring all homes to be designed so

¹⁰ *Id.* at 720-23.

¹¹ *Id.* at 736-38. The idea being that a general policy of building inclusive design housing provides additional benefits by creating a larger stock of more fungible inclusive design housing units; units that can be safely and easily used by people with mobility impairment when confronted with an emergency housing situation.

that they can be safely and easily visited by all *invited* guests without regard to mobility impairment.¹²

Background on Inclusive Design, and Demographics

Full inclusion of people into the fabric of everyday life is important. In order to be a full participant in one's community, however, one must be able to enjoy reasonable access to the spaces and places that make up and compose civic life. This means that public buildings, commercial venues, streets, transportation systems, and communication networks need to be navigable by people with disabilities. It also means that neighborhoods should be open and accessible so that people may enjoy the full benefits of community life.

There are many types of disability one might address, but in this chapter I focus on mobility impairment and residential housing. While most public spaces, shopping areas, places of employment, and educational and government institutions have been made reasonably accessible, our residential neighborhoods have generally avoided close scrutiny. Many neighborhoods consist of homes that cannot be easily visited by a person with mobility impairment. This should be unacceptable. We have millions of people who can not easily and safely visit family, enjoy socializing with neighbors, or engage in the requisite home party networking that is crucial to success in many work environments.

Being a member of a neighborhood—of a community—means being fully able to participate in the normal and everyday rhythms of community life. Being tucked away in one's own house, even if it has been personally modified for accessibility, is a lonely thing when all of one's neighbors, friends, colleagues, and extended family live in homes that cannot be easily and safely visited. In such a situation, one can not just drop by the home of a family member, friend, or colleague for a visit, and invitations to home-based events become scarce. People on all sides of the relationship begin to view the entire process as a chore. Under such circumstances it is difficult for people with mobility impairment to fully participate in community life and to feel like an equally dignified citizen in the important networks of one's own neighborhood.

¹² In this regard, this chapter expresses three important ideas. First, it emphasizes the fact that much of our residential housing is designed in an exclusionary way, making it difficult for people with mobility impairment to navigate their own homes as well as those of friends and family that they might wish to visit. Second, it recognizes that exclusion is by design and thus volitional. Hence it can easily be made inclusionary by simply changing our design choices. Third, the idea of open neighborhoods draws attention to the fact that accessibility is not just an issue for a particular housing unit occupied by a specific individual with mobility impairment. People live in communities and have social networks of friends, family, and colleagues. Unless entire neighborhoods are open and accessible in housing design these social networks will be truncated for the mobility impaired because they will be unable to freely visit and interact with others.

Through exclusion by design, our residential housing structures re-enforce a negative image of people with mobility impairment. Our housing design policy treats people with mobility impairment as isolated and detached from normal family relationships. It imprisons the mobility impaired in housing situations that take them out of normal friendship and community networks while signaling that each mobility impaired individual presents the broader community with a discrete housing “problem” to be dealt with as an exception to the norm. Instead of making low-cost changes to housing design to benefit everyone, our residential housing policy suggests that it is an injustice for housing costs to rise a very small amount in order to make all homes inclusive. This view is based on a misunderstanding of the number of families and social relationships affected by mobility impairment and by thinking in terms of discrete individuals rather than in terms of communities and social networks.

In getting at the accessibility problem in residential housing, this section of the chapter addresses two points. First, it discusses several standards of inclusive design. Second, it presents basic demographic information on the nature and scope of mobility impairment in the United States.

Two generally referenced standards of inclusive design are those of *universal design* and *visitability*.¹³

Universal design standards are generally quite pervasive and applied throughout an entire structure. One way to quickly grasp the basic idea of universal design is that everything within a structure is designed to be readily accessible to a person in a wheelchair. Thus, doorways and hallways are wider (36-inch width recommendation), and have entrances that are barrier free. Bathrooms include appropriate grab bars, are bigger in size to accommodate the turning radius of a wheelchair, and include showers designed for easy roll in and out with a wheelchair. Throughout the home light switches are placed lower, and traditional round doorknobs give way to lower positioned levers. Storage shelves and cabinets are lower, and counter tops are lower with “cut outs” so that a wheelchair user can push close enough to have the chair frame fit under the counter, thus permitting the user to be positioned to make full use of the counter space. In addition, the residential living unit is generally designed on a single level layout, and provides appropriate means for ready access to the entire unit and to any common property. These universal accessibility design criteria are applied to every room, and every element throughout the home.

