Disability Law for Property, Land Use, & Zoning Lawyers

By Professor Robin Paul Malloy

ONE OF THE FASTEST GROWING AREAS OF CONCERN FOR LOCAL GOVERNMENTS INVOLVES THE INTERSECTION OF DISABILITY LAW WITH LAND USE PLANNING AND ZONING.

Many of the legal issues for property, land use, and zoning lawyers involve interpreting rules and guidelines requiring improving the accessibility of the built environment, while other important issues relate to the defenses available to local governments and businesses when charged with complaints of discrimination based on lack of accessibility or failure to accommodate.

In this essay, Professor Robin Paul Malloy—E.I. White Chair and Distinguished Professor of Law, Kauffman Professor of Entrepreneurship and Innovation, and the author of several books on

disability law and land use—examines an area of law that can be complex, confusing, and underdeveloped, and sometimes the source of costly and prolonged litigation.


Robin Paul Malloy

In practice, accessibility is an important issue confronting our cities, but under US disability laws, accessibility is balanced with numerous other interests, including property rights and the ability of local governments or private parties to pay.

In advancing accessibility in our communities, it is important to know the actual legal requirements of an action and to frame arguments in response to these requirements.

To begin with, land use planning and zoning involve a system of public and private land regulations that connect and coordinate physical places and social spaces into communal networks. These networks include the places and spaces where people work, play, shop, entertain, eat, receive health care, vote, raise their families, and otherwise live their lives as individuals and as members of communities.

Access to these networks is important because these networks shape people's opportunities and influence their quality of life. Having a disability can often limit one's access to these important communal networks, either as a result of physical barriers or as a result of discrimination. Therefore, it is important for planning and zoning officials to think beyond inclusive design issues at specific property locations and work for connectivity between and among the venues within which community life takes place.

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The importance of addressing accessibility is highlighted when we account for the fact that 25% of Americans have a disability of some type. More specifically, when considering only disabilities that effect mobility, close to 20% of American families have a family member with a mobility impairment.

The rate of mobility impairment is significant when we are managing and coordinating land uses across the built environment. Moreover, the rate of disability and of mobility impairment increases with age, and America has an

aging population. Currently 64% of the US population is 50 years and older, with 23% being 65 and older.

Demographic trends indicate a need for greater planning so that our communities are safe and easy to navigate by everyone, including people with disabilities and people seeking to age in place.

KEY CONCERNS

In working to make our communities more accessible, we need to start by acknowledging three key points:

1. The problems of accessibility are big, and not small. People often think that disability affects only a small percentage of the population because they associate disability with the iconic image of a person in a wheelchair, and only 1% of the population uses a wheelchair. In reality, the statistics cited above on the rate of disability in America tell the true story of the needs confronting our communities.
2. Some property lawyers are unaware that the Americans with Disabilities Act (ADA) and related legislation apply to state and local land use planning and zoning activities. Others are aware but lack clarity as to exactly what the disability laws may require of property, land use, and zoning lawyers, since they perceive such matters as the work of disability rights lawyers.
3. Many of the planning and zoning issues concerning the rights of people with disabilities have little to do with accessible designs. Moreover, designing accessible buildings and spaces are matters better

addressed by architects and code enforcement officers than lawyers. While compliance with these codes and standards is important, the key concerns of land use and zoning lawyers go beyond compliance with design guidelines. Disability law at the intersection of land use and zoning is not just about designing doorways, bathrooms, and office space. It's about interpreting, classifying, and applying regulatory standards and advising local governments on avoiding actions that may be found to be discriminatory.

COMPETING INTERESTS

Many of the legal issues involved at the intersection of land use law and disability have to deal with mediating competing interests and rights with respect to accessibility and its cost.

From a property, land use, and zoning perspective, it is important to recognize both the requirements and limitations of our disability laws. Local governments, in particular, need good legal advice on the specific requirements of our disability laws so that they can meet their obligations to residents while defending against claims of noncompliance.

In discussing these issues, I consider three examples. All three are related to public land use and zoning activities focused on the application of Title II of the ADA. Title II applies to programs, services, and activities of state and local governments. This has been held to include all of the activities and functions of local planning and zoning officials.

To the extent that housing is involved, the Fair Housing Act (FHA) is also applicable. The FHA requires planning and zoning officials to afford people with disabilities an equal opportunity to obtain and enjoy housing in the same way as people without disabilities. In recognition of space limitations, I do not address issues arising in the context of private places of public accommodation as covered by Title III of the ADA, nor do I discuss the Rehabilitation Act or the Architectural Barriers Act.

The ADA requires "new construction" and "alterations" of existing facilities to be accessible to the maximum extent possible. The only defense to a complaint of noncompliance is, structural impracticability, which is extremely difficult to demonstrate. Nonetheless, local governments can make out a case of structural impracticability by focusing on engineering and other difficulties.

REASONABLE ACCOMMODATIONS

As to programs, services, and activities, these must be accessible to the maximum extent possible, and the defense to a claim of lack of accessibility is a showing of an undue administrative or financial burden. This is demonstrated by financial and economic evidence and is much easier to demonstrate than is structural impracticability.

