

## ADVANCING ACCESSIBLE COMMUNITIES

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## INTRODUCTION

The discussion of disability rights is almost always focused on civil and human rights and centered on protecting a specific and identifiable group of people from discrimination.<sup>1</sup> This is important, but when we think about our built environment, we also need to consider property and land use law. We need to think beyond the discriminatory effects of excluding people with disabilities and consider the best ways to affirmatively advance the accessibility of our communities for everyone.<sup>2</sup> This requires us to assess and evaluate the land use and zoning laws that shape our communities. These laws determine the ease of navigation for people with disabilities and for people seeking to age in place. This essay addresses the goal of advancing the accessibility of our communities by focusing on the intersection of disability and land use law. In doing this, the essay proceeds in several steps. First, it discusses the issue of accessibility. Second, consideration is given to the size of the population affected by disability. Third, market factors are considered in an effort to better understand some of the dynamics surrounding lack of accessibility. Fourth, it considers legal issues in disability law that go beyond compliance with accessible design guidelines.

## ACCESSIBILITY

Accessibility is about connecting people across an entire community network. This means connecting everyone to all the places where community life is experienced, including making it safe and easy for everyone of all abilities to navigate among places of work, entertainment, recreation, shopping, education, worship, political participation, and the places we call home. Working to build and connect all of these places requires the input of property and land use professionals as well as disability rights lawyers.<sup>3</sup> It involves not only civil rights but also the protection of the public health, safety, welfare, and morals through the exercise of the sovereign police power of government. The exercise of police power includes the planning and zoning process of local government.<sup>4</sup>

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<sup>1</sup> See ROBIN PAUL MALLOY, *LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES* 6–7 (2015) (see in particular, chapter 1, “Inclusion by Design: Thinking Beyond a Civil Rights Paradigm” at page 1–27).

<sup>2</sup> *Id.* at 1–27. See also Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 *HASTINGS L.J.* 699–748 (2009).

<sup>3</sup> MALLOY *supra* note 1, at 6–18.

<sup>4</sup> *Id.* at 18–30; see generally *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 393 (1926) (explaining how certain zoning procedures might enable better police protection in neighborhoods).

My work over the past twelve years has focused on bridging the divide between disability rights advocates and property, development, land use, and zoning professionals. All of these professionals need to work together to make our communities more livable, more sustainable, and more accessible. Sometimes this simple fact becomes obscured by the rhetoric of different discourses. Disability rights advocates speak in terms of inclusion and the prevention of discrimination.<sup>5</sup> In contrast, property and land use professionals concern themselves with the right to exclude and the protection of private property rights.<sup>6</sup> On the surface, therefore, it can appear that the two groups are in conflict, or at least that they are speaking past each other when addressing land development policy.

In some ways, the discussion of accessibility goes beyond conflicting discourses and raises actual tension between disability rights advocates and property rights advocates.<sup>7</sup> This is because accessibility requires public limitations on individual preferences with respect to property designs and land uses. While these limitations reduce the choices available to some individual property owners, they provide equality of opportunity to others. Figuring out the right balance or correct fit between disability rights and property law is sometimes difficult. One of the legal ‘venues’ where this tension has to be worked out is in the local land use planning and zoning office. These local government offices are on the front lines of integrating local land law with federal disability rights legislation.

For this reason, the insights and expertise of land planners and regulators are important when seeking to develop accessible communities that are safe and easy to navigate by everyone. Land use professionals are essential contributors to advancing disability rights and are critical to the process of coordinating land uses to ensure that people have access to the services, programs, and activities that they need in order to be active participants in their communities. This includes access to rehabilitation centers, group homes, and medical services.<sup>8</sup> These are uses that are often opposed by current neighboring property owners.<sup>9</sup> In many ways, therefore, land use lawyers and land use professionals operate at ‘ground zero’ in mediating the underlying tension between the civil rights of people with disabilities and the land use rights of owners of property. One of the problems local government regulators confront in regulating to advance accessibility is that some property rights advocates may believe that the

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<sup>5</sup> See MALLOY, *supra* note 1, at 9.

<sup>6</sup> See *id.*

<sup>7</sup> *Id.*

<sup>8</sup> See ROBIN PAUL MALLOY, *DISABILITY LAW FOR PROPERTY, LAND USE, AND ZONING LAWYERS* (2020); see, e.g., *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997); *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006).

<sup>9</sup> See *supra* note 8. (My Disability Law book provides a number of illustrations, and the two identified cases provide specific examples that demonstrate how the issues arise).

limitations imposed on their land use choices and on their design preferences amount to a regulatory taking of their property.<sup>10</sup> This is not the case.

In reality, creating accessible environments does not necessarily take anyone's property. Regulations aimed at accessible design and land uses that promote the public health and safety simply regulate design preferences and do not eliminate property rights. Moreover, these constraints on use are within the normal parameters of planning and zoning as an exercise of the police power.<sup>11</sup> Part of the reason for confusion for residential homeowners involves the concern that accessible design requirements intrude on what they do in the privacy of their own homes. These homeowners believe that the government has no right to require that their homes be designed for accessibility to people with disabilities. This is particularly true if the homeowner does not have a disability. The homeowner's argument is one that is consistent with civil rights law. The problem with the argument is that preventing racial discrimination is not the same as regulating to ensure the safety and accessibility of the built environment. While preventing discrimination against people with disabilities is a matter of civil rights, regulating for accessibility is a function of the police power in protecting the public health and safety.

To illustrate the point of confusion and show the difference between preventing discrimination and regulating for accessible design, consider a simple example. Under civil rights law, small business owners cannot exclude people from their places of business on the basis of race, but can use race as a basis for exclusion of people from their homes.<sup>12</sup> Legally, our civil rights laws accept the idea that one's private home is a *place* where people are permitted to express their preferences for discrimination as to whom they invite within.<sup>13</sup> In other words, the obligation to include without regard to race applies to places of public accommodation but ends at the property line of your private home. When we speak of accessibility in contrast to race, however, we speak in terms of safety and making the built environment accessible to anyone who might be invited into a given

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<sup>10</sup> MALLOY, *supra* note 1, at 16–17, 25–26, 85–103; *see e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); STEVEN J. EAGLE, REGULATORY TAKINGS (5th ed. 2012).