The visitability standard is much less pervasive. The general idea behind this standard, as applied to residential housing, is one of making it possible for every home to be easily and safely visited by anyone in the community. In other words, if I am hosting a neighborhood party at my house it should be possible for all of my neighbors to be included and to feel that they are full participants

¹³ *Inclusion by Design*, *supra* note 4, at 710-20 (this section of the chapter on universal design and visitability are based substantially on the indicated pages of the Hastings article).

in the social life of the neighborhood, without regard to mobility impairment. In order for this to readily happen my home would have to meet some minimal inclusionary design standards. The entrance to my home would have to have a zero step elevation through the doorway and appropriate grade of incline from street level to the entrance. And, my entrance doorway and hallway should be at least 36 inches wide (consistent with that of universal design). The main portions of my entertainment area need to be on one level floor, no drop living rooms or raised dining rooms for instance. In addition, for all of my guests to feel equally comfortable I should have a bathroom on the main floor of the home and it needs to be sized to permit entrance and appropriate turning radius for a wheelchair. Ideally, the bathroom will also have light switches and a sink at appropriate levels (slightly lower than the traditional non accessible levels). Round doorknobs would be replaced with lever style door openers placed at the appropriate height (these are easier to open). This would be a minimal visitability standard imposing very little cost on the design requirements of a housing unit. I refer to this standard as a Level I Visitability Standard.

Going a step further than the Level I standard would involve the need for at least one bedroom to be located on the main floor of the home (could be a bedroom/den) and a bathroom on the main floor which would have a roll-in shower and grab bars. These additional features would make the home visitable by anyone, such as a close friend or family member with mobility impairment, who is staying for a day or more, as a house guest. It also makes the housing unit more fungible and therefore more readily accessible in the event of an emergency resulting in a rapid loss of a significant part of a community's housing stock; as in the circumstances of New Orleans after Hurricane Katrina. The greater the fungibility of accessible housing, the more effective and efficient can be emergency responses to providing safe and sanitary re-housing for people in need of shelter. I refer to this standard as a Level II Visitability Standard.

From an aesthetic perspective, issues sometimes arise concerning the "look" of inclusionary housing. Young people sometimes feel that a home with grab bars in the bathroom, for instance, signifies that they are living in an "old person's home." Consequently, they often react by removing such devices in an effort to make the premises signify that a cooler and more hip younger resident has moved in to occupy the space. There are two logical responses to this concern. First, as more and more homes incorporate these accessibility features we can expect them to be manufactured in styles and colors that go beyond the typical cold steel ones often found in today's housing structures. Second, as the presence of these features becomes pervasive they will lose their signification of old age and will disappear into the realm of the "ordinary", in the same way that the soap dish and tooth brush holder have become ordinary fixtures in the current customary bathroom. Moreover, the accessibility standard might be met by simply building the home with the necessary reinforced bathroom walls needed as a prerequisite to affixing grab bars. With the walls properly reinforced to bear the weight, grab bars might

be installed at a later date or made removable so that they can be put on and taken off as desired.

A second set of aesthetic concerns relate to the front view of the home; the “curb appeal” of the property, as some real estate sales people might say. The inclusionary design standard that requires a zero elevation entranceway to permit an easy roll in on a wheelchair constrains some designs for front porches and patios. Again, these design features are in large part influenced by expectations of what is perceived as a norm in the housing market. Design norms can be changed and inclusionary housing design can be made pleasing to the eye. Acceptability depends not so much on the entrance door itself but on the planning that goes into integrating other home design features and landscaping with the view of the accessible point of entry. In new construction housing this issue can be readily addressed with good inclusive design work done up front.

