

Chapter 32

The Americans with Disabilities Act and the Fair Housing Act

32-100 Introduction

Title II of the Americans with Disabilities Act (“ADA”) provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Public entities include counties, cities and towns. *42 U.S.C. § 12131(A)*. Zoning qualifies as a public program or service and the enforcement of a zoning ordinance constitutes an activity of a locality within the meaning of Title II. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); *see also START, Inc. v. Baltimore County*, 295 F. Supp. 2d 569 (D. Md. 2003) (the administration of zoning laws is a “service, program, or activity” within the meaning of the ADA).

A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against disabled persons. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

A public entity shall make *reasonable modifications* in policies, practices, or procedures when 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.

Although the federal government has stated that the Fair Housing Act (“FHA”) does not preempt local zoning laws, the Act nonetheless can preempt the way a locality’s zoning regulations are administered.

Under the FHA, it is unlawful 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 person residing in or intending to reside in that dwelling. *42 U.S.C. § 3604(f)(1)(B)*. *Discrimination* under the FHA includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” *42 U.S.C. § 3604(f)(3)(B)*. A *handicap* under the FHA is the same as a *disability* under the Americans with Disabilities Act. *Dadian, supra*. *See Virginia Code § 51.5-45, which pertains to the rights of persons with disabilities to housing accommodations.*

The FHA, the ADA, and the Rehabilitation Act are “separate but interrelated federal laws that protect persons with disabilities from discrimination.” *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 746 (7th Cir. 2006).

32-200 The ADA protects qualified individuals with a disability

Under the ADA, a person is a *qualified individual with a disability* if he or she has: (1) a mental or physical impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) is regarded as having such an impairment. *42 U.S.C. § 12102(2)*; *see also Virginia Code § 36-96.1:1*. The term *mental or physical impairment* may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term *major life activity* may include seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, speaking, or working. *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999. An individual may be

regarded as having an impairment, regardless of whether or not he in fact has a substantially limiting impairment. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008) (on appeal from trial court granting a Rule 50 motion in favor of the clinic on this issue, holding that the clients of a methadone clinic could not be regarded as significantly impaired in a major life activity where they were regarded as criminals and undesirables, but were not necessarily regarded as significantly impaired in their ability to work, learn, care for themselves, or interact with others); see *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998).

The term *qualified individual with a disability* does not include persons who pose “a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation.” *Doe v. University of Maryland Medical System Corporation*, 50 F.3d 1261 (4th Cir. 1995). It also does not include current users of illegal controlled substances, persons convicted for the illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders. See *Joint Statement, supra*.

Examples of disabilities from zoning cases in which the ADA may be at issue include drug and alcohol rehabilitation facilities, mental health facilities, and physical disabilities that prohibit the reasonable use of a dwelling. See section 32-220 for a discussion of the cases considering these disabilities.

32-210 A locality must reasonably accommodate a qualified individual with a disability in the administration of its zoning regulations

A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against disabled persons. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

A public entity shall make *reasonable modifications* in policies, practices, or procedures when 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.

The United States Department of Justice explains this requirement as follows:

[Localities] are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks. In addition, [localities] may consider granting exceptions to the enforcement of certain laws as a form of reasonable modification. For example, a municipal ordinance banning animals from city health clinics may need to be modified to allow a blind individual who uses a service animal to bring the animal to a mental health counseling session.

The ADA and City Governments: Common Problems, U.S. Department of Justice, Civil Rights Division, Disability Rights Section.

Whether a requested accommodation is *reasonable* is highly fact-specific and determined on a case-by-case basis by balancing the cost to the locality and the benefit to the disabled person. *Dadian, supra*. