

CLAIMS BRIEF



Avoiding Discriminatory Zoning Practices

By Sherri Butler, Claims & Legal Services Analyst.

In 1990, Congress enacted the American with Disabilities Act (“ADA”)(42 U.S.C. § 12101 et seq.) as a comprehensive plan to eliminate discrimination against persons with disabilities.¹ The scope of the ADA is broad; most people know that the ADA prohibits discrimination in employment and requires disabled persons to have access to buildings, transportation, and communications services. At the same time, local governments must consider the ADA in every aspect of providing services. Title II of the ADA (42 U.S.C. § 23131-12161) provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Accordingly, zoning as a governmental process, falls within the purview of the ADA.

The ADA does not stand alone in protecting people with disabilities from discriminatory zoning decisions. The Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601) prohibits discrimination against the providers and clients of residential treatment programs. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) prohibits discrimination by all services that receive federal financial assistance. The ADA expands the protection of the Rehabilitation and Fair Housing acts to include non-residential programs that are privately funded.

Local governments run afoul of the ADA when zoning ordinances and administrative practices and decisions have the effect of unfairly limiting the access of people with disabilities to treatment and supportive services. It is this type of “zoning discrimination” claim that recently resulted in one of the largest jury verdicts awarded against a LGIT member in Trust history. That action arose from a member’s refusal to issue an occupancy permit to allow a mental health provider to locate its facility within the downtown commercial business district. The member’s planning and zoning commission determined that the mental health provider’s use was an “adult day care facility” and not a medical office, a use, which was not allowed in the commercial district. Based upon the facts presented at trial, the jury,

¹ 42 U.S.C. § 12101(b).

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unfortunately, determined that the mental health provider's use did fit within the permitted uses of the commercial business district, and that the member had intentionally violated the ADA. Indeed, the jury awarded plaintiffs punitive damages against one elected official whose personal actions were viewed as intentionally discriminatory.

What are the elements of discriminatory zoning?

Unintentional or Intentional

Discrimination under the ADA may be intentional or unintentional, however, evidence of a discriminatory or malicious intent is not required to prove an ADA violation. If a local government zoning decision has even the unintended effect of limiting or segregating disabled persons' access to programs and services, that action violates the ADA.

On the other hand, a service provider may prevail in a claim alleging intentional discrimination when it can show that a zoning decision was motivated by generalized fears or stereotypes about people with disabilities. For instance, zoning decisions related to treatment programs are often accompanied by concerns about the impact on traffic, congestion, or neighborhood character. When these concerns are legitimate they can usually be resolved to the satisfaction of the community. However, if these concerns are pretexts for stereotypes the ADA is intended to eliminate, a disabled person or treatment provider may be able to establish that the adverse zoning action was tainted by discriminatory motivation. The U.S. Supreme Court² has held that an inquiry into intentional motivations will include the following factors:

- Whether the impact of an official action bears more heavily on a protected class
- The historical background of the challenged decision
- The specific sequence of events leading up to the decision
- Departures from the normal procedural sequence
- Departures from substantive criteria
- Legislative or administrative history
- Contemporaneous statements made by the members of the zoning board

Of course, public officials rarely announce on the record that they are taking a particular action because they intend to discriminate against the disabled. Thus, courts will not only review official records, but also will consider even circumstantial evidence of off-the-record remarks or unusual actions or events, to determine whether a zoning decision was intentionally discriminatory. Seemingly benign remarks or benevolent attempts "to do what is best for people with disabilities" may be reviewed to evidence intentional discrimination, even though the motivation was non-malicious. Damages for unintentional ADA discrimination are limited; damages for intentional discrimination are not capped and a public official may be held personally responsible for punitive damages if a jury deems his or her actions intentional.

In the LGIT member lawsuit mentioned above, the jury heard evidence that one councilperson had personally promoted a petition by local business owners to prevent the mental health provider's relocation in the downtown district. After the council received the petition, which was signed by many business owners, the council rescinded a previously adopted resolution to endorse the mental health provider's loan application to the state. Although the council and the councilperson argued that there was no intent to discriminate and that their actions had other motivations, the jury interpreted their

² *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977).

actions as intentionally discriminatory, and sanctioned the individual official who promoted the petition with substantial punitive damages.