With remodeling of existing structures and with properties designated with historical significance some compromises may be needed. There are ways to design residential housing changes to provide aesthetically pleasing front views of the entrance while providing a side riser to the porch or patio. In addition to creative use of landscaping to eliminate a need for steps, a raised front patio might include a side ramp permitting access to the same front door but without being positioned as the primary focal point of the front yard. In the alternative, for situations in which remodeling and rehab work make costs prohibitive, it is often possible to construct a reasonably equal alternative point of access to the premises. This less desirable approach of using an alternative entranceway for accessibility might be a reasonable accommodation (or a permitted variance in zoning terminology) in cases where it can be demonstrated that historic preservation needs or remodeling costs make it prohibitive to properly rebuild a particular front entrance. The calculus involved in such a situation is not one of using a simple cost and benefit analysis. The individual benefits need not outweigh the costs, as there are significant public benefits to be gained by opening neighborhoods to readily accessible housing. The key point, with respect to both new housing and remodeling, is that thoughtful planning and design can make most any feature attractive, just as poor design and lack of planning can make most any construction feature look out of place and distracting.

As to Level I and Level II Visitability standards, the cost of meeting these design features is estimated at between \$0 and \$1,500 in most cases of new construction for single-family residential housing.¹⁴ It is mostly a matter of up front planning and design. And, costs should decline as inclusionary standards become the norm rather than the exception in building design. Normalizing certain design features permits mass production and economies of scale. This can apply, for example, to a change in the “standard size” door, or in moving from round doorknobs to lever style door openers. As inclusionary features are made the norm, the new design elements become cheaper because of the economies of scale associated with being

14 *Id.* at 715-20, 733-36, 746-48 (discussing costs).

an “off the shelf” product, as opposed to being a special order item. Thus, special order cost considerations for many accessible design features disappear once the accessibility feature is implemented as the new norm.

From a legal perspective, regulation of aesthetic features of design has been permitted for some time.¹⁵ Local government zoning codes have covered aesthetic matters and have been regularly upheld by the courts.¹⁶ A rationale for this is that the exterior of the home and its landscaping are “quasi-public,” rather than private. Exterior design and the space surrounding buildings are public in the sense of having a significant impact on others. The structural design, colors, and placement of landscaping address themselves to others beyond the owners. Thus, the exterior presents a classic example of an externality, with spillover effects that go beyond the immediate parties—beyond the current occupant of the house. Good design and landscaping may provide a positive externality to neighbors and the community. In contrast, poor design and landscaping may impose a negative externality. Since, as is often said, “beauty is in the eye of the beholder,” regulation has been permitted as one means of mediating the tension between private and public evaluations of such aesthetic matters.

The idea of considering the exterior surface and space of a structure as “public” is one found in architecture and in law. It is also consistent with the enforceable regulations of many planned communities and subdivisions. Architectural design controls, particularly as applied to things visible from off the property, are regularly upheld as valid and enforceable.¹⁷

Importantly, it needs to be noted that at the time of writing this chapter the only major national requirement for residential housing accessibility is that 5% of new housing units funded or operated as “public housing” under programs of the Department of Housing and Urban Development (HUD) need to be fully accessible (meet a general standard that is similar to universal design).¹⁸ This is a very small subset of our national housing stock and it completely misses privately owned

15 See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW*, 787-814 (2d ed., Practitioner’s Treatise Series 2007). See also DANIEL R. MANDELKER, *LAND USE LAW*, §§ 6.39-6.52, 11.01-11.12 (5th ed. 2003 & Supp. 2008)

“The Concept of the public welfare is broad and inclusive. ... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”

Id. at § 11.05 (alteration in original) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)) (noting that this represents the majority view in the United States).

16 See *supra* note 15.

17 See generally, James Charles Smith, *Restrictions on Freedom of Expressions Imposed by Servitudes* 16 *DIGEST* 1 (2009); Also things like zoning regulation of fences and good side faces out, sheds, etc.

18 *Inclusion by Design*, *supra* note 4, at 708. Other current legislation fails to cover private single family homes and includes:

single-family residential housing that does not otherwise function as offering public accommodation. This policy is seemingly based on misunderstanding the mobility impaired as discrete and disconnected individuals and then attempting to reasonably match the number of public housing units to the perceived needs (number) of people with mobility impairment in a given population. In other words, the view seems to be that there is not a universal need for all housing to be inclusive because only a small percentage of people have serious mobility impairment. This approach ignores the neighborhood and network effect of human relationships. In response, Congress is considering the Inclusive Design Housing Act which, if passed, will make all

Architectural Barriers Act of 1968. The Architectural Barriers Act (ABA) requires that buildings and facilities designed, constructed, altered, or leased *with certain federal funds* after September 1969 must be accessible to and useable by handicapped persons. Private market construction of single-family housing is not covered by the ABA. 42 U.S.C. §§ 4151-4157 (2006).

Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits discrimination based on disability in any *program or activity receiving federal financial assistance*. To the extent that Section 504 applies to housing it covers housing programs receiving federal funding and not privately funded single-family residential housing. 29 U.S.C. §§ 701 et seq. (2006).

Title II of the Americans with Disabilities Act of 1990. Title II prohibits discrimination based on disability in programs, services, and activities provided or *made available by public entities*. HUD enforces Title II when it relates to state and local *public housing*, housing assistance and housing referrals. Title II sets standards of accessibility for public facilities and programs, not for private residential housing. 42 U.S.C. §§ 12131-12181 (2006).

Title III of the Americans with Disabilities Act of 1990. 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*. Single-family residential housing is not considered a place of public accommodation. 42 U.S.C. §§ 12181-12213 (2006).

Executive Order 13217. 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. Community-based living arrangements might include senior housing developments and group homes but not single-family residential housing. Exec. Order. No. 13217, June 18, 2001.

Fair Housing Amendments Act of 1988. The Fair Housing Amendments Act applies to access to *multi-family* housing and it outlaws discrimination against people with disabilities. Fair Housing Act, 42 U.S.C. § 3601 et seq. (2008). It also provides mandates for all new multi-family housing to meet specific inclusive design standards; including guidelines for entranceways, hallways, light switches, grab bars, spacing to accommodate use of a wheelchair, and other design elements. The anti-discrimination and inclusive design criteria do not apply to single-family residential housing.

public housing accessible.¹⁹ Private single-family residential housing will still have its own guidelines of under inclusiveness.

To better appreciate the need for open neighborhood design standards we can consider some demographic information.²⁰ According to the 2000 census, the total number of families in the United States was 72.3 million.²¹ Of this number, approximately 20.9 million families had at least one member with a disability,²² and of this group over 12 million had at least one member with a *physical* disability.²³ For these purposes, a physical disability was defined as “a condition that substantially limited one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying.”²⁴ Thus, when we stop thinking in terms of atomistic individuals with discrete mobility impairment problems, we see that 16.6% of families in the United States are potentially affected by exclusionary design in residential housing. When we think in broader terms, including social networks of family, friends, and colleagues we begin to appreciate that perhaps 20-25% or more of Americans are potentially touched by issues of concern to people with mobility impairment.

The network implications of mobility impairment multiply quickly. As our population ages we will confront increasing demands for open neighborhood housing. As of the year 2000, the total number of people in the United States aged 65 and over was 35 million.²⁵ This is a 12% increase over the year 1990 when the number of people 65 and over totaled 31.2 million.²⁶ The 35 million people over age 65 represented 12.4% of the population in 2000.²⁷ Furthermore, in 2000 there were 18.4 million people ages 65-74,²⁸ and people age 75-84 numbered 12.4 million.²⁹ Many of these Americans aged 65 and over must deal with disability. In fact, according to an American Community Survey performed by the census bureau,

19 Inclusive Home Design Act of 2007, H.R. 4202, 110th Cong. (2007-08).

20 *Id.* at 720-23.

21 Qi Wang, U.S. Dep’t of Com., Report No. CENSR-23, *Disability and American Families: 2000*, at 3 tbl.1: (2005), available at <http://www.census.gov/prod/2005pubs/censr-23.pdf>.

22 *Id.*

23 *Id.*

24 *Id.* at 4. This definition referred to “substantial” limitations, so there are probably many more people who have physical limitations.

25 Lisa Hetzel & Annetta Smith, U.S. Dep’t of Commerce, Brief No. C2KBR/01-10, *The 65 Years and Over Population: 2000*, at 4 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf>.

