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A Primer on Disability for Land Use and Zoning Law

Robin Paul Malloy*

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I. Introduction

Approximately 20 to 30 percent of American families have a family member with a disability, many with a mobility impairment.¹ This is a large percentage of the population. Statistically, disability rates increase as a population ages and the trend in America is toward an aging population. This means that we can expect rates of disability to increase over time. In addition, many people have periods in their life when they have tem-

¹ ROBIN PAUL MALLOY, *LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES* 5 (2015); ROBIN PAUL MALLOY, *LAND USE AND ZONING LAW: PLANNING FOR ACCESSIBLE COMMUNITIES* 7 (2017).

porary disabilities, such as when they have a broken leg or after surgery on a shoulder or a hip. Moreover, many people need access to disability services and programs. They need the availability of group homes, senior housing, drug rehabilitations centers, medical marijuana dispensaries, and counseling clinics. Disputes over the requirement to provide these uses and services in a community and over where to locate them has become a source of increased litigation. Land use and zoning professionals are finding it necessary to navigate disability law in order to do their work without violating the rights of people with disabilities.

This Primer is designed for people familiar with property law and land regulation (planning and zoning), and with little experience with disability law. The goal is to present an introduction that facilitates understanding of the intersections between land use law and disability. In general, the legal requirements of primary concern are limited, such that only a few parts of our expansive disability law are most relevant to the vast majority of planning and zoning matters. This Primer will guide the reader through these key provisions. The Acts discussed in this Primer include the Americans with Disabilities Act (ADA), the Rehabilitation Act (RHA), and the Fair Housing Act (FHA).

Before outlining relevant provisions of our disability law, I set out some common examples of issues that arise at the intersection of land use and disability law. For the most part, the examples are about use issues rather than design issues. Design issues related to doorways, curb cuts, accessible bathrooms and such are primarily the concern of architects and code enforcers. The more relevant issues for land use and zoning lawyers concern uses and the coordination of uses across a community. Below are some examples of where one might encounter disability law questions in a land use and zoning context.

- A zoning regulation prevents group homes in a given 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 under the code result in discrimination against people with disabilities? It might.
- Planning and zoning regulations require the use of sand for all pathways leading to the waterfront of a river or lake. The stated purpose of this regulation is to maintain a permeable surface and reduce rainwater run-off problems along the waterfront. This regulation results in a soft surface and this functionally limits access to the waterfront for people with certain mobility impairments and people using walkers or wheelchairs. As a result, people with a disability are not able to enjoy the waterfront in the same way as others are able to enjoy it. Even though the requirement for a sandy walkway may meet an environmental objective, it simultaneously results in a negative consequence for people with certain disabilities.
- Zoning regulations limit the location of drug rehabilitation centers and a potential 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? What if the operator asserts a right to operate in this zone without regard to the zoning code on the ground that, as an entity providing services to people who may be considered to have a disability, it is entitled to a reasonable accommodation or modification of the zoning code. Most important, what factors must be considered and evaluated in making a decision?
- A not-for-profit organization seeks to open and operate a boarding house for women “struggling with life controlling problems.” These life-controlling problems may include

emotional stress, or depression, as well as abuse of drugs and alcohol. Under the zoning code, group homes are restricted to a limited size, but this boarding house would seek to have twice as many people living in it than is permitted under the code for a group home. The organization seeks an exception to the zoning code under the laws protecting people with disabilities. Key issues to consider include: (1) does the city have to provide an exception to its zoning ordinance; (2) what are the criteria for deciding the matter (what specific findings must be made when making a decision); (3) are women struggling with “life controlling issues” within the definition of a person with a disability; and, (4) what if only some of the women, not all of the women, who will occupy the boarding house have a recognized disability? Does the fact that some women in the group may not be legally considered as having a disability, disqualify the organization from protection of our disability laws?

- A zoning setback restriction prohibits the addition of a ramp on the front of a home because it will extend out into the required front yard setback. Without this ramp, the only way for the person with a wheelchair to enter this home is by putting a ramp in the back of the house. Does a requirement that the person with a disability enter via the back of the house, when the primary entrance is in the front, violate the ADA? If the homeowner is granted a variance for a ramp in the front of the home, can a zoning board require the ramp to be made out of high quality materials and designed to blend in with the house, even if it adds thousands of dollars to the cost of the ramp? Can a zoning board approve the variance for the use of a ramp at the front of the house and require that the ramp be removed once the person needing it is no longer residing in the home? Does the granting of the ex-

ception for the ramp run with the land, like a typical variance? What if there is a requirement to restore the front of the house to its original design after the person leaves the home and this imposes a substantial cost of the homeowner? Do regulations and conditions that impose higher costs or extra burdens on people with a disability violate the ADA?

- A zoning regulation prohibits horses, alpacas, donkeys, and pigs in single-family residential neighborhoods. A resident living on a one-acre lot has a miniature pony in her yard because it is a service and emotional support animal for her daughter, and neighbors complain about the smell of manure. Is the resident entitled to keep the miniature pony even though it is not otherwise permitted under the zoning ordinance?
- A zoning code permits people to operate a home office in their house. A number of lawyers and insurance agents have a home office in their single-family residential homes. Even if the home does not need to meet ADA design guidelines, must it do so to the extent that the home office transforms a part of the house into a place of public accommodation that must be accessible under the ADA?
- A city located within the “snow belt” region of the country refuses to plow the snow from sidewalks during the winter. By not removing the snow after a snowfall, the sidewalks become inaccessible to people with disabilities. A disability rights group sues the city for a violation of the disability laws claiming that the sidewalks are a service, program, or activity of the local government and as such they must be maintained in an accessible manner. The city responds that sidewalks are structures and not a service, program, or activity of local government. The city asserts that disability law does not govern snow removal from city sidewalks. Which

position is correct? Sidewalks are not only facilities that often receive federal funding, they are programs, services, and activities of local government and covered under our disability laws. This includes the need to remove snow and other obstructions from sidewalks.

- A city has an old sidewalk system, much of which does not meet current ADA requirements in terms of its design. The city is currently considering doing some infrastructure work on Main Street and is deciding between work that will fill potholes and put a fresh sealcoat on the surface of the street, or on just going ahead and redoing the roadway. The city is challenged by some residents to upgrade the sidewalks in the area in order to comply with the new ADA standards. The city claims that the sidewalks are grandfathered in until and unless the city does new sidewalk construction. This raises a question regarding the need to upgrade sidewalks. The answer turns on the interpretation of the meaning of “altering” the street. While normal street maintenance is not an alteration, going beyond normal maintenance may rise to the level of an alteration and require bringing adjoining sidewalks into compliance with new ADA design requirements.
- A church building located in your city does not have an accessible entrance. Does this violate our disability laws or is there an exemption for a religious organization? If the church decides to add a daycare center, does the daycare center need to be accessible?

These are just a few examples of the issues that arise at the intersection of land use law and disability law. Disability issues come up in all kinds of planning and zoning settings. Questions arise with respect to primary uses, conditional and accessory uses, variances, grandfather provisions, takings, and much, much more. This Primer

provides the framework for understanding how best to approach disability law issues in your land use and zoning practice.

II. Planning, Design, & Zoning

Disability concerns address planning, design, and zoning. **Planning** must be deliberative in terms of thinking about the needs of the entire community and this means including plans for making the community accessible to people with disabilities. Not only must buildings, roads, public spaces, sidewalks, and parks be planned for accessibility, planning must include the steps that will be taken to develop and finance new programs, services, and activities of local government, including ways of improving on existing programs, services, and activities that may be below standard. **Design** issues are important and focus on such things as making buildings, sidewalks, and other aspects of the built environment accessible. Much of the professional work in the design area is done by architects and land planners. For most lawyers, design issues are primarily matters of compliance with building codes for accessible and universal design. There are code books and design guidelines available. **Zoning** matters involve land use and the coordination of land uses within a community. Zoning requires interpretation of a local zoning code in the context of state and federal law. This includes federal, state, and local laws related to the protection of the rights of people with disabilities. Key among these concerns are the requirements related to protecting people with disabilities from discrimination in the functioning and application of local planning and zoning regulations and the requirement of providing a reasonable accommodation and modification in planning and zoning rules and procedures.

III. Applicable Federal Law

Three major federal statutes protect people with disabilities from discrimination and all three have been held to apply to local planning and zoning activities. These three federal statutes are:

1. *Title II of the Americans with Disabilities Act (ADA)*. It applies to all *programs, services, and activities* of local governments, which have been held to include planning and zoning, as well as specific activities such as building, repairing, and maintaining accessible sidewalks.² [Note Title III of the ADA may have some implications in terms of privately owned places of public accommodation.]
2. *Section 504 of the Rehabilitation Act of 1973, codified in Section 794 of the United States Code as amended by the Rehabilitation Act of 1978 (RHA)*.³ These sections prohibit discrimination with respect to any program or activity supported with federal funding.
3. *Fair Housing Act (FHA)*.⁴ It covers certain aspects of planning and zoning related to access to housing. It also applies to private land regulations and controls with respect to housing. In particular, the FHA is applicable to covenants and restriction in a subdivision or in terms of a regulations applicable to a condominium or cooperative. In 1988, the FHA was

² See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12161 (2016).

³ See Rehabilitation Act of 1973, Pub. L. No. 93–112, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794 (2016)). All statutory citations in this Article refer to the current statute unless otherwise indicated.

⁴ See Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2016) (note that this incorporates the Fair Housing Amendments Act of 1988 and the Housing for Older Persons Act of 1995).

amended to include among other prohibitions, discrimination against people with disabilities in housing.⁵ Collectively, the FHA and FHAA are often referred to as the FHA.

IV. People Protected Under the ADA, RHA, and the FHA

As a land use and zoning lawyer, it is important to know that there has been a great deal of litigation regarding the determination of who is protected under the various laws addressing the rights of people with disabilities. Most of these cases have involved the question of whether an individual qualifies as a person with a disability under these laws. In most land use and zoning cases, the question is not if the person qualifies but whether and to what extent the disability laws apply to the matter under consideration. Therefore, the details of this litigation are not central to understanding the core issues in the relationship between land use law and disability. The issues most typically confronted involve the application of these disability laws to land use planning and zoning when a person is accepted as having a disability. Nonetheless, one needs a basic understanding of the requirements for being considered a person protected by the ADA, RHA, and the FHA.

A. Americans with Disabilities Act (ADA)

The enactment of the ADA was intended to protect people with disabilities from discrimination. An individual receives no protec-

⁵ See Fair Housing Amendments Act, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. § 3601 et. seq. (2016)).

tion from the ADA if the individual's disability falls outside the statutory definition. The broad definition of disability employed by the ADA applies to all Titles of the ADA.⁶

The term "disability" means, with respect to an individual –

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.⁷

Thus, there are three categories of being a person with a disability under the ADA. People are considered "actually impaired" under section (A), having a "record of" impairment under section (B), and "regarded-as" impaired under section (C).⁸

For a person to be considered actually impaired, she must show that she actually has an impairment. Second, she needs to demonstrate that the impairment affects at least one major life activity. Third, she needs to demonstrate that the impairment substantially limits the named major life activity.

The ADA identifies a non-exhaustive list of major life activities including: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."⁹ These activities are considered as essential to daily life.

The implementation of the Americans with Disabilities Act Amendments Act (ADAAA), which became effective January 1,

⁶ *Widomski v. State Univ. of N.Y. at Orange*, 933 F. Supp. 2d 534, 541 (N.Y.S.D. 2013) (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 201 (2009)); 42 U.S.C. § 12102(4)(A) (2009).

⁷ 42 U.S.C. § 12102(1).

⁸ *Id.*; MARK C. WEBER, UNDERSTANDING DISABILITY LAW 14 (2007).

⁹ 42 U.S.C. § 12102(2)(A).

2009, attempted to define the meaning of “substantial limitation.” The ADAAA clarifies that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”¹⁰ Additionally, “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹¹

The most significant change in ‘substantial impairment’ litigation occurred by determining that ameliorative effects of mitigating measures can no longer be considered when determining if an impairment substantially limits a major life activity.¹² Ameliorative action includes medication, equipment, prosthetics (limbs, hearing aids, oxygen, cochlear implants), the use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned or adaptive behavior or modifications.¹³ Therefore, the effective use of an assistive device will not defeat a person’s qualification as a person with a disability under the ADA. However, there is one exception to not taking ameliorative effects of mitigating measures into account. The ameliorative effects of eyeglasses or contact lenses should be considered in determining whether an individual has an impairment that substantially limits a major life activity.¹⁴

To make a showing that an individual has a “record of” impairment, the individual is required to demonstrate that he has a record or history of impairment and that the impairment substantially limits a major life activity.¹⁵

¹⁰ 42 U.S.C. § 12102(4)(C).

