

Cambridge Disability Law and Policy



# Land Use Law and Disability

Planning and Zoning for  
Accessible Communities

ROBIN PAUL MALLOY

CAMBRIDGE

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Syracuse University



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## LAND USE LAW AND DISABILITY

### Planning and Zoning for Accessible Communities

In *Land Use Law and Disability*, Robin Paul Malloy argues that our communities need better planning to be safely and easily navigated by people with mobility impairment and to facilitate intergenerational aging in place. To achieve this, communities will need to think of mobility impairment and inclusive design as land use and planning issues, in addition to understanding them as matters of civil and constitutional rights.

Although much has been written about the rights of people with disabilities, little has been said about the interplay between disability and land use regulation. This book undertakes to explain mobility impairment, as one type of disability, in terms of planning and zoning. The goal is to advance our understanding of disability in terms of planning and zoning to facilitate cooperative engagement between disability rights advocates and land use professionals. This in turn should lead to improved community planning for accessibility and aging in place.

Robin Paul Malloy is the E. I. White Chair and Distinguished Professor of Law, and Kauffman Professor of Entrepreneurship and Innovation at Syracuse University. He is a recognized expert on property development law, land use law, and real estate transactions. He has authored eight books, including two earlier books with Cambridge University Press and a leading casebook on real estate transactions; edited eight additional books; and authored numerous articles and book chapters. He is an editor of three different book series, including the Cambridge Disability Law and Policy series (with Peter Blanck).

## CAMBRIDGE DISABILITY LAW AND POLICY SERIES

Edited by Peter Blanck and Robin Paul Malloy

The Cambridge Disability Law and Policy series examines these topics in interdisciplinary and comparative terms. The books in the series reflect the diversity of definitions, causes, and consequences of discrimination against persons with disabilities while illuminating fundamental themes that unite countries in their pursuit of human rights laws and policies to improve the social and economic status of persons with disabilities. The series contains historical, contemporary, and comparative scholarship crucial to identifying individual, organizational, cultural, attitudinal, and legal themes necessary for the advancement of disability law and policy.

The book topics covered in the series also are reflective of the new moral and political commitment by countries throughout the world toward equal opportunity for persons with disabilities in such areas as employment, housing, transportation, rehabilitation, and individual human rights. The series will thus play a significant role in informing policy makers, researchers, and citizens of issues central to disability rights and disability antidiscrimination policies. The series grounds the future of disability law and policy as a vehicle for ensuring that those living with disabilities participate as equal citizens of the world.

### *Books in the Series*

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Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*, 2010

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Jerome Bickenbach, Franziska Felder, and Barbara Schmitz, *Disability and the Good Human Life*, 2013

Robin Paul Malloy, *Land Use Law and Disability: Planning and Zoning for Accessible Communities*, 2014

*For*  
*Margaret, Gina, and Giovanni*

## Preface

Over the past couple of years, I witnessed family and friends age and gradually become less mobile. Slowly they drifted into isolation as it became increasingly difficult to participate in the events of everyday life. These observations inspired me to think about property development and the regulation of land use from the perspective of people with mobility impairment. At first, I focused on exploring inclusive design requirements confronting property owners and developers from the perspective of compliance with inclusive design building codes, but I soon concluded that the less explored and richer area of concern for land use lawyers and planning professionals was simply one of understanding mobility impairment as a land use and planning issue.

In this book, I suggest that our communities need better planning to be safely and easily navigated by people with mobility impairment and to facilitate intergenerational aging in place. This requires us to think of mobility impairment and inclusive design as land use and planning issues in addition to understanding them as matters of civil and constitutional rights. Although much has been written about the rights of people with disabilities, little has been said about the interplay between disability and land use regulation. This book undertakes to explain mobility impairment, as one type of disability, in terms of planning and zoning. It is written with the hope that a better understanding of disability in terms of planning and zoning will facilitate more cooperative engagement between disability rights advocates and land use professionals and that this in turn will lead to improved community planning for accessibility and aging in place.

In this regard, the book offers a new perspective because there has been very little challenge to the exclusivity of the civil rights paradigm in thinking about disability. Land use law emanates from the police power of government, and the central issue in the book involves finding an appropriate balance between the police power and civil rights when coordinating and regulating

land use and property development. Some guidebooks are on the market that deal with compliance issues concerning accessible and universal design, but these books do not really involve land use law. The books are more akin to manuals prepared for assisting in compliance with a building code. This book is different because it focuses on land use law.