26 *Id.*

27 See Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 *Elder L.J.* 77, 78 (2008).

28 Hetzel & Smith, *supra* note 25.

29 *Id.*

40.5% of Americans 65 and older have a disability.³⁰ The elderly are one of the fastest growing segments of our population, and we are just now starting to deal with the fact that there are 76 million “baby boomers” adding to their ranks³¹

Finally, we have to be mindful of the fact that accessibility is not just a question with respect to current occupants. Current occupants may not even have mobility impairment but they may have friends, relatives, grandparents, or neighbors with mobility impairment. And, at some point in the future they may develop a temporary or permanent impairment as the result of an accident or other incident that puts them in a wheelchair, or requires them to use a walker, crutches, or a cane. Our housing stock must, therefore, be designed and built for a dynamic population over time. It must respect the individuals occupying the home while also facilitating social networks crucial to open neighborhoods and healthy human relationships.

Private Homes and Our National Housing Stock

The housing market in the United States consists of a very large private sector and a much smaller but significant public sector. Both sectors must be responsive to regulation related to accessibility for the mobility impaired. As in other areas of American life, however, the government expresses a greater degree of comfort in its ability to regulate housing in which public funding and resources are used for construction and operations than it does with respect to housing in the “private” sector. This is particularly true with respect to the market for so called private residential home ownership.

This section of the chapter explores the potentially misplaced deference to private preferences in the private home ownership market. In proceeding, I first explore the basic contours of our housing markets, and then address the market implications for under production of inclusive design housing.³²

Home ownership has long been a public policy goal in the United States. Adequate and affordable housing is important. Currently approximately 70% of Americans own their own homes. This means, of course, that 30% do not. For those that do not currently own a home there may be multiple reasons. These reasons may include the voluntary choice to be a renter or it maybe that private

30 United States and States — R1803. Percent of People 65 Years and Over with a Disability (2005), http://factfinder.census.gov/servlet/GRTSelectServlet?ds_name=ACS_2005_EST_G00_&_lang=en&_ts=254773591968 (follow the link to the right of “R1803” under “Aging”).

31 See Pynoos et al., *supra* note 27 at 79 (using the number 75 million rather than 76 million and defining boomers as those born between 1946 and 1964); Judy Stark, *And Access for All*, ST. PETERSBURG TIMES (Fla.), June 8, 2002, available at http://www.sptimes.com/2002/06/08/Homes/And_access_for_all.shtml.

32 *Inclusion by Design*, *supra* note 4, at 720-38 (This part of the chapter is substantially based on the material covered in the identified pages in the Hastings article).

housing is too expensive. Many people find that they are involuntary renters. They are in rental housing because they lack the income, employment history, savings, and access to credit necessary to become an owner. Even with an adequate monthly income it is difficult for some people to save enough for the down payment and closing costs. In fact, many home buyers are people that already own a home and who are simply moving on to buy a different one. The most difficult hurdle to homeownership, therefore, is the ability to move from renting (or residing for free with a friend or family member) to owning a first home.

While the average rate of home ownership in the United States is around 70%, home ownership rates differ by race, with a significant disparity between whites and Asians on the high end, and blacks and Latinos on the low end. Correspondingly, mortgage application approval and denial rates also reveal similar disparities, although gains in each area have been made by people of color over the past few years.³³

In many instances people may be home owners and yet find themselves underhoused or in housing of poor quality, or located in undesirable areas (areas of urban decay or rural poverty). The overwhelming majority of housing in both the rental and ownership markets is private. In addition to the private sector, we also have a much smaller, yet significant number of people living in public and publicly subsidized housing. Public housing is directly owned, regulated, or subsidized by the government. The primary focus of this chapter is on physical accessibility with respect to the private home ownership market.

In the private home ownership market, developers often build products assumed to meet the personal preferences of their buyers, and the assertion is made that to the greatest extent possible, private homes should reflect individual preferences rather than government dictates. For the most part, however, these private preferences are expressed in the context of prefabricated housing units or pre-construction design templates. In other words, people are not going into the process asking to have inaccessible doorways and homes. They are being shown inaccessible designs and housing products and are selecting based on preferences for other elements such as layout, colors, and construction materials. Thus, core accessibility issues are driven not so much by intentional consumer preferences as by pre-packaged and prefabricated housing designs.