¹¹ 42 U.S.C. § 12102(4)(D).

¹² 42 U.S.C. § 12102(4)(E).

¹³ 42 U.S.C. § 12102(4)(E)(i).

¹⁴ 42 U.S.C. § 12102(4)(E)(ii)–(iii).

¹⁵ *Title II Technical Assistance Manual, The Americans with Disabilities Act*, <https://www.ada.gov/taman2.html> (last visited Jan. 8, 2018).

An individual is “regarded as” having an impairment for purposes of 42 U.S.C.A. § 12102(1)(C) when “the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”¹⁶ Thus, someone who is perceived by others as being a person with a disability, but in fact does not have a disability, is still protected from discrimination under the ADA.

To be protected under the ADA an individual must qualify under the applicable Title of the ADA.

Title II of the ADA, applies to government programs, services, and activities provided by public entities. Under Title II, a “qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”¹⁷

The following conditions are not considered an impairment: homosexuality, bisexuality, transvestism, gender identity disorders, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance abuse disorders.¹⁸

Alcoholism is a condition protected under the ADA.¹⁹

The ADA, RHA, and FHA deny protection to individuals who are currently engaged in the illegal use of drugs.²⁰ The “illegal use of

¹⁶ 42 U.S.C. § 12102(3)(A).

¹⁷ 29 C.F.R. § 35.104 (2016).

¹⁸ 42 U.S.C. § 12211 (2009); 29 U.S.C. § 705(20)(E)–(F) (2014) (applying to Section 504 of the Rehabilitation Act).

¹⁹ *Mararri v. WCI Steel*, 130 F.3d 1180, 1180 (6th Cir. 1997).

²⁰ 42 U.S.C. § 12210(a) (2009); 29 U.S.C. § 705(20)(C)(i).

drugs” includes the use of any drugs that are considered unlawful under the Controlled Substances Act.²¹ However, the ADA and RHA protect individuals who have successfully completed a supervised drug rehabilitation program and are no longer engaged in the use of illegal drugs, and individuals that are “erroneously regarded” as using of illegal drugs.²²

B. Section 504 of the Rehabilitation Act (RHA)

Similar to the ADA, the RHA only protects individuals who have a qualifying disability.

The RHA defines a “disability” as:

- (A) except as otherwise provided in subparagraph (B), a physical or mental impairment that constitutes or results in a substantial impediment to employment; or
- (B) for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII, the meaning given it in section 12102 of Title 42 [the ADA].²³

Therefore, for our purposes concerning the intersection of disability law with land use and zoning, the RHA and the ADA employ the same definition of disability.

C. The Fair Housing Act (FHA)

The FHA prohibits housing discrimination in both public and private real estate transactions on the basis of race, color religion, sex, disability, familial status, and national origin. The FHA uses the term “handicap” rather than disability (the addition of language to the FHA to protect people with a handicap was added by the FHAA).

²¹ 42 U.S.C. § 12210(d)(1); 29 U.S.C. § 705(10).

²² 42 U.S.C. § 12210(b); 29 U.S.C. § 705(20)(C)(ii).

²³ 29 U.S.C. § 705(9). An individual with a disability is defined in 29 U.S.C. § 705(20).

The FHA defines a qualified person with a “handicap” as one who has:

- (1) a physical or mental impairment which substantially limits one or more of such a person’s major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment.²⁴

The FHA defines handicap in the same manner as the ADA and RHA define disability. Therefore, case law on the issue of disability concerning the ADA and RHA will impact cases arising under the FHA.

V. Not a Matter of Preemption

None of the ADA, RHA, and the FHA are planning and zoning laws: therefore, they do not preempt local land use and zoning law. These acts provide rights and protections to people with disabilities. These acts cover local government planning and zoning, and thus, they effect legal practice and constrain the exercise of the police power by local officials but they do not preempt local law.

VI. Coverage of the ADA, RHA, and FHA

A. ADA

Title II of the ADA covers “services, programs and activities provided or made available by public entities.”²⁵ A public entity is defined as “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State

²⁴ 42 U.S.C. § 3602(h).

²⁵ 42 U.S.C. § 12132; 38 C.F.R. § 35.102(a).

or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined by section 24102(4) of Title 49).”²⁶

By this definition, Title II is meant to apply to all State and local governments, but does not apply to the Federal government.

Courts have held municipal planning and zoning are covered programs, service, or activities under Title II of the ADA.²⁷

B. RHA

The RHA precludes discrimination against people with disabilities only in those “programs or activities” that receive “federal financial assistance” from a federal agency²⁸

According to the Department of Justice (DOJ) and Department of Health and Human Services (DHHS) regulations for Section 504, an agency is any Federal department that has power “to extend financial assistance.”²⁹ A recipient can be either any private or public agency that receives Federal financial assistance.³⁰

“Federal financial assistance” is defined as:

any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of: (1) funds; (2) services of Federal personnel; or (3) real and personal property or any interest in or use of such property, including: (i) transfers or leases of such property for less than fair market value or for reduced consideration; and proceeds from a subsequent transfer or

²⁶ 42 U.S.C. § 12131.

²⁷ *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir. 2006).

²⁸ 29 U.S.C. § 794(a).

²⁹ 28 C.F.R. § 41.3(c).

³⁰ 28 C.F.R. § 41.3(d); 45 C.F.R. § 84.3(f).

lease of such property if the Federal share of its fair market value is not returned to the Federal Government.³¹

Program or activity means that “all of the operations of” the agency receiving financial assistance are required to comply with Section 504 even if part of the agency did not directly receive federal funds.³² In practice, this also means that if a private corporation receives any Federal assistance, or if the corporation provides a public service, then the entire corporation is covered by Section 504. However, if Federal assistance is provided to a “geographically separate facility” then only that facility is covered under Section 504.

C. FHA

The FHA is something that many people familiar with property, housing, and real estate law may already know. The FHA covers private housing, housing that receives Federal financial assistance, State and local government housing, lending, planning and zoning practices, new construction design, advertising, and private land regulations such as those contained in covenants and restrictions and in a declaration of condominium.

VII. Anti-Discrimination Provisions

The vast majority of land use and zoning issues covered under the ADA, RHA, and FHA will relate to a claim of discrimination, including the claim that an individual has been denied a reasonable accommodation and a request for a reasonable modification. In many cases you will find courts addressing the ADA, RHA, and FHA because the causes of actions and issues are treated the same or

³¹ 28 C.F.R. § 41.3(e); 45 C.F.R. § 84.3(h).