I have written the book for the general reader but hope that it will be of particular interest to planning and zoning professionals as well as to students of planning, property development, and land use. I also intend the book to reach an audience of people interested in disability studies and hope that the book is understood as a useful contributor to our mutual goal of making communities more accessible. At the same time, I do understand that people in disability studies will not be familiar with thinking of disability from a land use perspective. This may cause them to have some initial concerns because analysis under the police power is different than analysis under civil rights; nonetheless, it seems important to move beyond a civil rights paradigm so that we can address the planning and zoning issues we confront in making our communities more accessible.

Having presented issues from this book at various conferences, I understand that some property rights advocates may think that my views do too little to protect property rights from regulation. For example, some property rights people express a view that the government should not have the authority to require a homeowner to alter any aspect of a residential home for purposes of making the home more accessible under federal and state disability law. They express a belief that a homeowner has a right to build a home in any way that she wishes, and they assert this even though they seemingly understand that building codes already restrict this right. At the same time, I understand that some disability rights advocates think that my views do not go far enough to advance all of their goals because they feel that government should ensure universal and absolutely equal access to 100 percent of the built environment, without regard to cost. Some of these people also express the view that local government should have no role in regulating the separation and location of particular uses when a disability right is asserted. I am of a different view. Land use law has traditionally dealt with tensions between land use regulation and other important fundamental rights, such as those represented by the freedom of religion, the right to free speech, the definition of family, freedom of association, the right to travel, the right to a healthy environment, and the protection of property under the Fifth Amendment. Thus, although some advocates of property rights and disability rights may find points of contention with positions taken in this book, I am satisfied that the book develops a view grounded in the traditional jurisprudence of land use law and that it initiates



a respectful dialogue concerning the need to mediate competing and deeply held values in our system of governance and in the way that land use regulation interacts with disability.

In addition to being of interest to the general reader and the land use professional, this book may also be used as the basis for a seminar on land use law and disability or as a supplement to a college course in planning and in a class on land use and zoning law. It might also serve as the core of a “short course” or “mini-course” on the subject (such courses are becoming increasingly popular as summer offerings and as bridge courses between academic terms at many colleges and law schools). I have used the materials as a way to introduce my regular land use and zoning law students to key issues regarding disability and aging in place. Typically, this means setting aside two to three weeks of classes during my 13-week course for discussion of the interplay between land use law and disability. In addition, I have used these materials in working with planners and zoning officials seeking guidance on dealing with issues surrounding disability and aging in place. I have found that the book facilitates discussion and gets people thinking about these issues in a new way. Initially, most land use professionals and property developers believe that disability and mobility issues are strictly civil rights matters and that the only questions to address are technical compliance issues with respect to Americans with Disability Act (ADA) design guidelines. Using these materials, we are able to discuss the importance of planning and to sort out the distinctions between ADA design guidelines and the law related to land use regulation.

In the book, I include edited versions of a few of the key cases that seem most pertinent to the issues being discussed. These cases have been edited so as to flow with the text, and they are used to advance the discussion in each chapter. The cases extend and expand on the text and are not used simply to offer an example, although they do illustrate application at the same time as they explain the subject. The cases provide the reader with a good basis for understanding the way that courts approach these issues in practice. Although I have file cabinets (both real and virtual) full of documents and resources, I have intentionally attempted to avoid the tendency in legal journal writing to use an excessive number of long footnotes. My hope is that this will permit the discussion to flow more naturally. At the same time, footnote references should be more than adequate for tracking down additional resources for those readers who are so inclined. I hope that I have been successful in striking a reasonable balance. Footnotes are prepared in Bluebook style for U.S. legal citation.

I provide a table of cases for the book. It is to be noted that the table of cases identifies only those primary cases included and discussed in the text of the book. Cases that simply appear in the footnotes, and cases that are merely cited

by a court within an edited case opinion, are not included in this table. Thus, the table of cases includes the case opinions that have been included in edited form and cases specifically identified and discussed in the text, excluding the text of edited case opinions. I consider these to be the primary cases.

In developing my ideas for this book and preparing the manuscript, I benefited from the support of many people. I wish to acknowledge and thank these people. First and foremost, I thank my wife, Margaret, for 36 years of marriage and her continued encouragement and for her willingness to listen to and discuss an endless array of ideas. Second, I wish to thank Dean Hannah Arterian and the Syracuse University College of Law for actively supporting my research and writing on this project over the past two and a half years. In addition, a number of individuals were willing to listen to my ideas and read some draft materials. They have provided valuable feedback and include Keith Bybee; Jennifer Champa Bybee; Jeremy Blumenthal; Christian C. Day, Nestor M. Davidson, Michael Diamond, David Driesen, Deborah Kenn, and Shelley Saxer; and James C. Smith. I thank my friend Jerry Evensky for a willingness to engage in numerous lunchtime conversations concerning aspects of this book project. I also wish to recognize, more generally all the participants in the Syracuse University College of Law faculty workshop series coordinated by Rakesh Anand; the participants in the third annual meeting of the Association for Law, Property, and Society (ALPS); Suzanne Lennard and the participants in the 2012 Livable Cities Conference held in Portland, Oregon; Molly Stuart and the participants in the Bettman Symposium of the 2013 annual meeting of the American Planning Association held in Chicago, Illinois; Peter Blanck, who initially encouraged me to look more deeply into the connections between property development and disability; and Sheila Welch, for her invaluable administrative assistance.

I also want to thank the following for collectively and intermittently providing research assistance for this project, two earlier projects identified later, and other related papers leading up to this book: members of the professional library staff at the Syracuse University College of Law (in particular, Mark Burns and T. J. Holynski) and student research assistants Laura Gagnon, Lesley Germanow, Jason Hirata, Amber Mufale, Matthew Oja, Anthony Osbourne, Anthony Rapa, Melissa Schreiber-Stahl, and Kelly R. Tichacek.

Finally, I want to thank the town of DeWitt for providing me with the privilege of serving on the Zoning Board of Appeal (ZBA), where I have been able to observe and participate in the process of dealing with land use and disability law issues firsthand. Thanks go to Edward Michalenko, town supervisor, for appointing me to the ZBA and to the people with whom I have enjoyed the pleasure of working as a member and as deputy chair, including

Kenneth Alweis, Dylan Bruns, Thomas Carello, Dino Centra, Robert Jokl, Effe O'Hara, Julian Modesti, Robert Sweeney, Matthew Wells, and ZBA attorney Don Doerr. I also extend thanks to our professional staff members, Angela Epolito, Richard Robb, and Andrew Worden.

Some of the ideas discussed in this book were previously explored in Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L. J. 699–748 (2009), and Robin Paul Malloy, *Accessible Housing and Affordability*, in AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 207–217 (Nestor M. Davidson and Robin Paul Malloy, eds., Ashgate, 2009); Robin Paul Malloy, *Opening Neighborhoods to People with Mobility Impairment: Property, Disability and Inclusive Design Housing*, in THE PUBLIC NATURE OF PRIVATE PROPERTY 133–152 (Robin Paul Malloy and Michael R. Diamond eds., Ashgate 2011).

It goes without saying that I am indebted to the continued support of my editor at Cambridge University Press, John Berger.

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## Inclusion by design

### *Thinking beyond a civil rights paradigm*

#### 1.1 PAULI: AGE 28

Pauli was a passenger in an automobile being driven by his mother when they were hit by a drunk driver.<sup>1</sup> The accident left Pauli unable to walk, paralyzed from the waist down. That was 11 years ago. Today, at age 28, Pauli has just been promoted to junior partner of a local management consulting firm.

While he finishes his work for the day, Pauli looks forward to attending a celebratory party for all the newly promoted people in the firm. The party is being held later this night at the home of the firm's senior partner. Pauli organizes his desk, makes a call to request a wheelchair-accessible bus, freshens up in the men's room, and then rolls himself down the hallway to the elevator. He makes his way out the front door of his building and rolls his wheelchair down the sidewalk to the curb cut, where he crosses the street to wait for the wheelchair-accessible bus that will take him to his home. Two regular city buses that cover his route come and go while Pauli waits the 40 minutes that will be required on this day for the accessible bus to arrive with one other passenger already on it. As Pauli waits for his bus, he thinks about the way his life has changed since that accident 11 years ago. In his wheelchair, life is so much different from the time when he played football, ran track, and danced with his high school sweetheart at the junior prom. Although those memories are cherished, he has since adjusted to a new life and reflects positively on the many changes that have recently improved his quality of life, such as curb cuts, accessible buses, roll-in entrances to buildings, bathrooms with lower sinks and light switches, and new building designs with doorways and facilities that provide adequate space for moving and manipulating his wheelchair.