The argument in favor of protecting private preferences is also problematic in as much as private housing markets have a significant public dimension. First, each new housing unit becomes a part of our national housing stock, and the housing stock lasts much longer than the time in which any particular unit is occupied by a given owner. Second, private home ownership is subsidized through the tax system, through the mortgage markets, and to some extent through the insurance markets. Thus, private home ownership is really a misnomer. We really have a system of publicly supported housing units that are temporarily occupied for a

³³ Some of these gains may be wiped out after accounting for the sub-prime mortgage foreclosure problems.

period less than the useful life of the structure. Consequently, there is a legitimate public interest in the type of housing being built and in the implications of such housing on the long-term housing stock.

In this context it is important to note that in the United States the age of the housing stock varies considerably. Over 25% of the housing stock was built prior to 1950.³⁴ However, over 25% of the housing stock is much newer, having been built since 1980.³⁵ A significant number of homes, nearly 50%, were built between 1950 and 1980.³⁶ The median age of housing units in the United States, as of 2000, was 30 years.³⁷ Thus, we see that housing units enter the market and stay in service for a long number of years. Each of these units becomes part of our national housing stock. Significantly, while individual housing units remain in the national housing stock for 20, 40, 70, or even 100 years, the typical American moves once every seven to ten years. In this respect we have a situation in which private parties are building and buying housing units based on private individual design preferences which create potentially negative long-term path dependent implications for future potential users of our long-term national housing stock.

In a market where private home ownership represents a short time period in the life of a unit that will be in the public housing stock for years to come, it is unclear that private preferences should be given significant weight in the balancing of public policy respecting inclusive design for the mobility impaired. The design implication of a national commitment to visitability and open neighborhoods imposes a nominal cost on construction while delivering significant benefits to individuals, families, and communities. And, even with accessible design requirements, homes can be built with numerous decorating and design features capable of expressing the personal tastes and preferences of the occupant. This is no different than designing houses that otherwise incorporate particular building code and land use requirements.

In response to the clear need for more accessible housing, and the lack of Federal leadership, some individual counties have created ordinances aimed at forcing homebuilders to build housing that is more accessible.³⁸ Pima County, Arizona, for instance, passed the first ordinance in the country to require a zero-step entrance.³⁹ It also required doors to be at least 32 inches wide, lever style door handles, reinforced walls in ground floor bathrooms so grab bars could be

34 *How We Are Housed: Results from the 1999 American Housing Survey*, <http://www.huduser.org/periodicals/ushmc/fall00/summary-2.html> (last visited Mar. 23, 2009).

35 *Id.*

36 *Id.*

37 *Id.*

38 *Inclusion by Design*, *supra* note 4, at 728-31.

39 See Pima County Visitability Ordinance (Dec. 23, 2003), <http://www.accessiblesociety.org/topics/housing/pimacoruling.html>; World Visitability Legislation, Sample U.S. State and Local Ordinances, http://www.concretechange.org/policy_legislative_local.aspx (last visited Mar. 23, 2009).

easily installed, switches no higher than 48 inches, and hallways 36 inches wide throughout the main floor.⁴⁰

In *Washburn v. Pima County*, the ordinance was challenged on several grounds by homebuilders and a homebuilder's association.⁴¹ First, the plaintiffs claimed that the county lacked statutory authority to adopt the ordinance.⁴² The plaintiffs also claimed the ordinance violated their right to privacy and their equal protection rights.⁴³ The court did not accept the plaintiff's arguments. Instead, the court held that the county was authorized, pursuant to an Arizona statute, to adopt individual building design criterion for the purpose of developing codes in enacting its ordinance.⁴⁴ The court also held that the county's ordinance did not unconstitutionally infringe on the homebuilders' right to privacy because the ordinance was a proper exercise of the county's police power. Finally, the court held that the ordinance did not violate the homebuilder's equal protection rights because the county advanced the legitimate government interest of increasing the number of accessible homes.⁴⁵

Significantly, Judge Eckerstrom stated in the majority opinion:

The uncontested evidence established that approximately one percent of the population is confined [*sic*] to wheelchairs, but the county points out that a much larger percentage will suffer [*sic*] a disability at some point in their lives. Although all age groups are affected by disability, the county introduced evidence that approximately forty-one percent of people over the age of sixty-five have some form of disability. Disability is a growing problem both nationally and locally, and the county also introduced evidence that Arizona's population of people over the age of sixty is expected to triple by 2025. Although many of these disabled people will not be confined [*sic*] to wheelchairs, the county concluded from these figures that the number of people confined [*sic*] to wheelchairs is rising. For these reasons, the county addressed a legitimate governmental interest when it adopted a building code designed to increase the number of homes accessible to those in wheelchairs.⁴⁶