³² 29 U.S.C. § 794(b).

in a similar manner. Private housing arrangements and private land regulations, of course, will be handled under the FHA. Each of these anti-discrimination provisions converge in as much as the failure to provide a reasonable accommodation or a reasonable modification is one method of demonstrating discrimination.

A. ADA

... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.³³

“To prevail under Title II(A) [public services generally] plaintiff’s must demonstrate that (1) they are ‘qualified individuals’ with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants’ services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs’ disabilities.”³⁴

B. RHA

No otherwise qualified individual with a disability in the United States, as defined by section 705(2) of this title, shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receiving Federal financial assistance or under any program or activity conducted

³³ 42 U.S.C. § 12132.

³⁴ Noel v. NYC Taxi & Limousine Comm’n, 687 F.3d 63, 68 (2012) (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2003)).

by any Executive agency or the United States Postal Service.³⁵

C. FHA

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.³⁶

To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of: (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is sold, rented or made available; or (C) any person associated with that buyer or renter.³⁷

VIII. Methods of Demonstrating Discrimination

There are three theories of discrimination under the ADA, RHA and FHA: disparate treatment; disparate impact; and the denial of a legitimate request for a reasonable accommodation or a reasonable modification. These claims may arise in a number of common land use and zoning situations.

In addition to asserting that a certain planning or zoning regulation is discriminatory with respect to people with disabilities, a request for a variance may be made. If the request for a variance is not

³⁵ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794(a).

³⁶ 42 U.S.C. § 3605.

³⁷ 42 U.S.C. § 3604(f)(1).

granted a person protected by disability law may request an exception to the zoning and planning regulations as a reasonable accommodation or modification. We will discuss the process for determining if a reasonable accommodation or modification is required, but note that failure to provide such an accommodation or modification is illegal discrimination.

What if instead of dealing with a public zoning regulation we are dealing with a private land restriction in a subdivision? If a person with a disability seeks to do something that is not permitted by the rules or the covenants and restrictions of a subdivision, can she obtain an exception on the grounds of discrimination or failure to provide a reasonable accommodation and a reasonable modification? The answer to this question will generally be covered under the FHA.

The ADA and RHA prohibit discrimination in the programs, services, or activities of public entities. *Innovative Health Systems v. City of White Plains* explains “programs, activities, and services and the application of the ADA to local planning and zoning.”³⁸

Both Title II of the ADA and section 504 of the RHA prohibit discrimination based on a disability by a public entity.³⁹

The ADA does not explicitly define “services, programs, or activities.” ... the Rehabilitation Act, however, defines “program or activity” as “all of the operations” of specific entities, including “a department, agency, special purpose district, or other instrumentality of a State or of a local government.”⁴⁰ Further, as the district court recognized, the plain

³⁸ 117 F. 3d 37, 44–45 (2d Cir. 1997).

³⁹ *Id.* at 44.

⁴⁰ *Id.* (quoting 29 U.S.C. § 794(b)(1)(A) (1994)).

meaning of “activity” is a “natural or normal function or operation.”⁴¹ Thus, as the district court held, both the ADA and the RHA clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity.⁴² Moreover, as the district court also noted, the language of Title II’s anti-discrimination provision does not limit the ADA’s coverage to conduct that occurs in the “programs, services, or activities” of the City.⁴³

As the preamble to the Department of Justice regulations explains, “Title II applies to anything a public entity does. . . . All governmental activities of public entities are covered.”⁴⁴ The Department of Justice’s Technical Assistance Manual, which interprets its regulations, specifically refers to zoning as an example of a public entity’s obligation to modify its policies, [p]ractices, and procedures to avoid discrimination.⁴⁵

In applying our disability laws to planning and zoning, there are three ways of demonstrating discrimination in violation of the laws protecting people with disabilities. The material below covers disparate treatment, disparate impact, and failure to provide a reasonable accommodation / modification.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 44–45.

⁴⁴ *Id.* at 45.

⁴⁵ *Id.*

A. Disparate Treatment (Intentional Discrimination)

Quoting from the opinion in *Candlehouse, Inc. v. Town of Vestal*, NY:⁴⁶

Claims of intentional discrimination are properly analyzed utilizing the familiar, burden shifting model developed by the courts for use in employment discrimination settings dating back to the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). Under that analysis, a plaintiff must first establish a prima facie case of intentional discrimination . . . by "present[ing] evidence that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision makers were knowingly responsive." Once a plaintiff makes out its prima facie case, "the burden of production shifts to the defendants to provide a legitimate, nondiscriminatory reason for their decision." "The plaintiff must then prove that the defendants intentionally discriminated against them on a prohibited ground." The fact-finder is permitted "to infer the ultimate fact of discrimination" if the plaintiff has made "a substantial showing that the defendants' proffered explanation was false."

The key inquiry in the intentional discrimination analysis is whether discriminatory animus was a motivating factor behind the decision at issue. The Second Circuit has identified the following five factors a fact-

⁴⁶ *Candlehouse, Inc. v. Town of Vestal*, No. 3:11-CV-0093 (DEP), 2013 WL 1867114 (N.D.N.Y., May 3, 2013); see also *Cinnamon Hills Youth Crisis Ctrs., Inc. v. Saint George City*, 685 F.3d 917 (10th Cir., 2012); *Nikolich v. Village of Arlington Heights*, 870 F. Supp. 2d 556 (N.D. Ill., 2012); *Rise, Inc. v. Malheur County*, No. 2:10-cv-00686-SU, 2012 WL 1085501 (D. Or., Feb. 13, 2012); *10th Street Partners, LLC v. County Comm'm of Sarasota*, No. 8:11-cv-2362-T-33TGW, 2012 WL 4328655 (M.D. Fla., Sept. 20, 2012); *United States v. City of Balt.*, 845 F. Supp. 2d 640 (D. Md., 2012); MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 5.

finder may consider in evaluating a claim of intentional discrimination:

(1) the discriminatory impact of the governmental decision; (2) the decision's historical background; (3) the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequences; and (5) departures from normal substantive criteria.⁴⁷

B. Disparate Impact

Quoting from the opinion in *Candlehouse, Inc. v. Town of Vestal*, NY:⁴⁸

To establish a prima facie case under this theory, the plaintiff must show: (1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." "A plaintiff need not show the defendant's action was based on any discriminatory intent." To prove that a neutral practice has a significantly adverse or disproportionate impact "on a protected group, a plaintiff must prove the practice actually or predictably results in discrimination." In addition, a plaintiff must prove "a causal connection between the facially neutral policy and the alleged discriminatory effect." Once a plaintiff establishes its prima facie case, "the burden shifts to the defendant to prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."