<sup>11</sup> *See* MALLOY, *supra* note 1, at 16–17, 25–26, 85–103; MALLOY, *supra* note 8, at 35–37 (“Making the built environment more accessible and navigable does not violate anyone’s right of privacy or association; it simply requires that buildings and uses be developed and coordinated in ways that make a community safe and easy to navigate for everyone. It also means making services, programs, and activities readily available and accessible, with particular attention given to the inclusion of people with disabilities and people aging in place.”).

<sup>12</sup> MALLOY, *supra* note 1, at 11; 42 U.S.C. § 2000a (2011); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1274 (7th Cir. 1993); *Boy Scouts of Am. v. Dale*, 520 U.S. 640 (2000).

<sup>13</sup> *Boy Scouts of Am. v. Dale*, 520 U.S. 640, 656 (2000).

place or location. The safe and easy navigation of the built environment is somewhat independent from who, at any given moment in time, might be invited on to a property. The owner of a fully accessible home can still exercise the right to exclude anyone, and has no requirement to extend an invitation to a person with a disability.<sup>14</sup> Making a structure accessible does not change the owner's right to invite or exclude people from entry. Likewise, a private club may be designed to be fully accessible but can still have requirements for membership.<sup>15</sup> Regulations promoting a safe and accessible environment do not necessarily mean eliminating the traditional property right to exclude.

Safety and accessibility are public concerns independent of race and independent of a right to exclude. Buildings, public and private, impact our built environment, and the safety and accessibility of the structures themselves should be treated differently from the expectations of privacy within them. We need to view the entire built environment as an interconnected web of public and private places, all of which should be safe and easy to navigate by everyone, including people with disabilities. In short, all places in our community should be accessible to the greatest extent reasonably possible, even if a private owner has a right to exclude certain individuals from entry.

Another area of confusion in local planning and zoning involves *inclusionary zoning*. Planning and zoning for accessibility is different than inclusionary zoning. For the most part, inclusionary zoning focuses on opening communities to a diverse range of income groups and prohibiting wealthy people from using zoning restrictions to de-facto exclude lower income people from certain neighborhoods. This is usually the result of zoning restrictions that raise the cost of housing and thereby exclude many people who are unable to pay.<sup>16</sup> While income inequality can be a cause for concern, this is a different political problem from that of accessibility. One does not have to advocate for the end of gated communities and of wealthy suburban enclaves to insist on making the built environment within these spaces safe and easy to access by people with disabilities.<sup>17</sup> This is an extension of the idea behind making buildings safer by developing and implementing building codes and fire codes. These regulations advance and protect the public health, safety, and welfare. Building codes are important without regard to the income of the people occupying a given structure. Likewise, accessibility is beneficial no matter who is included or excluded from being able to purchase a home in a given neighborhood.

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<sup>14</sup> MALLOY, *supra* note 1, at 214.

<sup>15</sup> *Lobel v. Woodland Golf Club of Auburndale*, 260 F.Supp.3d 127, 147 (D. Mass. 2017).

<sup>16</sup> MALLOY, *supra* note 1, at 23.

<sup>17</sup> *Id.* (explaining the difference between “inclusive design” and “inclusive design communities.”).

Accessibility does not require income integration nor does it require the elimination of the traditional property right to exclude.<sup>18</sup> Accessibility of the built environment is a public good and while it overlaps with considerations for civil rights and inclusionary zoning, it is important to understand that it is not one in the same with either of these approaches. The civil rights approach focuses on compliance with laws that prevent discrimination but that do not necessarily concern public safety. Understanding accessibility as a matter of safety brings disability under the police power and permits local planning and zoning offices to plan for accessibility just as they do for sustainability and green development.

#### DEMOGRAPHICS: THE SCOPE OF THE PROBLEM

One difficulty in dealing with planning and zoning for accessibility is the misunderstanding as to the number of people affected by barriers to safe and easy navigation of the built environment. People tend to think of disability in terms of people using wheelchairs since this is the iconic image used to depict disability in its various forms. Approximately 1% of the population uses a wheelchair for mobility.<sup>19</sup> Thus, a natural reaction includes a concern that we should not spend too many public resources on problems that affect such a small percentage of the population. The reality, however, is that disability includes more than using a wheelchair for mobility. Many people use walkers, canes, and crutches, or have hip and knee replacements, or any variety of conditions that qualify them as having a disability, even if the disability is not visible. In fact, it is estimated that 20% to 25% of the population of the United States have a disability of some sort.<sup>20</sup> These are individuals with various types of disability. In discussing the built environment, however, we are often concerned primarily with a narrow range of disabilities that usually relate to mobility. This can include vision and hearing issues but, in many cases, it involves physical-function mobility. We might be tempted to think that mobility impairment by itself is not a big problem but more in-line with our image of the person in the wheelchair representing 1% of the population. This would be wrong. Mobility impairment issues often affect more than just the individual (a fact that is applicable to many types of disability). It is estimated that 20% of American families have a family member with a mobility impairment that makes doing routine functions difficult and reduces one's ability to safely and easily navigate our built environment.<sup>21</sup> In addition to this fact, we know that disability rises

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<sup>18</sup> See generally Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L.J. 699, 720 (2009).

<sup>19</sup> MALLOY, *supra* note 1, at 21–22, 105–110 (information gathered from census data and other government materials referenced in notes to the text); MALLOY, *supra* note 8, at 1–4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

dramatically with age and that America has an aging population.<sup>22</sup> Currently, 34% of our population is age fifty and older, and 16% is sixty-five and older.<sup>23</sup> The average life expectancy of an American in 2010 was seventy-eight years.<sup>24</sup> Demographically, these numbers indicate the extent of the potential problem of inaccessibility in our communities. Lack of accessibility is a problem for people with a mobility impairment and is a matter of concern for those people seeking to age in place.<sup>25</sup> If we live long enough, the process of aging will present almost all of us with the experience of having a disability of some type. Unless our communities are readily accessible, the ability to safely and easily age in place will be problematic and as we age it will become increasingly difficult to remain in our homes and in our communities.