In addition, the ADA and the FHA prohibit discrimination against people with disabilities. There are three methods of demonstrating discrimination:

1. Disparate treatment (or intentional discrimination).

2. Disparate impact (showing, with the use of statistics, that a planning or zoning policy has a disparate impact on people with disabilities as compared to people without disabilities).
3. Failure to provide a reasonable accommodation or modification when requested.

Currently, most litigation involves the alleged failure to provide a reasonable accommodation or modification. Some disability rights advocates assume that persons with disabilities are entitled to an accommodation by simply demonstrating that they have a disability. Some also mistakenly believe that the person with a disability should be granted the particular accommodations/modifications being requested. This, however, is not what the law requires.

Reasonable accommodations/modifications only need to be granted if the plaintiff can make a prima facie case with respect to three criteria that will be discussed below. If the local government planning or zoning board is able to carry the burden in countering the assertions of the plaintiff, the requested accommodation/modification may rightfully be denied.

VARIANCE REQUESTS

Judicial opinions have clarified the term reasonable accommodation as meaning the making of an adjustment or exception to local planning and zoning rules, policies, plans, or procedures, whereas the term reasonable modification means making an adjustment to a physical space, facility, or environment.

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Below, I provide three examples of zoning matters addressing the requirement for reasonable accommodations. One of these situations involves what zoning people will recognize as an area variance, and the other two involve use variances. There is one significant difference. A variance, of either type, runs with the land (runs to future owners), whereas a reasonable accommodation/modification is personal to the person and does not run with the land.

First, let us consider an example of a typical area variance request. To begin with, a variance involves a petition for

an exception from a rule, policy, plan, or procedure. In the zoning context, state and local law establishes the specific criteria to be considered in reviewing a petition for a variance.

A request for a reasonable accommodation/modification by a person protected by the ADA and FHA often starts as a petition for a standard zoning law variance. Failing to meet the requirements for a standard variance, the person then typically petitions for an exception based on the right to a reasonable accommodation/modification under federal disability law.

The accommodation claim is one of asserting that notwithstanding the inability of petitioner to meet the criteria for a variance as provided for under state and local law, the petitioner as a person with a disability is entitled to an exception to the land use requirements as a reasonable accommodation. Failure to provide a “reasonable” accommodation, when requested, is an act of discrimination in violation of federal law. The difficult legal question is one of determining what is reasonable.

So, let us assume that a city has a zoning code that provides for all structures to be set back from the front property line by at least 25 feet. The petitioner has a home that is set back 26 feet from the front property line but now petitioner seeks to add a ramp to the front of the house so that a wheelchair user can easily and safely navigate ingress and egress to the front door of the home.

The proposed ramp is to be constructed by the petitioner from two-by-fours and when completed will extend 12 feet into the required front yard setback. Since this encroachment on the setback is a violation of the code, the property owner must seek an area variance. Assume that after evaluating the requirements for an area variance under state and local zoning law, the variance petition is denied. Now, if the petitioner affirmatively requests an accommodation, the local zoning board must move forward to evaluate the petition on the criteria for a reasonable accommodation. There are three criteria for a reasonable accommodation and they include:

1. It must be reasonable (using a cost and benefit analysis).
2. It must be necessary (using a “but for” test to show that “but for” the accommodation and its ability to address the person’s disability, the person will not be able to enjoy an equal opportunity to live in this community).
3. It must not fundamentally alter the plan for the development and regulation of the community.

The zoning board needs to take evidence on each of these three factors and then, based on the totality of the evaluation, determine whether or not the requested accommodation is reasonable. While each case is fact specific, the requirements as to probative value of evidence as to each of the three factors must be gathered from various case opinions. A decision against the petitioner may be appealed to state or federal court. On appeal, a zoning board determination is reviewable on a rational basis standard, meaning that if the zoning board denial is rational and supported by competent evidence in the record, the accommodation can legally be denied.

ALTERNATIVE WAYS

Thus, a local zoning or planning board must be prepared to apply state and local zoning law to a variance request and also federal disability law if the petitioner is protected by our disability laws. It is important to note that in making its determination, a planning or zoning board may consider alternative ways of accommodating the petitioner even if the petitioner has only requested one way of addressing an accommodation.

In this process, second level issues also arise and need to be addressed. For example, assume a board determines that the request for a ramp is reasonable, then the issue arises as to can they control the design of the ramp and the materials used in the construction of the ramp? In other words, can the board impose requirements that make the construction of an approved ramp twice the cost of the ramp proposed by the petitioner?

The answer is “yes,” the board can impose conditions that raise the cost to the petitioner. Beyond this, consider yet another issue that may arise. In as much as interpreting the code to allow for a reasonable accommodation does not involve a granting of a zoning variance that runs with the land, might the board require the petitioner to remove the ramp when the petitioner leaves the property? Again, the answer seems to be “yes.”

A petitioner granted an accommodation can be required to bear the cost of rehabilitation of the property when they leave, unless the rehabilitation cost is perceived as so burdensome that it would cause a person not to exercise their right to request an accommodation in the first instance.