⁴⁷ *Candlehouse, Inc.*, 2013 WL 1867114.

⁴⁸ *Id.* Note that the U.S. Supreme Court held in support of disparate impact analysis in *Texas Department of Housing and Community Affairs v. Inclusive Communities Projects, Inc.* 135 S. Ct. 2507 (2015).

The basis for a successful disparate impact claim involves a comparison between two groups—those affected and those unaffected by the facially neutral policy. This comparison must reveal that although neutral, the policy in question imposes a significantly adverse or disproportionate impact on a protected group of individuals.

Statistical evidence is . . . normally used in cases involving fair housing disparate impact claims.” “Although there may be cases where statistics are not necessary, there must be some analytical mechanism to determine disproportionate impact.

C. Failure to Provide a Reasonable Accommodation or Reasonable Modification

1. Reasonable Accommodation

Quoting from the opinion in *Cinnamon Hills Youth Crisis Centers, Inc. v. Saint George City*:⁴⁹

A claim for reasonable accommodation . . . does not require the plaintiff to prove that the challenged policy intended to discriminate or that in effect it works systematically to exclude the disabled. Instead, in the words of the FHA, a reasonable accommodation is required whenever it “may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B).

What does it mean to be “necessary”? The word implies more than something merely helpful or conducive. It suggests instead something “indispensable,” “essential,” something that “cannot be done without.” . . . What’s more, the FHA’s necessity requirement

⁴⁹ *Cinnamon Hills*, 685 F.3d 917.

doesn't appear in a statutory vacuum, but is expressly linked to the goal of "afford[ing] . . . equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). And this makes clear that the object of the statute's necessity requirement is a level playing field in housing for the disabled. Put simply, the statute requires accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without. See *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597, 605 (4th Cir.1997); Schwarz, 544 F.3d at 1227.

Of course, in some sense all reasonable accommodations treat the disabled not just equally but preferentially. Think of the blind woman who obtains an exemption from a "no pets" policy for her seeing eye dog, or the paraplegic granted special permission to live on a first floor apartment because he cannot climb the stairs. But without an accommodation, those individuals cannot take advantage of the opportunity (available to those without disabilities) to live in those housing facilities. And they cannot because of conditions created by their disabilities. . . .

But while the FHA requires accommodations necessary to ensure the disabled receive the same housing opportunities as everybody else, it does not require more or better opportunities. The law requires accommodations overcoming barriers, imposed by the disability, that prevent the disabled from obtaining a housing opportunity others can access. But when there is no comparable housing opportunity for non-disabled people, the failure to create an opportunity for disabled people cannot be called necessary to achieve equality of opportunity in any sense. So, for example, a city need not allow the construction of a group home for the disabled in a commercial area where nobody, disabled or otherwise, is allowed to live.

Requesting a reasonable accommodation for financial feasibility reasons does not qualify as a necessary accommodation.⁵⁰ The fact that a person with a disability may prefer to conduct a use of property in a less costly way, or that a given project would be more economically feasible if done on a larger scale, does not make the use necessary for FHA purposes. Thus, the use need not be approved by local zoning officials who are otherwise validly acting in accordance with the police power. At the same time, local zoning officials must show a willingness to take modest steps to accommodate a person with disability as long as the steps do not pose an undue hardship or a substantial burden on the exercise of their planning and zoning authority.⁵¹

When a planning board or a zoning board of appeal is presented with a claim for a reasonable accommodation it must make specific findings. First, it should make an assessment as to the application of the various disability laws to the applicant raising the claim. (That is, the applicant a person protected by the various Federal law addressed herein.) Second, it should proceed to evaluate the criteria for an accommodation determining: (1) is it reasonable; (2) is it necessary; and (3) does it fundamentally alter the planning and zoning scheme. There is no one factor that seems to trump the evaluation of the request. Findings should be made on each of the criteria and then a rational decision should be made based on substantial competent evidence on the record. Reasons and justification for the decision should be included.

A claim for reasonable accommodation . . . does not require the plaintiff to prove that the challenged policy intended to discriminate or that in effect it works systematically to exclude the disabled. Instead, the FHA

⁵⁰ *Nikolich*, 870 F. Supp. 2d 556.

⁵¹ *Candlehouse, Inc.*, 2013 WL 1867114.

provides that a reasonable accommodation is required whenever it may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling.⁵²

There is a similar duty to make a reasonable accommodation under both Section 504 of the RHA and the FHA.⁵³ There is no specific reasonable accommodation requirement in Title II of the ADA, but the Attorney General has issued implementing regulations that outline the duty of public entities to make reasonable accommodations for people with disabilities. Unlike Title I and Title III of the ADA, Title II does not contain a specific accommodation requirement. The Attorney General, at the instruction of Congress issued implementing regulations and the courts have held that the ADA includes a requirement to provide reasonable accommodations and modifications.⁵⁴ The relevant Title II regulations state:

A public entity shall make reasonable modifications in policies, practices, or procedures where the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.⁵⁵

Regulations require recipients of federal funds to make reasonable accommodation. . . . unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the program.⁵⁶

⁵² MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 145.

⁵³ Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 746–46 (7th Cir. 2006).

⁵⁴ *Id.* at 750–51.

⁵⁵ *Id.* at 751 (quoting 28 C.F.R. § 35.130(b)(7)) [ADA].

⁵⁶ *Id.* at 747 (quoting 28 C.F.R. § 41.53) [Rehabilitation Act].

“The Supreme Court has located a duty to accommodate in the statute generally.”⁵⁷ The ADA and the RHA both impose statutory obligations on public entities to provide reasonable accommodations to persons protected by the acts.

2. *Reasonable Modification*

A reasonable modification is treated in a similar way as a reasonable accommodation. In practice, courts have treated modifications as changes to the physical environment,⁵⁸ such as modifying an entranceway by making it wider and by eliminating a step-up at an entranceway. In contrast, an adjustment in a rule or a practice is often treated as a reasonable accommodation. However, one does sometimes encounter discussion that references making a reasonable modification to a rule or a practice, rather than limiting that phrasing to physical changes to the environment.

A reasonable modification applies to Title III of the ADA, which governs privately owned places of public accommodation.