A significant problem with losing mobility is that people lose the ability to navigate their own homes and become unable to visit the homes of others. This means being unable to visit the homes of friends and family because most homes continue to have barriers to accessibility. This is why we need to plan for accessibility as part of thinking about sustainable communities. Sustainable communities are accessible communities that welcome residents of all abilities and support aging in place with facilities and services that integrate everyone into community life.<sup>26</sup> People with disabilities and people aging in place should not have to move to a new community simply because of diminishing mobility. Accomplishing this requires good planning and zoning.

In planning and zoning for accessible communities, we must be forward thinking and deliberative. Thus, comprehensive planning should require something that I identify as an Accessibility Impact Report (AIR).<sup>27</sup> These AIRs are similar to Environmental Impact Statements

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<sup>22</sup> *Id.*

<sup>23</sup> JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, HOUSING AMERICA'S OLDER ADULTS 7 (2014), [https://www.jchs.harvard.edu/sites/default/files/jchs-housing\\_americas\\_older\\_adults\\_2014-ch2\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/jchs-housing_americas_older_adults_2014-ch2_0.pdf) (50 and over); Erin Duffin, *Share of old age population (65 years and older) in the total U.S. population from 1950 to 2050*, STATISTA, <https://www.statista.com/statistics/457822/share-of-old-age-population-in-the-total-us-population/> (65 and over).

<sup>24</sup> *Life Expectancy*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/nchs/fastats/life-expectancy.htm> (last accessed Jan. 24, 2020).

<sup>25</sup> MALLOY, *supra* note 1, at 24–25.

<sup>26</sup> *Id.* at 211. For an example of a sustainability plan, see CENT. N.Y. REG'L PLAN. & DEV. BD., TOWN OF DEWITT: SUSTAINABILITY PLAN (2014), <http://www.townofdewitt.com/Sustainability3.aspx> (select the “Sustainability Plan” hyperlink to access the report).

<sup>27</sup> MALLOY, *supra* note 8, at 2–4; MALLOY, *supra* note 1, 237–39 (“Accessibility Impact Reports” or what I have previously referred to as “Accessibility Impact Assessments”). Explaining that such assessments would be similar to Health Impact Assessments and Environmental Impact Statements. The

(EIS), only they specifically address accessibility issues in a community. Every element of a comprehensive plan should reflect on accessibility — for example, housing, schools, retail, recreation, transport, water, and sustainability. Too often, accessibility issues are dealt with in terms of responses to litigation. For example, rather than planning ahead for sidewalk improvements, needed curb cuts, and the means for keeping sidewalks accessible during snowfalls, we most often see cities taking action only after being sued for failure to comply with the requirements of our disability laws.<sup>28</sup> Responding to litigation is not a good process for developing accessible communities. Planning needs to be proactive and should not simply be looked at as an added cost for local governments. Accessibility should be treated as a public good that benefits the community as a whole.<sup>29</sup> Given the number of people in our society who deal with disability, it is important that we plan for access and not simply respond to litigation.

#### ACCESSIBILITY AND THE MARKET

As we have discussed, land use law involves a system of public and private land regulation that connects and coordinates physical places and social spaces into communal networks.<sup>30</sup> 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. Consequently, given the prevalence of disability and the demographic trends indicating an increasing problem for many cities, one might wonder about the failure of the private market to adequately respond to the need for greater accessibility.

There are several reasons for the weak market response for greater accessibility that I have written about elsewhere.<sup>31</sup> Here, let me simply touch on a couple of points. For illustrative purposes let us first look at single-family residential homes. Many buyers of new homes select homes that have barriers to accessibility such as several steps required to enter the home, no accessible bathroom on the first floor, no bedrooms on the first floor, and hallways or kitchen counters that are not fully accessible.<sup>32</sup> Buyers argue that they should not be required to build a house to meet accessibility standards when they themselves do not have an accessibility

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AIRs would focus on the way land use regulation and property development affect the accessibility of a community.

<sup>28</sup> See generally *Willits v. City of Los Angeles*, 925 F.Supp.2d 1089, 1091 (C.D. Cal. 2013); *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011).

<sup>29</sup> MALLOY, *supra* note 1, at 196.

<sup>30</sup> *Id.* at 197–203 (discussing the network nature of inclusive design).

<sup>31</sup> See generally MALLOY, *supra* note 1, at 182–210.

<sup>32</sup> *Id.* at 182–210.

issue and their preferences are what matters when building a new house.<sup>33</sup> The basic claim is that building their private single-family home should be done in accordance with their preferences.<sup>34</sup> The problem with this view is that it fails to account for the full cost of building structures with barriers to access.<sup>35</sup> The typical house may be in the housing stock for 100 years, whereas the average American moves every 7 years.<sup>36</sup> The preferences that are selected by the first buyer continue for decades after that buyer will no longer occupy the structure. Since the original buyer does not fully account for the impact of the lack of accessibility over time, the private market for housing fails to achieve a desirable long-term social goal. There is a disconnection between the long-term impact on society from building these structures and the short-term investment horizon of the original buyers. Many people with preferences for houses that have barriers to accessibility grow older and then complain that there are not enough housing units in the housing stock that are suitable to their needs given that age has rendered them less mobile.<sup>37</sup>

A second element of this problem involves what I have referred to as “amenity pricing.” By this I mean that buyers are looking for home value based on the amenities within the housing structure.<sup>38</sup> To start, we have to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* See also Malloy, *supra* note 18, at 713 (explaining that “[y]oung 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.’”).

