



**DISABILITY LAW FOR
PROPERTY,
LAND USE,
AND ZONING
LAWYERS**

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This presentation is adapted from this excellent book

Five federal laws to know...

- Americans with Disabilities Act (ADA)
- Fair Housing Act (FHA)
- Rehabilitation Act § 504 (RHA)
- Architectural Barriers Act (ABA)
- Executive Order 13217

Architectural Barriers Act

- Requires buildings and facilities that are designed constructed, latered, or leased by using certain federal funds after September 1969 to be accessible to and usable by people with disabilities
- Addresses construction-based standards of accessibility for new and renovated buildings
- Private market construction of single-family housing is not covered by the ABA

Rehabilitation Act § 504

- Prohibits discrimination based on disability in any program or activity that receives federal financial assistance
- Reasonable accommodations must be made for employees, and this includes the physical environment
- New construction and alterations must be accessible
- Section 504 covers housing programs that receive federal funding; does not cover privately funded single-family residential housing

Fair Housing Act

- Prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, or disability and applies both to private housing and public supported housing
- Covers selling ,advertising, leasing and financing of housing
- Zoning can also be covered. FHA requires owners and zoning officials to make reasonable exceptions to policies and practices to afford people with disabilities an equal opportunity to obtain housing
- This may require zoning officials to grant a variance or exception if a person with a disability can show that doing so is a reasonable accommodation (utilized a “but for” test)
- Can also mandate new multi-family housing meet inclusive design standards
- Design standards don’t usually apply to single-family dwellings

Americans with Disability Act

- Requires accessibility
- Accessibility guidelines are published by the US Access Board as the ADA Accessibility Guidelines
- Title I: private employers must provide reasonable accommodations
- Title II: accessibility by state and local governments. Part A covers a range of programs, services, and activities. Part B covers transportation
- Title III: prohibits discrimination based on disability by any person owning, leasing, or operating a place of public accommodation
- Title IV: equal access to telecommunications systems

Executive Order 13217

- Requires federal agencies to evaluate their policies and programs to determine whether any can be revised or modified to improve the availability of community-based living arrangements for persons with disabilities
- Applies to senior housing, group homes, provision of clinical or health services, etc.

Land use law and disability law

- Disability law does not preempt authority by public land use regulations, such as zoning, or private land use regulations, such as CC&Rs
- It may, however, require some alteration to the way those land use laws are enforced and applies

Group homes

- Issue: A zoning regulations prevents group homes in a specific district or it permits group homes, but provides for special or conditional review only for group homes that serve people with disabilities. Does this difference in treatment result in discrimination?
- Answer: Most likely. There will need to be a rational and important state interest in justifying different treatment for the group home for persons with disabilities.

Permeable surfaces / pavers

- Issue: Planning and zoning regulations require the use of sand for all pathways that lead to the waterfront of a river or lake. The stated purpose is to maintain permeable surface and reduce rainwater runoff problems. It creates a soft surface, which functionally limits access to the waterfront for those with mobility impairments. People with disabilities cannot enjoy the waterfront like others.
- Answer: Likely subject to a successful challenge. Local officials will need to be able to explain why there are no alternative ways of accomplishing the goal without providing some reasonable access for people with disabilities

Rehab centers

- Issue: Zoning regulations limit the local of drug rehabilitation centers. A potential drug rehabilitation operator seeks to locate in a zone that does not permit such centers. Should the operator be permitted to operate in the zone, even though the code prohibits operation in this location?
- Answer: A person with a disability and certain third parties can sue for a reasonable accommodation/modification. This leaves open the issue of determining the meaning of “reasonable” in this situation. There is a three-factor test: it must be (1) reasonable, (2) necessary, and (3) it cannot fundamentally alter the program, service or activity.

Boarding houses

- Issue: A not-for-profit organization seeks to open and operate a boarding house for women who are “struggling with life controlling problems,” which may include emotional stress or depression or the abuse of drugs and alcohol. Under the zoning code, group homes are restricted by a size limit, but this boarding house would seek to have twice as many people than permitted under the code. Org seeks an exception to the zoning code under laws that protect people with disabilities. Key issues: (1) does the city have to provide an exception to its zoning ordinance; (2) what are the criteria for deciding the matter; (3) are women struggling with “life-controlling issues” within the definition of persons with disabilities; (4) what if only some of the women have a recognized disability?
- Answer: Not every member of a group has to meet the definition of a disability. Unclear what the percentage needs to be, but probably substantial. Use the 3-factor test to determine if accommodation/modification is reasonable.