A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.⁵⁹

Under the Fair Housing Act,

⁵⁷ *Id.*

⁵⁸ *Fair Housing Bd. v. Windsor Plaza Condo.*, 768 S.E.2d 79, 87 (2014).

⁵⁹ 28 C.F.R. 36.302(a).

discrimination includes a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.⁶⁰

A “modification means any change to the public or common use areas of a building or any change to a dwelling unit.”⁶¹

IX. Emotional Support Animals Under the FHA and the RHA, Service Animals Under the ADA

The FHA and Section 504 of the RHA differ from the ADA, in terms of when a reasonable accommodation and a reasonable modification need to be granted for different service animals. The reasonable accommodation provisions of the FHA and Section 504 of the RHA arise when a qualified individual with a disability uses, or wants to use, service animals in housing where the provider precludes residents from having pets or has pet restrictions.⁶²

Under both the FHA and Section 504, it is not necessary for service animals to be trained.⁶³ However, service animals are not pets.⁶⁴

⁶⁰ 42 U.S.C. § 3604(f)(3)(A).

⁶¹ 24 C.F.R. § 100.201.

⁶² U.S. Dep’t of Housing and Urban Development, FHEO Notice FHEO-2013-01 (Apr. 25, 2013), https://www.hud.gov/sites/documents/SERVANIMALS_NICFHEO2013-01.PDF.

⁶³ *Id.*

⁶⁴ *Id.*

Dogs are the most common animals used, but other animals can also be used.⁶⁵ Service animals are animals that provide assistance and/or emotional support for a disabled individual. The functions provided by service animals can range from guiding blind individuals, alerting deaf individuals of a sound, getting items, alerting to impending seizure, etc.

There are two questions a housing provider must consider after receiving a request for a reasonable accommodation: “(1) Does the person seeking to use and live with the animal have a disability; and (2) does the person making the request have a disability-related need for an assistance animal?”⁶⁶

If the answer to either one of these questions is no, then the request for the reasonable accommodation may be denied.

If the answer to both questions is yes, then the FHA and Section 504 requires the housing provider to make a reasonable accommodation. This means that the housing provider is required to modify the “no pet policy” to allow the person with the disability to use a service animal in all areas of the premises where persons are normally permitted to go, unless allowing this modification would create an undue hardship.⁶⁷ Moreover, the housing provider is prohibited from charging the tenant with a service animal an additional fee, although the housing provider can charge for reasonable and expected wear and tear from the animal.⁶⁸

A housing provider is also allowed to deny a request for a reasonable modification if the specific service animal imposes a direct

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at n.6.

threat to the safety and health of others or if the specific service animal would cause physical damage to the property that cannot be eliminated by another reasonable accommodation.⁶⁹ However, the housing provider is not allowed to place breed, size, or weight standards on service animals.⁷⁰ Finding that a specific service animal imposes a direct threat or could cause physical damage requires that the housing provider make an individualized assessment based on objective evidence. A decision based on speculation is not sufficient to deny the requested reasonable accommodation.⁷¹ Additionally, conditions and restrictions that housing providers apply to pet owners, cannot be applied to service animals (i.e., cannot charge a pet deposit for a service animal).⁷²

However, different rules may apply simultaneously, or separately, to a housing provider under the ADA regarding service animals. The ADA regulations define service animal as

any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.⁷³

This is a narrow definition that only defines trained dogs as service animals. Furthermore, emotional support animals are precluded under this definition. The different definition of service animals in

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ 28 C.F.R. § 35.104.

the ADA as compared to the FHA and Section 504 require the determination of whether a service animal is permitted to be handled as a definitional analysis and not under the reasonable accommodation analysis.⁷⁴

If it is not readily apparent that the service animal is trained to perform tasks for the individual with the disability, then a covered entity can ask two questions in its analysis of whether the service animal is permitted. The covered entity can ask: “(1) Is this a service animal that is required because of a disability?; and (2) What work or tasks has the animal been trained to perform?”⁷⁵ A covered entity under the ADA cannot ask for documentation regarding the certification of the service animal.⁷⁶ If the service animal satisfies the above conditions, then it is permitted to be in all areas of the facility that any member of the public can be.⁷⁷

A service animal who satisfies the above two questions can be denied access to a covered entity under the ADA if the animal is out of control and the owner cannot control it, the animal is not house-broken, and if the animal possesses a direct threat to the health and safety of others.⁷⁸ Similar to finding a direct threat under the FHA and Section 504, under the ADA finding a direct threat requires an individualized assessment and cannot be based on stereotypes.⁷⁹

The reasonable accommodation requirement under Section 504 of the RHA is similar to that of the FHA, but Section 504 only applies

⁷⁴ U.S. HUD, FHEO-2013-01, *supra* note 62.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

to programs and activities receiving federal funds and the FHA has a broader application.⁸⁰

The FHA applies to zoning and requires zoning officials to make reasonable exceptions to policies and practices to afford people with disabilities an equal opportunity to obtain housing.⁸¹

Requesting a reasonable accommodation for financial feasibility reasons does not qualify as a necessary accommodation.⁸²

X. Standing

A. ADA

In order to establish standing to bring a case in court, a plaintiff must show an injury in fact that meets the following three requirements: (1) concrete and particularized or an actual and imminent injury that is not hypothetical; (2) the injury is fairly traceable to a challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision.⁸³

The Attorney General does not have standing to bring suit under Title II of the ADA.⁸⁴ The Court in *C.V. v. Dudek* stated that the enforcement provision in Title II was distinct from the enforcement provisions in Title I and Title III.⁸⁵ Under Title I and Title III the enforcement provision directly confers standing on the Attorney General.⁸⁶ Whereas Title II grants standing to “persons alleging

⁸⁰ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 113.

⁸¹ 42 U.S.C. § 3601.

⁸² MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 146.

⁸³ *Transport Workers Union v. N.Y. City Transit Auth.*, 342 F. Supp. 2d 160, 165–67 (S.D. N.Y. 2004); *Ross v. City of Gatlinburg*, 327 F. Supp. 2d 834, 841–43 (E.D. Tenn., 2003).

⁸⁴ *C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1282 (S.D. Fla. 2016).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1282–83 (citing 42 U.S.C. § 12188(b)(1)(B); 41 U.S.C. § 12117(a)).

discrimination” and the Attorney General is not considered a person under this title.⁸⁷ “Where Congress has conferred standing on a particular actor in one section of a statutory scheme, but not in another, its silence must be read to preclude standing.”⁸⁸ At the time of publication an appeal has been filed on this decision.