<sup>35</sup> *Id.* See Washburn v. Pima County, 81 P.3d 1030, 1039 (Ariz. Ct. App. 2003) (ruling that a building code requiring single-family residential homes to be accessible did not violate the Constitution); “The uncontested evidence established that approximately one percent of the population is confined to wheelchairs, but the county points out that a much larger percentage will suffer 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 to wheelchairs, the county concluded from these figures that the number of people confined 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.” *Id.*

<sup>36</sup> MALLOY, *supra* note 1, at 204; Malloy, *supra* note 18, at 727 (explaining “[i]n this respect we have a situation in which private parties are building and buying housing units based on short-term private individual design preferences which create potentially negative long-term path-dependent implications for future users of our long-term national housing stock.”).

<sup>37</sup> MALLOY, *supra* note 1, at 182–210. Additionally, “many people find themselves with short-term mobility impairment during their lifetime (from injury for example), thus we need to build in basic design features that reflect concerns for public health, safety, and welfare.” Malloy, *supra* note 18, at 741.

<sup>38</sup> MALLOY, *supra* note 1, at 191.



understand that a house is constructed in terms of square feet. Housing costs are typically considered in terms of cost per square foot.<sup>39</sup> In essence, the housing structure defines a scarce asset in terms of available square feet. Within this limited space, one can place a variety of rooms and amenities. The problem this presents for building accessible housing is that most consumers look to maximize amenities and this is the way that real estate brokers promote a sale.<sup>40</sup> Given the same available square footage, most buyers would rather have a less accessible four-bedroom home with two full bathrooms than an accessible three-bedroom house with one bathroom — the difference being that the three-bedroom house has more space for mobility around the kitchen and dining areas, much wider hallways, and a bigger bathroom with a shower area that can accommodate a wheelchair.<sup>41</sup> Making the hallways wider and the bathroom bigger consumed more square feet than would be allocated to these uses in a house not designed to accommodate a wheelchair user. In most cases, getting the same number of amenities (rooms, for example) in a home built to accommodate a wheelchair user will require more square feet than a house built to standards that do not fully accommodate a wheelchair user. Thus, to obtain the same amenities, the accessible house will generally have more square footage, and this adds to the cost of the house. The cost of the house is important because a 1% increase in the cost of buying a home can eliminate a million people from the housing market.<sup>42</sup> Consequently, builders and policy makers are often legitimately concerned about a negative impact on affordability and on construction activity if accessibility is pursued too aggressively and housing designs do not reflect consumer preferences.

Further complicating the amenity pricing problem is the fact that housing is often produced as a mass production good rather than a custom good in today's market.<sup>43</sup> This means that people in a corporate headquarters design a limited number of floorplans to offer homebuyers and they operate on volume and work with precut woods and standardized features that permit them to take advantage of economies of scale. In this model of mass production, variations are not easy to get because any variation from the corporate-approved plan becomes a custom job that

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<sup>39</sup> Elizabeth Weintraub, *Using Price per Square Foot to Figure Home Values*, BALANCE (last updated Apr. 3, 2020), <https://www.thebalance.com/can-i-use-the-price-per-square-foot-to-figure-home-values-1798754>.

<sup>40</sup> MALLOY, *supra* note 1, at 191.

<sup>41</sup> *Id.* at 191–92.

<sup>42</sup> AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 215 (Nestor M. Davidson & Robin Paul Malloy eds., 2009); Na Zhao, *Households Priced-Out by Higher House Prices and Interest Rates*, NAT'L ASS'N OF HOME BUILDERS, <https://www.nahb.org/news-and-economics/housing-economics/Housings-Economic-Impact/Households-Priced-Out-by-Higher-House-Prices-and-Interest-Rates> (last visited Feb. 4, 2020).

<sup>43</sup> MALLOY, *supra* note 1, at 190.

costs money and slows down production. Thus, rather than making accessible home models, many developers offer homes with standard barriers to accessibility, such as steps rather than ramping, and simply refer buyers to after-market contractors who can be hired to come in and customize accessibility. Though this is a more expensive way to achieve the goal of accessibility, it is a way that the developer can pass the issue and expense onto the homebuyer. In the alternative, some developers may offer new housing in communities limited to residents age fifty-five and older. These housing units are generally more accessible, but they are isolated and segregated from the ‘normal’ neighborhoods within the greater community.

Moving away from the example of single-family housing, consider an example of a collective coordination problem involving public sidewalks and snow removal. In snow-belt regions of the country, sidewalks are often covered with snow during the winter months. This makes them inaccessible to people with mobility impairments.<sup>44</sup> Some homeowners shovel the snow off the sidewalk in front of their home and some businesses do the same. Others do not. Some business owners say that their customers drive to their locations and they do not want to spend time and money clearing the sidewalks when they are already spending resources on clearing the parking lots. The problem is that if only discrete parts of the sidewalk are cleared, the system as a whole is useless since a person cannot really navigate around town when every other house or every other block has an impassable sidewalk. While an accessible sidewalk can generate benefits for the public at large, many people just see a high cost for snow removal and calculate that the effort only benefits a few people. They conclude that it just does not make sense to spend the amount of money required when they see little or no benefit for themselves.

The above sidewalk example helps us appreciate another issue that we need to understand with respect to the market and accessibility. Accessibility is an integrated concept that requires coordination and cooperation. In many ways, accessibility of the built environment is a public good and as such is under-produced by the private market.<sup>45</sup> While not a perfect fit for the technical definition of a public good in economics, accessibility can generally be understood as a good that can be consumed by one individual without reducing availability to others (nonrivalrous), and it is a good that is not readily excludable from use by other members

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<sup>44</sup> Margaret E. Reuter, *To Shovel or Not to Shovel*, 1 CITY L. 97, 99 (1995) (“Clearing snow and ice is part of the City’s responsibility to maintain streets and sidewalks in a safe condition.”); Robin Paul Malloy & Sarah Spencer, *Sidewalks and the Americans with Disabilities Act*, 41 ZONING & PLAN. L. REP. 1 (2018); Robin Paul Malloy et al., *Land Use Law and Sidewalk Requirements Under the Americans with Disabilities Act*, 51 REAL PROP. TR. & EST. L.J. 403 (2017).