<sup>1</sup> Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L. J. 699 (2009).

He knows that such changes have come slowly and that there is a need for additional design changes, but he also appreciates the increasing community awareness of the need for greater accessibility. While acknowledging that much work needs to be done, Pauli feels lucky because his office is in a new building with many inclusive design features, which was not the case in his prior job location, nor is it the case in many of the office buildings downtown, some of which were built 40 or more years ago and have done a poor job of updating. Pauli also feels fortunate because the city, after threats of litigation, recently purchased two new wheelchair-accessible buses, and he now enjoys being able to take advantage of one of the few bus routes served by such a bus, even if service is often slower than that provided by the regular city bus service. The city still has not looked at demographic trends and the need for future bus routes, but at least Pauli can see improvements in transportation and building designs that are beneficial to many people with low functional mobility, not just people in wheelchairs. Within a few minutes, the bus arrives, and Pauli, aware of all the hard work that has gone into becoming a junior partner, rolls onto the bus and is headed home.

After arriving at home, Pauli changes for the party and, together with his wife, drives to the home of the senior partner. The senior partner lives in a newly developed suburban neighborhood to which Pauli has never been before. By the time they locate the partner's home, there are already a number of cars parked along the street. From their car, they can hear the music of laughter and joyful conversation spilling out into the neighborhood. They park the car and head toward the front of the house. There are no sidewalks in the neighborhood, and Pauli's wheelchair does not work well in the soft grass, so they make their way down the center of the street and past the wall of parked cars. Pauli's sense of excitement dissipates, and his gut wrenches as he looks out at a tiered three-level stone sidewalk terracing up the front lawn to a porch with a two-step entry to a relatively narrow front door. Disheartened, but with a well-practiced smile on her face, Pauli's wife goes to the front door to inquire about another, more suitable entrance to the house.

As she waits at the door, she cannot help but notice the way in which the warm glow of the party inside contrasts with the sullen lines of distress on Pauli's face. The senior partner comes to the door and offers her regrets for not thinking about the issue of Pauli's access to her home. She pauses and thinks for a minute about the entrance from the garage, but that too has steps – three steps up from the garage to the main living room – and the doorway is too narrow. Finally, she suggests that Pauli roll around the side of the house, past the line of garbage cans, and come in through the rear mud room. "This," she says, "is the door we use to let the dogs in and out. I am sure that they won't

mind.” She goes on to explain that there is only one step at this entrance and that she will send several guests back to help lift Pauli through the doorway – the only doorway in her home wide enough to accommodate a wheelchair. Pauli makes his way past the trash cans thinking of all the family gatherings and all the college and Super Bowl parties hosted at homes in which the same old issue arises. He wonders to himself if people anguish as much over “having” to invite him to their homes as he does over being invited.

### 1.2 ANN: AGE 15

Sally and Jim have a 15-year-old daughter, Ann, born with a mobility-impairing condition necessitating the use of a wheelchair or scooter.<sup>2</sup> Ann attends the public school, which provides an inclusive and open environment. Ann is a good student, and with the aid of her motorized scooter, she is able to get around the school and participate in some school activities, such as helping to manage the school track team and playing an instrument in the band. Ann has many friends and is well liked by her classmates. All of this is good, but there is a problem: Ann never gets invited to anyone’s home for a play date or a sleepover, or for general socializing, not because of personal discrimination but because of exclusion by design in the homes of her classmates and friends. Although her home is a model of accessibility, there are no sidewalks in her neighborhood, and her school friends and extended family members do not have homes able to easily and safely accommodate her use of a wheelchair. Thus, Ann lives in a partitioned world of public inclusion at school and social exclusion after school. Ann lives in a space of truncated social relationships, and indirectly, her parents’ relationships are also hindered, as they find it increasingly difficult to visit others who occupy exclusionary housing units. The implications of these truncated relationship networks are isolating and stigmatizing for everyone but perhaps more so for young school-age children and teenagers, because reciprocal social networking is so important to a healthy self-image and to their proper social development.