However, the Department of Justice has been allowed to intervene on a pending Title II suit.⁸⁹ The Attorney General was allowed to intervene and was not required to show standing because the Attorney General sought no more relief beyond what the plaintiffs sought.⁹⁰

There is no specific statute of limitations under the ADA. Typically, the state statute of limitations that is most analogous to the plaintiff’s claim will govern.

B. Section 504 of the RHA

The general rule is that an individual who is not disabled within the terms of the RHA lacks standing to sue under Section 504. However, a group of disabled persons that form an organization will traditionally have standing to sue if the group can establish a sufficient nexus between the organization and the injury claimed. For a plaintiff seeking injunctive relief to have standing under Section 504, the plaintiff must show a real or immediate threat of future injury.⁹¹ Some courts have seemed to lessen the burden required for a plaintiff to establish standing. For example, some courts have found

⁸⁷ *Id.* at 1284.

⁸⁸ *Id.* at 1283.

⁸⁹ *Steward v. Abbott*, 189 F. Supp. 3d 620, 624–27 (W.D. Tex. 2016).

⁹⁰ *Id.* at 625.

⁹¹ *Davis v. Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio, 1999); *Schroedel v. N.Y. Univ. Med. Ctr.*, 995 F. Supp. 594 (S.D.N.Y., 1995).

standing where the injury occurred in the past, but it is illustrated that the lack of accommodation still exists.

Section 504 does not require that administrative remedies be exhausted against a federal grantee. This means that the statute of limitations runs while administrative remedies are being brought. The relevant statute of limitations that govern Section 504 claims are the relevant state's limitations for personal injury actions.⁹²

C. Third Party Standing

Quoting from the opinion in *RHJ Medical Center, Inc. v. City of DuBois*,⁹³ the ADA and RHA grant third party standing:

Generally, a "plaintiff . . . must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." However, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." In certain cases, standing may exist because of statutorily created rights: "[T]he standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Where Congress grants a right of action to an entity or association, the entity may assert standing either in its own right or on behalf of its members. . . .⁹⁴

The ADA and RHA are statutes in which Congress has granted third party standing. The regulation implementing Title II of the ADA provides, "A public entity shall not exclude or otherwise deny equal services,

⁹² *Holmes v. Tex. A&M Univ.*, 145 F.3d 681 (5th Cir., 1998) (citing 42 U.S.C. § 1988(a)).

⁹³ 754 F. Supp. 2d 723 (W.D. Pa. 2010).

⁹⁴ *Id.* at 735 (citation omitted)

programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to *have a relationship or association.*" 28 C.F.R. § 35.130(g) (emphasis added). This provision establishes the basis for associational standing. The "prudential limits imposed in pure associational standing cases do not apply to" statutory grants of associational standing. This broad conception of standing does indeed "extend standing to the full limits of Article III." So "long as this requirement [of Article III] is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and indeed, may invoke the general public interest in support of their claim."⁹⁵

D. FHA

Standing under the FHA is satisfied by minimum constitutional case or controversy requirements of Article III.⁹⁶ This requires: (1) actual or threatened injury; (2) injury that is caused by or is fairly traceable to defendant's challenged action; and (3) that is likely redressed by favorable court decision.⁹⁷

Under the FHA, the language of the statute permits any "aggrieved person" or the Attorney General to bring a lawsuit to enforce the FHA. The FHA defines an aggrieved person as "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory

⁹⁵ *Id.* (citation omitted).

⁹⁶ See 42 U.S.C. § 3610(1)(A)(i); 42 U.S.C. § 3602(i); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Hallmark Developers, Inc. v. Fulton County*, 386 F. Supp. 2d 1369, 1381 (2005).

⁹⁷ *Hallmark Developers*, 386 F. Supp. 2d at 1381.

housing practice that is about to occur.”⁹⁸ The Court has found that there was a Congressional intention to define aggrieved person as broadly as possible.⁹⁹

An aggrieved person may commence a civil action in an appropriate United States District Court or State court no later than two years after the occurrence or the termination of an alleged discriminatory housing practice.¹⁰⁰

A recent Supreme Court decision has held that cities may be aggrieved persons under the FHA following the congressional intent to confer standing broadly.¹⁰¹

In another case, developers who sought to build low income housing had standing under the FHA to challenge county’s denial of a rezoning request.¹⁰² The developers were able to show that they had been injured by the denial and that there was a disparate impact upon minority residents that was discriminatory.¹⁰³

XI. Remedies

“An action based on an allegation of discrimination under the ADA, FHA, and RHA may be pursuant to one or more of the three theories set out earlier: intentional discrimination, disparate impact, and failure to make a reasonable modification.”¹⁰⁴

A Title II claim under the ADA “may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification,

⁹⁸ 42 U.S.C. § 3602(i).

⁹⁹ 42 U.S.C. § 3602(i); *Trafficante*, 409 U.S. at 209.

¹⁰⁰ 42 U.S.C. § 3613(a)(1)(A) (2016).

¹⁰¹ *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

¹⁰² *Hallmark Developers*, 386 F. Supp. 2d at 1381.

¹⁰³ *Id.*

¹⁰⁴ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 143.

or (3) the defendant's rule disproportionately impacts disabled people."¹⁰⁵

Remedies pursuant to the ADA track remedies under the RHA.

Under the ADA, a plaintiff, or a representative of the plaintiff, can choose to file an administrative complaint under the ADA. The administrative complaint process is governed by regulations 28 C.F.R. §§ 35.170-35.174. An appropriate federal agency is either the designated agency under Subpart G of the regulations or any agency that provides funding to the public entity. An individual could also file the administrative complaint with the Department of Justice who would refer the complaint to the proper agency. An individual is not required to directly file a grievance with the public entity that committed the discrimination as a prerequisite to filing any administrative complaint.

After receiving the complaint, the federal agency issues either a "Letter of Findings" or resolves the complaint. Resolving the complaint should include an attempt to negotiate a voluntary agreement with the public agency.¹⁰⁶ If the federal agency is unable to reach a resolution, the agency is required to refer the complaint to the DOJ for further action.

However, it is not necessary for a plaintiff to exhaust administrative remedies before filing a cause of action against a public entity with the federal court.¹⁰⁷

¹⁰⁵ *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

¹⁰⁶ RUTH COLKER, *FEDERAL DISABILITY LAW IN A NUTSHELL* 209 (5th ed. 2015).