<sup>45</sup> See generally MALLOY, *supra* note 1.

of the community once it is available (nonexcludable).<sup>46</sup> A building doorway that opens automatically or a curb cut that makes sidewalks easier to navigate both enhance access for someone using a wheelchair and also for any other person. These benefits are available to everyone using the doorway and using the sidewalk. The problem with a public good is that even though it generates public benefits for the broader community, it is often difficult to motivate self-interested individuals to take collective action in an effort to produce or enhance the availability of the good. This is especially true if these self-interested individuals fail to see how collective action benefits them individually, and if they feel that collective action is costly while providing only a marginal benefit to a small percentage of the population in their community.<sup>47</sup>

To advance a goal of promoting accessible communities, it helps to think about the idea of accessibility as a public good and appreciate that this public good, with respect to the built environment, arises within a land use network. The market for integrated accessibility across the built environment is different from the market for ordinary production goods, and the difference implies further difficulty in expecting private market mechanisms to produce an appropriate level of accessibility for a community. The built environment, while built of many individual pieces, is itself an integrated network. This network, with regard to accessibility and sustainability, produces “quality of life” outcomes that are not fully expressed in the design of individual structures or places. The built environment is a kind of “eco-system” that reflects interconnectivity among all of its component parts even though the parts are produced by a mix of numerous private and public actors.<sup>48</sup> This interconnectivity of the built environment more closely resembles the production of a network good than a typical market good, and this implicates a concern as to the ability of innumerable self-interested individuals to make choices that simultaneously advance the public interest.<sup>49</sup>

In thinking about local communities as a type of network, we have to understand that networks involve interrelated goods and services, and consumption is typified by the need to have a system.<sup>50</sup> For example, to get

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<sup>46</sup> *Id.* at 197–210 (presenting the network nature of inclusive design).

<sup>47</sup> *Id.* at 194–95 (presenting that the reason more people may be willing to invest in “green” or sustainable development is because of the indirect cost benefits to the consumer).

<sup>48</sup> *Id.* at 197–210; see generally Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005).

<sup>49</sup> MALLOY, *supra* note 1, at 197.

<sup>50</sup> See generally Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); MANUEL CASTELLS, *THE RISE OF NETWORK SOCIETY* (2010); *THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE VOL. I* 147 (2000); BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF*

value from a cell phone you need a network system for phone services in addition to your individual communication device; it is the system that gives the cell phone its primary value.<sup>51</sup> Likewise, a sidewalk system has to be connected and maintained as a system and not simply as a series of disconnected pieces of concrete. Moreover, to get value from the tools, medical advances, and technology that enhance an individual's mobility, we need a connected community of accessible places and spaces that are easily navigated by everyone, including people with disabilities. We need to think and plan in terms of a web of interconnected places and spaces. An accessible community must be a connected community where people can fully engage and participate in all aspects of community life. Furthermore, we have to remember that land use decisions are not simply matters of economic calculus. Rather, they are informed by a number of factors including social, political, cultural, and aesthetic values.<sup>52</sup> With respect to people with disabilities, including people with mobility impairment, the law has already established their rights, and communities must focus on the required efforts needed to develop opportunities for accessibility. This need for accessibility is not a matter for debate. The only issues up for debate and discussion involve determining how to best fulfil the mandates of the law.

#### LEGAL ISSUES CONFRONTING LOCAL PLANNING AND ZONING OFFICIALS

There are many legal issues at the intersection of land use and disability law and many of them go beyond issues of compliance with design guidelines.<sup>53</sup> Many of these legal issues involve defenses available to local governments and businesses when charged with complaints of discrimination based on lack of greater accessibility. Accessibility is one

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SHARED RESOURCES (2012); KECHENG LIU, SEMIOTICS IN INFORMATION SYSTEMS ENGINEERING (2000); Frischmann, *supra* note 48.

<sup>51</sup> Frischmann, *supra* note 48, at 971; MALLOY, *supra* note 1, at 197 (see footnote references as well).

<sup>52</sup> MALLOY, *supra* note 1, at 197.

<sup>53</sup> U.S. ACCESS BOARD, ARCHITECTURAL BARRIERS ACT (ABA) STANDARDS (2015), <https://www.access-board.gov/files/aba/ABASTandards.pdf> (standards implementing the Architectural Barriers Act (ABA)); U.S. DEP'T OF JUSTICE, ADA REQUIREMENTS, [https://www.ada.gov/revised\\_effective\\_dates-2010.htm](https://www.ada.gov/revised_effective_dates-2010.htm) (2011) (specifying that new construction or work on altered state and local government facilities that began on or after March 15, 2012, must comply with the 2010 ABA Standards, new construction or work on altered state and local government facilities that began on or after September 15, 2010, and before March 15, 2012, must comply with either the 1991 ABA Standards, the Uniform Federal Accessibility Standards (UFAS), or the 2010 ABA Standards, and that any new construction or alterations that began before September 15, 2010, must comply with either the 1991 ABA Standards or the UFAS); 28 C.F.R. § 36.401 (defining new construction as a building that was designed for first occupancy beginning January 26, 1993, or later, and an altered facility as an existing building that undergoes alterations).

important issue confronting our cities, but under our 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, it is therefore important to know the actual legal requirements of an action and to frame arguments in response to those requirements.

To begin, the federal disability laws most relevant to land use planning and zoning are found in the following Acts: Americans with Disabilities Act (ADA),<sup>54</sup> Fair Housing Act (FHA),<sup>55</sup> and the Rehabilitation Act (RHA).<sup>56</sup> In general, each of these Acts prohibits discrimination against people with disabilities, and collectively they contain provisions addressing accessibility standards applicable to facilities, programs, services, and activities of state and local governments and to the provisioning of housing. As to the prohibition against discrimination, discrimination would be evidenced by noncompliance with accessibility requirements, and by treating people with disabilities in a different and negative way relative to people without disabilities.<sup>57</sup> The three methods of demonstrating discrimination include: disparate treatment, disparate impact, and the failure to provide a reasonable accommodation when properly requested.<sup>58</sup> In addressing legal claims, it is important to understand that compliance with accessible *design* guidelines is predominantly handled by architects, planners, and other professionals

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<sup>54</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101–12213 (2006)); *see also* MALLOY, *supra* note 8; MALLOY, *supra* note 1, at 112–120; Robin Paul Malloy, *Land Use Law and Disability*, 38 ZONING & PLAN. L. REP. 1 (2015).