Disparate Impact

The ADA further prohibits governments from using standards, criteria, or administrative methods that have a disparate impact upon people with disabilities. A disparate impact claim arises when neutral rules or policies are applied in ways that burden a protected class of citizens, such as the disabled. For example, a hearing requirement in a zoning ordinance, which disproportionately affects certain treatment providers for disabled people, even if it also affects services for non-disabled individuals, may violate the ADA. In *Smith-Berch v. Baltimore County*, 115 F. Supp. 2d 520 (D. Md. 2000) the U.S. District Court invalidated Baltimore County's zoning ordinance because it excluded methadone clinics, but not other drug treatment or counseling programs, from locating in a business district. The county's policy imposed a public hearing requirement only on methadone clinics, thereby disproportionately impacting program providers who provided services to opiate addicts.

ADA regulations prohibit public entities, in determining the location of a facility, from making selections that have the effect of discriminating against people with disabilities or impairing the accomplishment of the objectives of a service, program, or activity for disabled people.³ In the LGIT member lawsuit mentioned above, it would appear that the local zoning administrative procedures were not well defined. After receiving the citizen petition, the town administrator referred the occupancy permit to his planning and zoning commission because he was concerned about proceeding without some input from the commission. Unfortunately, the member was unable to show that it had, in the past, referred any "occupancy permit applications" to the commission. The jury found this to be evidence of disparate treatment and intentional discrimination.

Segregation

The ADA also requires public entities to administer services, programs and activities to people with disabilities in integrated settings appropriate to their needs. Consequently, persons with disabilities must be given the opportunity to participate in community-based services. Local governments must avoid zoning regulations and/or zoning decisions that have the effect of segregating people with disabilities into certain areas of the land-use map or perpetuating their need to remain in institutions.

Reasonable Modifications

Federal ADA regulations require that public entities make reasonable modifications in their policies, practices, or procedures when the modifications are necessary to avoid discriminating against disabled people unless the public entity can demonstrate that making a modification would fundamentally alter the nature of the service, program or activity. The public entity carries the burden of proving that a proposed modification would materially alter the service or program.

In the zoning context, modifications are considered reasonable if they "[do] not cause any undue hardship or fiscal or administrative burdens"⁴ on the local government or undermine the basic purpose that the zoning ordinance achieves. Most courts have held that proposed zoning code modifications do

³ 28 C.F.R. §35.130.

⁴ *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37 (2d Cir. 1997).

not impose significant fiscal or administrative costs on local governments. Furthermore, when a proposed modification is compatible with surrounding uses, and does not have significant adverse impact or effects on the neighborhood, adopting a reasonable modification that serves to accommodate disabled persons or service provider does not undermine the basic zoning code.

The comprehensiveness of the ADA pose dilemma for local zoning officials and decision-makers. Are community concerns valid? Should the disabled person or provider be accommodated? In *Mastandrea v. North*, 361 Md. 107 (2000⁵), the Court of Appeals approved a zoning board's consideration of the ADA in granting a critical areas variance on the grounds that the ADA superseded a county zoning ordinance. It is absolutely essential that local government officials and legal advisors understand the ADA and how it applies to land-use planning and zoning.

How can members avoid discriminatory zoning?

- Zoning ordinances, policies, regulations, and administrative practices must be reviewed by legal counsel for ADA compliance
- Develop and publish clear administrative procedures for the zoning process and apply the process consistently to all zoning applications
- Zoning uses must be clearly defined
- Local zoning ordinances must contain provisions that a zoning board shall make reasonable accommodation for disabled citizens and establish criteria for making such accommodations
- Zoning administrators, officials, administrators and legal counsel should receive training on the impact of the ADA in the context of the zoning process
- Zoning administrators and decision-makers must refrain from making off the record comments regarding ADA zoning applications
- Zoning administrators, public officials, and decision-makers must refrain from participating in the public discourse regarding zoning applications

⁵ *Mastandrea* involved the Chesapeake Bay Critical Area Commission's review of a county board of appeals' grant of a variance from critical area regulations for a brick-in-sand pathway designed to give the landowners' disabled daughter wheelchair access to creek frontage on landowners' residential property. The Circuit Court overturned the board's decision and explained its judgment as follows: the ADA had no application to the variance because it applied only to "places with public access; and the ADA does not apply to zoning ordinance enforcement." The Circuit Court ordered the removal of the walkway. The landowners appealed and the Court of Appeals stepped in to decide the case in favor of the ADA.

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