Ramps in front yards

- Issue: zoning setback restriction prohibits the addition of a ramp to the front of a home because it extends into the front yard setback. Person with wheelchair can only enter the home this way but for potentially putting a ramp in the back. If in front, can the city mandate the construction materials of the ramp?
- Answer: The ramp probably needs to be allowed as a reasonable accommodation. Whether at the front or the back will depend on a determination of what is reasonable, including what might be readily achievable in seeking to remove this barrier to accessibility. Design and materials can be regulated. This is true even if the regulations impose more costs on the person with a disability relative to some other design and the use of some other materials. Further, the removal of the ramp can be required for when the person leaves (e.g., the ability to have the ramp doesn't have to run with the land).

Service / emotion support animals

- Issue: zoning regulation prohibits horses, alpacas, donkeys and pigs in single-family residential neighborhoods. A resident living on a one-acre lot has a miniature horse in her yard as a service and emotional support animal for her daughter. Neighbors complain about smell of manure. Can they keep the horse even though not otherwise permitted by zoning?
- Answer: Maybe. If it is a service animal under the ADA, it is likely permitted assuming sanitary and safety procedures are in place to prevent the service animal from being a danger to public health, safety, and welfare. If it is an emotional support animal, a zone variance will depend on an evaluation of what constitutes a reasonable accommodation under the circumstances. [since Idaho doesn't have use variances, perhaps a catch-all CUP may be advisable for all zones.]

Home offices

- Issue: Zoning code permits people to operate home offices in their homes. In this community, a number of lawyers and insurance agents have home offices in their single-family, residential homes. Even if the single-family home does not meet ADA design guidelines, must it do so if to the extent that the home office transforms part of it into a public accommodation?
- Answer: Yes. This includes an accessible pathway into the parts of the home used for meeting with the public

Sidewalks

- Issue: A city in a snowy region refuses to plow the snow from sidewalks during the winter. Sidewalks become inaccessible to those with disabilities. Group sues and claims that sidewalks are a service, program or activity of the local government, and as such, sidewalks must be maintained in an accessible manner. City responds that sidewalks are structures and not a service, program or activity of the local government.
- Answer: Sidewalks are not only facilities; they may be facilities that receive federal fundings. Likewise, sidewalks are considered programs, service, and activities of local government. In each case, sidewalks are covered under disability laws. The city needs to maintain the accessibility and usability of its sidewalls, which includes snow removal

Religious organizations

- Issue: A church building in a city does not have an accessible entrance. Does this violate disability laws or is there an exemption for a religious organization? What if church adds a daycare center?
- Answer: There is an exemption for religious organizations, but if they receive federal funds, they are subject to Section 504 of the RHA

Developers

- A commercial home builder develops subdivisions of single-family residential homes. In the subdivisions, the developer offers a choice of five different model homes from which consumers may select. None are accessible entry, and none offer a wheelchair-accessible bathroom. Wheelchair bound buyer asks for a home to be built with a ramp entrance and a larger, accessible first floor bathroom. Developer refuses. Violation of the FHA?
- Answer: Maybe. Single-family homes do not have very many accessibility requirements but a case can be made that with new construction a builder should offer some accessible options when requested.

HOAs - mobility

- Issue: Gated community prohibits buses on the private roads in the subdivision. One family living in the gated subdivision has a child with a severe mobility impairment and seeks to have the public school bus pick up their child and drop off at the house rather than at the public road outside the gate that is a half mile away from their house. Parents petition HOA for an exception to the rule, which is denied. Has the HOA violated the FHA?
- Answer: Probably, but it will depend on application of the three-factor test for determining if the request is reasonable

HOAs - fences

- Issue: Private subdivision governed by restrictive covenants has CC&Rs that prohibit yard fencing and enforced by HOA. Couple living in the subdivision has an autistic child who often runs out of the yard and into the street. To secure safety of their child, the couple petitions the HOA for the right to erect yard fencing on the property. Present HOA with doctor's certification of the disability and of recommendation for yard fence. Present board with a letter from the state authorizing payment for the fence and its installation. HOA denies request. Reasonable accommodation or modification violation under the FHA? Does it matter if it is in rules and regs versus CC&Rs?
- Answer: This is probably a violation. The fence is likely reasonable but the HOA may put some conditions on how the fence is constructed and the materials to be used to build it. The HOA may also require that the fence be taken down when the child is no longer residing on the property.