<sup>55</sup> Fair 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))); *see also* MALLOY, *supra* note 8; MALLOY, *supra* note 1, at 112–20; Malloy, 38 ZONING & PLAN. L. REP., *supra* note 54.

<sup>56</sup> Section 504 of the Rehabilitation Act (RHA) of 1973, codified in Section 794 of the U.S.C. as amended by the Rehabilitation Act of 1978, 29 U.S.C. § 794 (2006). Section 504 applies only to programs and activities that receive federal funds. *See also* MALLOY, *supra* note 8; MALLOY, *supra* note 1, at 112–20; Malloy, 38 ZONING & PLAN. L. REP., *supra* note 54.

<sup>57</sup> MALLOY, *supra* note 8, at 25–37.

<sup>58</sup> Our disability laws prohibit discrimination against people with disabilities. Under the ADA see 42 U.S.C. Sec. 12132; under the RHA see 29 U.S.C. sec. 794(a); and under the FHA see 42 U.S.C. sec. 3605, sec. 3604(f) (1). MALLOY, *supra* note 8, at 51–54 (2020). There are three Methods of demonstrating discrimination. *See id* at 55–86. For a case example of disparate treatment, see *Candlehouse, Inc. v. Town of Vestal*, No. 3:11-CV-0093, 2013 WL 1867114 (N.D.N.Y. May 3, 2013). For an example of disparate impact, see *id* and see *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project*, 135 S.Ct. 2507, 2511–12 (2015). For an example of reasonable accommodation, see *Austin v. Town of Farmington*, 826 F.3d 622 (2d Cir. 2016), and *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 922–23 (10th Cir. 2012).

dealing with matters of construction design and with code enforcement.<sup>59</sup> The key legal issues for lawyers tend to go beyond matters of design. Standard lawyering concerns start with determining who is a person covered by our various disability laws (ADA, FHA, RHA) and identifying the appropriate Act applicable to the situation. There are also preliminary issues related to legal standing to bring a disability claim, particularly because we often have organizations suing on behalf of clients with disabilities.<sup>60</sup> This means dealing with third-party standing issues.<sup>61</sup> A related complexity arises because some of these organizations work with a mixed client base, with some clients meeting the definition of having a disability and others not meeting the definition. Thus, a question arises with respect to how many people within a group have to be persons protected by the disability laws in order for the third-party organization to properly assert standing.<sup>62</sup>

Many of the non-design issues confronting lawyers involve matters of dealing effectively with definitions and classifications. Our disability laws present many issues on this front. Key definitional concerns involve determining the meaning of such terms as: new construction; alterations; facilities; programs, services, and activities of state and local government; readily achievable; and reasonable accommodation or reasonable modification. These are not issues for architects or designers, nor are they issues that can be handled by disability rights lawyers who lack expertise in land use and zoning law. Issues at the intersection of disability and land use law require attention by professionals knowledgeable in both areas of law. It is important to understand both the rights of a claimant with a disability and the obligations of local government.

Unlike the United Nations Charter on the Rights of Persons with Disabilities, the disability laws of the United States do not create any positive human rights.<sup>63</sup> The focus of U.S. law is on preventing unlawful discrimination. Furthermore, U.S. law balances the goal of advancing accessibility of the built environment with the cost of achieving this goal. For instance, programs, services, and activities of local government (this includes planning and zoning) must be accessible, but a defense to a claim of lack of accessibility includes evidence that compliance imposes undue financial or administrative burdens on the defendant.<sup>64</sup> Likewise, a claim for a reasonable accommodation or modification includes a cost and

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<sup>59</sup> MALLOY, *supra* note 8, at 8–12.

<sup>60</sup> *Id.* at 109–14.

<sup>61</sup> See *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F.Supp.2d 723 (W.D. Pa. 2010).

<sup>62</sup> See *id.*; see also *Candlehouse, Inc. v. Town of Vestal*, *supra* note 58.

<sup>63</sup> United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 2515 U.N.T.S. 3. There are 163 signatories but the U.S. is not one of them.

<sup>64</sup> *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002).

benefit analysis with respect to the reasonableness of the request.<sup>65</sup> And, when dealing with a claim against a private property owner operating a place of public accommodation, the demand that barriers to access be removed from pre-existing structures and facilities is subject to a defense that may include a cost and benefit analysis to evaluate if a proposed change is “readily achievable.”<sup>66</sup> Cost and benefit analysis is less relevant to the evaluation of new construction and alterations. In the case of new construction and alterations, facilities and structures must be accessible to people with disabilities to the maximum extent possible.<sup>67</sup> The only defense is that of structural impracticability.<sup>68</sup> Evidence of high cost is not determinative.<sup>69</sup> Evidence must confirm that there are real engineering or

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<sup>65</sup> MALLOY, *supra* note 8, at 62–74. There are three criteria. The three criteria are: (1) it must be reasonable (as demonstrated by a cost and benefit analysis); (2) it must be necessary (applying a ‘but for’ test); and (3) it must not fundamentally alter the program, service, activity, or plan from which the exception is being requested. *See also* Cinnamon Hills Youth Crisis Ctrs., Inc. v. Saint George City, *supra* note 58; Wis. Cmty. Servs. Inc., v. City of Milwaukee, *supra* note 8.

<sup>66</sup> 42 U.S.C. § 12182 (2010).

<sup>67</sup> MALLOY, *supra* note 8, at 10–12, 95–98.

<sup>68</sup> 28 C.F.R. § 35.151 (2011).