The judge observed that wheelchairs are not the only reason that accessible housing should be required. He pointed out that much more than 1% of the population will suffer a disability at some point in their lives, and also noted that the aging population suffers from a much higher prevalence of disability. Following up on the judge's point, it is important to keep in mind that the proper frame of reference

40 *Id.*

41 81 P.3d. 10301, 1030 (Ariz. Ct. App. 2003).

42 *Id.* at 1033.

43 *Id.* at 1038-39.

44 *Id.* at 1038.

45 *Id.* at 1039-40.

46 *Washburn v. Pima County*, 81 P.3d. at 1039 (citation omitted).

is not just the individual with mobility impairment but the web of relationships of each such person. The accessibility issue in residential housing is really about families and communities. Looking only at meeting housing needs of a small fraction of our population misses the point; people do not live in isolated shelters, they live in communities and share their homes with family and friends.

Since the time that Pima passed its ordinance to promote accessibility, other communities have also enacted laws regarding visitability.⁴⁷

Another interesting development has taken place in Georgia. In 2003, the directors of the National Association of Home Builders passed a policy resolution in favor of voluntary visitability programs and opposing mandatory programs.⁴⁸ The Home Builders Association of Georgia took this guidance and created a voluntary program called "Easy Living."⁴⁹ The problem with such voluntary efforts is that they leave too many housing units out of the system and they fail to account for market imperfections that result in the underproduction of fully accessible units.

There are several reasons for this underproduction.⁵⁰ As previously discussed, housing units are quasi-public goods and, as such, we observe the same kind of under production as we do with other public goods. In the case of public goods, the parties to the transaction do not capture or internalize all of the costs and benefits of their activities and thus, too few of the desired products are produced; in this case we under produce housing units with open neighborhood design. Another way to look at this involves the problem of having the parties internalize the true cost of their design choices. The individuals involved in a given purchase and sale transaction do not take account of the full social costs of adding exclusionary housing units to the long-term housing stock. Thus, we over produce exclusionary housing units and underproduce housing that is fully accessible to the mobility impaired.

In addition to these reasons for underproduction of open neighborhood design housing, some developers just do not want to update their building work because they are resistant to change and prefer to follow path dependent designs of the past. Inertia is a powerful defender of the status quo. Another more likely reason, however, for resisting inclusive designs in residential housing has to do with what I call "amenity pricing." Because developers may believe that price and profit can

47 Jordana L. Maisel, Ctr. For Inclusive Design & Env'tl. Access (IDEA), *Visitability as an Approach to Inclusive Housing Design and Community Development: A Look at Its Emergence, Growth and Challenges* 20-23 (2005) [hereinafter *Visitability as an Approach*]. Katie Spegal & Phoebe Liebig, *Visitability: Trends, Approaches, and Outcomes* (2003), (unpublished manuscript), available at <http://www.usc.edu/dept/gero/nrcshhm/research/pages/VA%20PAPER.pdf>. For information on some communities see World Visitability Legislation, Sample U.S. State and Local Ordinances, *supra* note 39.

48 NAHB Supports Voluntary "visitability," NATION'S BUILDING NEWS ONLINE, May 26, 2003, <http://www.nbnnews.com/NBN/issues/2003-05-26/Seniors+Housing/2.html>.

49 *Id.*

50 *Inclusion by Design*, *supra* note 4, at 730-35.

be enhanced by allocating scarce square footage inside the housing unit to features other than accessibility, they are reluctant to sign on to a national standard for open neighborhood design. Many developers would rather offer an exclusionary design with one and one half bathrooms than an inclusionary one with only one bathroom. More bathrooms add market value; whereas wider hallways and bigger bathrooms simply allocate more precious square feet to what is already there. When hallways and bathrooms are kept small and exclusionary, some square footage can be reallocated to other defined amenities with higher consumer appeal (another bathroom, a bigger kitchen with a breakfast nook, an additional closet, etc.). After all, builders and realtors generally sell houses by advertising amenities such as one and one half baths, and not by advertising 36-inch wide hallways. The problem with this, of course, is that self-interested consumers are drawn to these other amenity options because they do not absorb the full cost of adding to our exclusionary housing stock and they do not account for the externality of generating truncated social networks for the mobility impaired.