PERMITTED USE

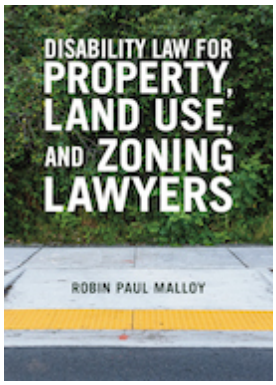
The above described analysis has been applied to petitions for ramps, decking, pathways, and even therapeutic swimming pools. Many of the cases illustrate that local planning and zoning boards are underprepared to handle even simple disability petitions, and as a consequence they end up being pursued on charges of discrimination.

As a second example, consider a request for a use variance. This is a request to use a property for a use that is not otherwise permitted under the zoning code. Assume a city has designated a downtown zoning district for commercial redevelopment and has identified a variety of commercial and business uses as permitted within this zone. A not-for-profit agency identifies a building within this zone in which it would like to open a clinic to provide services to people recovering from drug and alcohol addiction. The clients of this clinic are protected under the ADA

On application for a permit to open a clinic, the agency is denied on the grounds that such a clinic is not a permitted use

in the redevelopment zone but would be appropriate in another zone. The agency then seeks a reasonable accommodation to permit the use within the zone, notwithstanding the provisions of the code and their inability to meet the criteria for a use variance under state and local zoning law.

The planning and zoning board must then be prepared to evaluate the petition for a permit on the basis of the three criteria for a reasonable accommodation. The cases are clear that such challenges can be made and litigated (imposing time and costs) and less clear on when and if the use accommodations are required.



Professor Robin Paul Malloy's new book—Disability Law for Property, Land Use, and Zoning Lawyers *(ABA, 2020)–explains how to navigate one of the fastest growing areas of concern for local governments: the intersection of disability law with land development, planning, and regulation. Learn more in our Faculty Books section (http://law.syr.edu/publication/magazine/faculty-books1).*

SERVICE ANIMALS

Third and finally, consider another use accommodation request. In a single-family residential zone with home lots of one to one-and-a-half acres, only domestic pets are permitted.

Farm animals are specifically excluded. One property owner generates complaints because she has recently purchased a miniature horse as a service animal for her young daughter. Her daughter has difficulty with her balance and with walking. The miniature horse has been trained to walk with the young girl so that she can lean on the horse for stability and balance. Working with the horse, she is able to walk in her backyard and obtain much needed exercise. Neighbors complain to the city about the presence of the horse and all that goes with housing a horse on a one-acre residential urban lot.

In this situation, a miniature horse—just like a service dog—is specifically covered by the ADA as a service animal. If the miniature horse is trained to provide the assistance, is controllable by the owner, and poses no danger to others, it will be permitted to be on the property.

For this case, the local planning and zoning board will need to make findings as to the qualification of the miniature horse in terms of training, being under the control of the owner, and posing no harm to others. Part of the posing no harm determination will include looking at the steps taken to ensure sanitary conditions on the property.

If the service animal criteria are met, the property owner will be entitled to maintain the miniature horse on the property under both the ADA and FHA.

EFFECTIVE REPRESENTATION

As this essay illustrates, local planning and zoning officials need to be knowledgeable about our federal disability laws and account for them in their practices. Adjusting for accommodations can be disruptive to the process of planning, but it is sometimes necessary to ensure the protection of the rights of people with disabilities.

There are, of course, many more issues than these involved at the intersection of land use law and disability. For example, lawyers need to determine who is a protected person under each of the various disability laws, and they must assess standing, particularly in situations of third-party standing in bringing a lawsuit on behalf of clients who may be protected persons under these acts.

In addition, special rules apply to historic buildings and historic preservation districts, and additional regulations apply to places of public accommodation and to private land restrictions operating in such settings as residential subdivisions and condominiums.

Lawyers must also classify and define such concepts as:

- New construction
- Alterations
- Programs, services, and activities of state and local government
- Facilities
- Reasonable accommodations/modifications
- Accessible to the maximum extent possible
- Structural impracticability
- Readily achievable
- Undue administrative and financial burden

My research, writing, and teaching cover each of these areas at the intersection of land use law and disability, and I believe strongly that the ability to handle these issues is essential to the future practice of property and land use law.

At the College of Law, I educate property development and land use students to navigate disability law. The next step for legal education is to build out the capacity for educating and training all future property, land use, and zoning lawyers, so that as a profession we can effectively represent local governments and the people protected by our disability laws.

1901

With enrollment in excess of 100 students, the College becomes a charter member of the Association of American Law Schools, one of 32 law schools that the AALS describes in its history as “exemplars of the academic model for studying the law.” In a bulletin for that year, the

College announces the requirement for at least one year of Latin study.

Students in c.1901

1903

The College marks two notable graduations: William H. Johnson becomes the College's first African American alumnus and Bessie Seely becomes the first alumna. Both are recognized annually through the Seeley Johnson Award, given to "a graduate who embodies the highest ideals of professionalism, integrity, diversity, and leadership."

Bessie Seeley L'1903

William H. Johnson L'1903

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