<sup>69</sup> MALLOY, *supra* note 8, at 95–98. The language of the provision says that new construction and alterations “shall” be accessible to “the maximum extent feasible.” There are no provisions for considering costs, as there are in other provisions of the ADA. 28 C.F.R. § 35.151 (2011) provides:

a) *Design and construction.* (1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) *Exception for structural impracticability.*

(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

*See also* Roberts v. Royal Atl. Corp. 542 F.3d 363, 372 (2008):

other concerns that make a more accessible design structurally impracticable, and this is a difficult standard to meet in most cases.<sup>70</sup>

When dealing with obligations that impose costs and administrative burdens on local governments and property owners, it is important to evaluate the cases to determine the best evidence for demonstrating the asserted cost and benefits, and the various administrative and financial burdens. Legal issues in this area also include definitional problems such as determining the meaning of a facility and an alteration. Some people might be surprised to learn that sidewalks are facilities.<sup>71</sup> At the same time, sidewalks are also within the definition of being a program, service, or activity of state and local government.<sup>72</sup> Different legal standards apply in the case of facilities relative to programs, services, and activities of local government. This means that when it comes to the new construction or alteration of a sidewalk, a defense to accessibility is structural impracticability, but when addressing maintenance and snow removal the defense involves the lower standard of showing that making it accessible imposes an undue financial or administrative burden.<sup>73</sup> Moreover, people have to consider the ambiguity in the term “alterations.”<sup>74</sup> The problem is one of determining the line between doing repairs and upkeep relative to making a change that rises to the level of an alteration.<sup>75</sup> This is important because if the work rises to the level of an alteration it must be accessible

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Section 12183's "maximum extent feasible" requirement does not ask the court to make a judgment involving costs and benefits. Instead, it requires accessibility except where providing it would be "virtually impossible" in light of the "nature of an existing facility." 28 C.F.R. § 36.402(c). The statute and regulations require that such facilities be made accessible even if the cost of doing so — financial and otherwise — is high. Indeed, in promulgating the implementing regulations, the Department explicitly rejected suggestions that cost be considered with respect to this provision. *See* Title III Final Rule, 56 Fed. Reg. at 35,581 ("The legislative history of the ADA indicates that the concept of feasibility only reaches the question of whether it is possible to make the alteration accessible in compliance with this part.

*Id.* at 372. *See generally* De La Rosa v. 597 Broadway Dev. Corp., No. 13cv7999, 2015 WL 7351540 (S.D.N.Y. Aug. 4, 2015) (citing *Roberts* and referencing the above quote. *Id.* at 22–23).

<sup>70</sup> *Id.*

<sup>71</sup> *Willits v. City of Los Angeles*, *supra* note 28, at 1092–94 (noting that cities may not put forth an “undue financial burden” defense for new construction and alterations).

<sup>72</sup> *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002); *Frame v. City of Arlington*, 657 F.3d 215, 226–27 (5th Cir. 2011).

<sup>73</sup> MALLOY, *supra* note 8, at 87–100.

<sup>74</sup> *Kinney v. Yerusalim*, 812 F.Supp. 547, 550 (E.D. Pa. 1993).

<sup>75</sup> *Id.* at 571.



to the fullest extent possible subject only to demonstrating that greater accessibility is structurally impracticable.

As to discrimination. It is an act of discrimination to fail to comply with the requirements of our disability laws.<sup>76</sup> In this area of law, the ADA, FHA, and RHA are all treated the same in terms of the analysis and the methods of demonstrating discrimination.<sup>77</sup> Three standard methods of demonstrating discrimination apply. These methods include disparate treatment, disparate impact, and failure to provide a reasonable accommodation/modification when one is requested.<sup>78</sup> People familiar with the Fair Housing Act will be well aware of the methods of demonstrating disparate treatment and of disparate impact but they might be less familiar with the third method: the failure to provide a reasonable accommodation or modification.<sup>79</sup> Therefore, I offer some introductory guidance on the subject.

First, a request for a reasonable accommodation is generally a request for an exception to a rule or procedure, whereas a reasonable modification is usually a request for an adjustment in the physical environment, such as providing a wider doorway. A request for a reasonable accommodation/modification is something that may typically arise in a planning and zoning context. This is because it is a method of seeking an exception to the zoning code and often involves a request that resembles that of an area or use variance.<sup>80</sup> Importantly, it should not be confused with a request for a variance because a variance runs with the land, and in contrast, the granting of a reasonable accommodation/modification is personal.<sup>81</sup> Granting a reasonable accommodation/modification involves an interpretation of a code or plan in light of the person's disability and the application of the appropriate regulations. Many disability rights advocates believe that if a person has a disability they are automatically entitled to an accommodation. This is incorrect. A person with a disability is only entitled to a *reasonable* accommodation and that requires a fact-specific determination.<sup>82</sup> Moreover, any accommodation that might be

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<sup>76</sup> MALLOY, *supra* note 8, at 63–67; MALLOY, *supra* note 1, at 211–32.

<sup>77</sup> MALLOY, *supra* note 8, at 63, 67; MALLOY, *supra* note 1, at 227.

<sup>78</sup> MALLOY, *supra* note 1, at 144–48.

<sup>79</sup> See e.g., *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, *supra* note 58; *Candlehouse, Inc. v. Town of Vestal*, *supra* note 58.

<sup>80</sup> MALLOY, *supra* note 8, at 63–67; MALLOY, *supra* note 1, at 211–32.

<sup>81</sup> MALLOY, *supra* note 8, at 62–85; see, e.g., *Austin v. Town of Farmington*, *supra* note 58; *Cinnamon Hills Youth Crisis Ctrs., Inc. v. Saint George City*, *supra* note 58.