Some builders and developers have opposed inclusive design standards because they think it will drive up their costs.⁵¹ Of course, many building code features can be opposed for similar reasons. While costs are important to keeping housing affordable, cost alone is not the only value factor to consider when building safe and socially desirable housing. Housing costs are probably less significant to most developers than loss of control with respect to flexible allocation of square footage to enhance amenity pricing inside the unit. In contrast to developers who express concern about housing costs, we find that others have willingly adopted visitability standards because they have found it to be another marketing tool in some markets, which may outweigh any added costs. There are other complaints about inclusionary housing standards. In addition to cost based complaints, some developers assert that inclusionary features are impractical, go beyond the scope and purposes of building codes, and unfairly restrict consumer choice. These concerns seem to be outweighed by the negative implications of exclusionary housing and by the reality of the market imperfections upon which they are based. Likewise, they under appreciate the health and safety issues of non-inclusive design housing.

As to the cost of achieving a visitability standard of inclusion, there is some debate. Some of the debate likely stems from the fact that houses can be built in a variety of ways in an infinite number of locations. These variables obviously affect the cost. Despite these many variables, some numbers may be less difficult to determine. A paper by the Center for Inclusive Design and Environmental Access stated that the cost of a zero-step entrance would only add \$150 to the cost of a new construction.⁵² Additionally, the cost of having wider interior doors could be

⁵¹ *Id.* at 732-35.

⁵² *Visitability as an Approach*, *supra* note 47. Costing considerations are also more fully discussed in; *Inclusion by Design*, *supra* note 4, at 715-6; and in AFFORDABLE HOUSING

as little as \$50 if they are put in during construction.⁵³ Adding these features later on is significantly more costly. For example, the cost of having a no-step entrance added later would be around \$1,000.⁵⁴ Also, the cost of widening the doors later on could be as much as \$700.⁵⁵ These costs, while not high, are not insignificant and they emphasize the importance of having the correct design at the outset. There is no reason to believe that wider hallways and larger bathrooms would add any costs.

Pima County, Arizona, before implementing its visitability ordinance, did a study on the cost of visitability. The court noted the study in its opinion. The results of the study corroborated the numbers stated above. The study found that implementing the visitability standards [in the Pima County ordinance] would only cost about \$100.⁵⁶ Specifically, the court stated, “The Board of Supervisors could have rationally concluded that the benefit to the community in providing for the disabled justified the comparatively minimal cost of implementing the required design features.”⁵⁷

The key here is to build visitability and inclusionary standards into the construction process to avoid the added costs of doing rehab work at a later date. With a national standard all developers will face the same design constraints and thus would have incentives to develop attractive ways of integrating accessible design features into the homes they build.

Conclusion

This chapter suggests that while much progress has been made in making public places more inclusive, there is still much work to be done in our residential neighborhoods. The chapter has taken a focused and narrowly tailored look at one important part of the housing market; the market for so called single family private residential homes. It suggests a reframing of key underlying assumptions so that the need for regulatory reform can be more readily understood. While change might be implemented by expansion of coverage under the Fair Housing Act or the Americans with Disabilities Act, it may also be implemented through local zoning laws.⁵⁸ The key is that change in whatever form is more likely to come about when people understand the public nature of our private housing stock.

AND PUBLIC-PRIVATE PARTNERSHIPS 207-17 (Nestor M. Davidson & Robin Paul Malloy eds. 2009)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Washburn v. Pima County, 81 P.3d. 1030, 1040, 1039 (Ariz. Ct. App. 2003); *see also* Pima County Visitability Ordinance, *supra* note 39.

⁵⁷ Washburn v. Pima County, 81 P.3d at 1040.

⁵⁸ The Fair Housing Act and the Americans with Disabilities Act have so far avoided covering these inclusive design concerns in private single-family residential housing. The

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focus of this chapter has not been on addressing the details of those Acts but rather to address the reframing of assumptions that when properly understood might make reform possible; either through revision of those Acts or in some other way.