### 1.3 CELIA: AGE 74

Celia, a 74-year-old woman, until recently has been living independently in her own home.<sup>3</sup> Celia had lived in the same home for 50 years, ever since she was married to her now deceased husband. She had six children while living in that house and has many cherished memories of the people and events that

<sup>2</sup> *Id.* at 701.    <sup>3</sup> *Id.*

filled the home with love and laughter over the years. Now, at age 74, Celia has difficulty living in her home. Celia suffers from arthritis in her joints and occasionally loses feeling in her right foot, causing minor interference with keeping her balance. With her arthritis and her foot problem, she is no longer able to navigate the five concrete steps that lead into and out of her home. Inside of her home, she struggles with the layout of the house, which has all three bedrooms and the only bathroom on the second floor. There is a 12-step stairway between the main floor of the house and the second floor. On flat surfaces she is fine and does not need, or use, either a walker or a wheelchair. Doctors estimate that Celia has many years ahead of her and that she would be able to live independently in her home for several more years if it were not for the presence of so many stairs. Celia prefers to age in place, but she recently had to sell her home and move 10 miles away to a senior living facility in a nearby town because her town has none. This facility is easier to navigate, but it removes her from a neighborhood populated with families and people of all ages and places her in an environment where everyone is her age and older. As was the case with her private residence, the neighborhood by the nursing home has no sidewalks and no form of public transportation.

She misses looking out her window and watching the neighborhood children play and seeing the new moms and dads proudly pushing carriages with newborn babies along the sidewalk. She misses the joy of participating in front yard neighborhood chatter and of the children coming around on Halloween and singing carols at Christmas. The hardest thing to deal with is the realization that in addition to having to leave her own home after so many years, she is no longer able to visit the homes of her children, grandchildren, nephew, sister, and friends, who all reside nearby but occupy houses that are not readily accessible because of entry steps and internal stairways. Despite her lack of need for a wheelchair or even a walker, Celia finds that almost every home that she used to visit now represents a barrier to the normalcy of her prior pattern of social interaction. Celia misses the opportunity to visit the homes of the people she cares so much about and finds herself prematurely disconnected from many of the important social networks that she had enjoyed over the years.

#### 1.4 TIFFANY: AGE 65

Tiffany is 65 years old and lives in a small city, on the third floor of a walk-up apartment building. She no longer drives, and she uses a cane when she walks because of an injury to her right leg. In recent years, going up and down the stairway to her third-floor apartment has become increasingly difficult. As life



in the city has changed over time, Tiffany has witnessed the increase in broken sidewalks and the closing up of the downtown drug store, grocery store, and two restaurants, which, in her younger days, were all located within a three-block radius of her home. Tiffany finds it to be increasingly difficult to live independently because of where she is located.

The nearest grocery store, drug store, and restaurant are located several miles away in a suburban shopping center. The shopping center features a new store that is fully accessible. Housing costs in the suburb are too high for Tiffany to afford. The public transit system provides service between the neighborhood of her home in the city and the suburban shopping center, but the four-mile trip takes two hours and requires two transfers. Once in the suburb, there are no sidewalks in the town because property owners do not want to pay for them, and they worry about having to keep them free of snow during the four months when snow is typically on the ground. Across a six-lane highway from the shopping center is a hair salon and a movie theater, but Tiffany has never had the courage to cross the busy road that slices through the town on the way into the city. The grocery store, although fully accessible and having won awards for its inclusive design, is still very difficult for Tiffany to access and enjoy because it is poorly integrated into the surroundings that she must navigate to get there in the first place. Similar difficulties arise when Tiffany attempts to visit the city-based senior citizen's center and when she wishes to visit her local church; sidewalks are in disrepair, and crossing streets is difficult because of traffic and because few intersections have safe crosswalks. Even getting in and out of her home is difficult, because it is an apartment in an older building that still has a difficult stairway to climb. The problem is magnified during winter months, when very few of the sidewalks are properly cleared of snow. Tiffany has found that neither city nor suburban living is necessarily ideal for a person with low functional mobility and living without an automobile.

Unfortunately, the experiences of Pauli, Ann, Celia, and Tiffany are not unique. Their experiences are shared each day by millions of people representing almost 20 percent of American families, and their particular situations simply illustrate the broader set of problems arising from the fact that functional mobility levels vary among people.<sup>4</sup> They also illustrate the fact that many communities are doing a less than ideal job of planning for inclusive design. As indicated in these narratives, we see examples of communities

<sup>4</sup> *Id.*; QI WANG, U.S. DEP'T OF COM., REPORT NO. CENSR-23, DISABILITY AND AMERICAN FAMILIES: 2000, at 4 (2005), available at <http://www.census.gov/prod/2005pubs/censr-23.pdf>. See also LINDA L. NUSSBAUMER, INCLUSIVE DESIGN: A UNIVERSAL NEED 4-6 (2012).