<sup>82</sup> See MALLOY, *supra* note 8, at 62–74 (discussing requirements of a reasonable accommodation and a reasonable modification). See also *Austin v. Town of Farmington*, *supra* note 58; *Cinnamon Hills Youth Crisis Ctrs., Inc. v. Saint George City*, *supra* note 58, at 922–23; *Nikolich v. Village of Arlington Heights, Ill.*, 870 F.Supp.2d 556, 565 (N.D. Ill. 2012). Cf. *Cinnamon Hills Youth Crisis Ctrs.*, 685 F.3d at 919 (there is a duty under the RHA and the FHA to make a reasonable modification or accommodation in order to avoid discrimination

provided is determined by the decision-maker and it may or may not be the particular accommodation that the person with a disability prefers. In seeking a reasonable accommodation, the first requirement is that the claimant seeking the accommodation/modification has to raise the issue and request it. The claimant also has the burden of making a prima facie showing that she is a person with a disability and that her request satisfies three criteria: 1) it is *reasonable* using a cost and benefit analysis; 2) it is *necessary* to address her disability using the “but for” test used in the FHA; and, 3) that granting of the requested accommodation/modification *will not fundamentally alter* the program, service, or activity being challenged.<sup>83</sup> After making a prima facie showing, the planning or zoning officials must offer evidence to rebut the claimant if they do not wish to grant the requested accommodation/modification. The planning or zoning board may either deny the request or offer a different accommodation/modification than the one requested. In granting an accommodation/modification, the planning or zoning board may put conditions on it even if such conditions raise the cost to the person with a disability. These conditions must be reasonable. Decision-making as to the three criteria relevant to a request for a reasonable accommodation/modification must be rational and supported by substantial competent evidence on the record.

A reasonable accommodation can be more complicated than it first appears. As a simple example, let us consider a situation of a homeowner with a mobility impairment seeking an area variance to put a wheelchair ramp at the front entrance to her home. Assume the ramp will extend out from the home and intrude on a zoning code front yard setback requirement. The claimant, homeowner, files with the local zoning board of appeal for a variance to the code. A variance is addressed under state and local law and has specific criteria. Assume the zoning board denies the request under its zoning law. Then, claimant makes an alternative request for an exception to the code based on a reasonable accommodation under the ADA and FHA. Now the zoning board must make a decision based on application of the three criteria for an accommodation. The board might rule for or against the request, but let us assume they agree to permit the ramp. Now additional issues follow. Can the board approve the ramp but not the one that claimant proposes which her son is going to build for her out of two-by-fours and plywood purchased at the local hardware store? Can the board require that the ramp be built of certain specified materials and designed in a particular way to blend in with the home and neighborhood, even if this will triple the cost of the ramp? Can the board

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where the criteria are met); *Wis. Cmty. Serv., Inc. v. City of Milwaukee*, *supra* note 8, at 746 (under Title II of the ADA, a reasonable accommodation and modification must be made when the criteria are met); *MALLOY*, *supra* note 8, at 73 (the courts have read in a general duty to accommodate under the ADA Title II).

<sup>83</sup> See *Austin v. Town of Farmington*, *supra* note 58, at 630.

condition the approval of the ramp on a requirement that the ramp be removed at the time the claimant leaves the property, even though this too raises costs? The answer to each of these questions is yes, within reason.

The same three criteria for an accommodation apply when a claimant is seeking a use variance, such as making a use of the property that is otherwise not permitted in a given zone.<sup>84</sup> For example, perhaps an organization wishes to locate a drug rehabilitation facility in a commercial business zone that does not permit such a use. Even though a city may have other zones that permit the intended use, claimant seeks a permit to conduct the use in the commercial business zone. When the city denies the variance application, the claimant requests a reasonable accommodation. As with the ramp discussed earlier, the city zoning officials must go through the criteria and then make a ruling based on the three criteria. Their decision is subject to rational basis review and must be supported by substantial competent evidence on the record.<sup>85</sup> In addition to the claimant who is making a request for an accommodation, neighbors are also able to join in these public planning and zoning board hearings. They can, as in any zoning hearing, contribute to the fact-finding process by offering evidence that weighs for or against any or all of the three criteria.

Historic districts and historic buildings have special rules that are applicable to them.<sup>86</sup> So too, places of public accommodation, private clubs, and residential subdivision housing.<sup>87</sup> In addition, there are a number of procedural nuances in the Acts that can make these matters more complex. The important thing to understand about the issues arising at the intersection of disability and land use law is that they involve a lot more than the designing of doorways, bathrooms, and office spaces. Design issues, while important to accessibility, are distinct from the legal issues that need to be addressed by property, land use, and zoning lawyers.

#### CONCLUSION

As professionals working in the areas of property, land use, and zoning law, we need to be concerned with advancing the accessibility of

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<sup>84</sup> See, e.g., *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, *supra* note 8, at 751.

<sup>85</sup> The rational basis standard supported by substantial competent evidence on the record is the standard of review typically applied in administrative law to decision making bodies exercising quasi- adjudicative decision making. This standard has been repeatedly held to be applicable to the standard decisions of local government entities such as a zoning board of appeal. While some have argued that the standard should be higher when dealing with people with disabilities, the last word from the U.S. Supreme Court did not raise the standard to intermediate or strict scrutiny. Thus, the rational basis standard continues in land use and zoning situations even when dealing with people with disabilities. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

<sup>86</sup> MALLOY, *supra* note 8, at 129–31.

<sup>87</sup> *Id.* at 119–28; MALLOY, *supra* note 1, at 112–20.

our communities. We need to make our communities safe and easy to navigate for everyone, including those with disabilities and people seeking to age in place. Moreover, we need to ensure that our residents have convenient access to the facilities, services, programs, and activities that assist them in dealing with their needs and that make it possible to fully integrate everyone into the opportunities of being a full and active participant in community life. In order to accomplish these things, we have to consider matters of design and of land regulation. At the same time, balance must be maintained so as to respect the rights of property owners, and to facilitate the coherence and stability of local planning and zoning efforts. To accomplish this, we will need to bring property, land use, and zoning professionals together with disability rights advocates. Collectively, we can make certain that planning and zoning are done in a way that protects the rights of people with disabilities, while complying with the requirements of traditional planning and zoning law.

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