¹⁰⁷ *Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816, 824 (11th Cir. 1998); *see e.g.*, *Bogovich v. Sandoval*, 189 F.3d 999 (9th Cir. 1999).

XII. ADA Title III

Title III applies to private entities and precludes discrimination based on disability in the provision of goods, services, facilities, privileges, advantages, or accommodations by any place owning, leasing, or operating a place of public accommodation.¹⁰⁸ Places of public accommodation are places that are not government owned or operated as publicly operated facilities.¹⁰⁹ “A partial list of examples of places of public accommodation, for illustrative purposes, includes hotels, restaurants, auditoriums, shopping malls, concert halls, retail centers, and banks.”¹¹⁰ Private clubs are not covered under Title III of the ADA unless the private club opens itself up to nonmembers.

Under limited circumstances, single-family homes are covered under Title III of the ADA, even though they are not covered under Title II of the ADA, if for example a business is operated out of part of the house.¹¹¹ In the case of a home office or a home based business the home should be ADA compliant with respect to an entrance and as to those parts of the home where the public is welcome.

While Title III applies to private places of public accommodation, there is an exception for religious organizations and entities controlled by religious organizations.¹¹² The preamble to Title III provides:

[T]he ADA’s exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations. Religious organizations and entities controlled

¹⁰⁸ 42 U.S.C. § 12181(7).

¹⁰⁹ 42 U.S.C. § 12181(7).

¹¹⁰ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 117.

¹¹¹ 28 C.F.R. § 36.207.

¹¹² 42 U.S.C. § 12187

by religious organizations have no obligations under the ADA. Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage. Thus, if a church itself operates . . . a private school, or a diocesan school system, the operations of the . . . school or schools would not be subject to the requirements of the ADA or [the title III regulations]. The religious entity would not lose its exemption merely because the services provided were open to the general public. The test is whether the church or other religious organization operates the public accommodation, not which individuals receive the public accommodation's services.¹¹³

But note, if a religious entity receives federal funds, it is subject to Section 504 of the RHA.¹¹⁴

A different set of remedies are available under Title II than Title III. The only remedies available under Title III are injunctive relief and attorney's fees.¹¹⁵ When the DOJ brings a cause of action for violating Title III the Court may charge a fine of up to \$100,000. No punitive damages are available under Title III.¹¹⁶

XIII. Special Provisions and Issues for Housing

A. Single-Family

Privately owned single-family detached homes have the least amount of regulation in terms of the ADA, Section 504 of the RHA,

¹¹³ See 56 Fed. Reg. 35,554 (July 26, 1991) (codified at Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. part 36, appendix B (2007)).

¹¹⁴ 29 U.S.C. § 794(a) (2006) (applying to *all* recipients of Federal funding).

¹¹⁵ 42 U.S.C. § 12188; 28 C.F.R. § 36.501.

¹¹⁶ 42 U.S.C. § 12188.

and the FHA.¹¹⁷ Generally, design guidelines are limited but the FHA applies to sales and rentals of housing. In terms of design, there are two common reference points. First, is *universal design*. Universal design seeks to make a building universally accessible to the fullest extent possible. This includes entranceways, hallways, access to cabinets, light switches, sinks, showers/bathtubs, etc. Second, is *visitability*. The idea of visitability is that a building or a home may not meet all of the requirements of universal design throughout the entire structure but that it is generally accessible enough to be easily and safely visited by a person with a disability, perhaps a person using a wheelchair. This means that the entranceway and the primary social area of the structure should be accessible, and there should be at least a half-bath that is accessible to visitors.

B. Multi-Family

The FHA requires “. . . all new multi-family housing to meet specific inclusive design standards, including guidelines for common areas, entranceways, hallways, light switches, grab bars, space to accommodate use of a wheelchair, and other design elements.”¹¹⁸ Design and construction requirements are issued by both HUD and DOJ. Any failure to make multi-family housing compliant with these standards is a violation of the FHA.

A multi-family dwelling is defined as “(A) buildings consisting of four or more units if such buildings have one or more elevators;

¹¹⁷ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 113; 42 U.S.C. § 3603.

¹¹⁸ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 114; U.S. DEP’T OF HOUSING & URBAN DEV. & U.S. DEP’T OF JUSTICE ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR COVERED MULTIFAMILY DWELLINGS UNDER THE FAIR HOUSING ACT (2013).

and (B) ground floor units in other buildings consisting of four or more units.”¹¹⁹

C. Private v. Public Housing

HUD enforces Title II of the ADA when it relates to state and local public housing, housing assistance, and housing referrals.¹²⁰

Under HUD regulations, “five percent of qualifying public housing units must be fully accessible in terms of universal design.”¹²¹

D. Condominiums, Subdivisions, and Cooperative Housing

A “covered multi-family dwelling” under the FHA has design and construction requirements and this may include condominiums, cooperatives, apartment buildings, vacation and time share units, assisted living facilities, continuing care facilities, nursing homes, public housing developments, housing projects funded with federal funds, transitional housing, single room occupancy units, shelters designed as residence for homeless persons, dormitories, hospices, extended stay or residential hotels,” etc.¹²²

Single family homes may be covered under the FHA as a condominium if they are in buildings of four or more units.¹²³

The ADA is also relevant to the creation of new condominiums and cooperatives by providing design and construction guidelines. Common elements of a condominium need to be accessible under

¹¹⁹ 42 U.S.C. § 3604(f)(7).

¹²⁰ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 116.

¹²¹ *Id.* at 118.

¹²² U.S. Dep’t of Housing and Urban Development & DOJ, *Accessibility (Design and Construction) Requirements for Covered Multifamily Swellings under the Fair Housing Act*, Joint Statement (Apr. 30, 2013), https://www.ada.gov/doj_hud_statement.pdf.

¹²³ MALLOY, LAND USE LAW AND DISABILITY, *supra* note 1, at 114.

the FHA.¹²⁴ Furthermore, while the cooperative board retains an absolute right of approval, they are not allowed to deny the approval of an applicant because of the applicant's disability.

XIV. For More Information

<http://landuselawanddisability.syr.edu>

Robin Paul Malloy, *LAND USE AND ZONING LAW: PLANNING FOR ACCESSIBLE COMMUNITIES* (Carolina Academic Press, 2018)

Robin Paul Malloy, *LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES* (Cambridge University Press, 2015).

¹²⁴ *United States v. Edward Rose & Sons*, 384 F.3d 258, 263 (6th Cir. 2004).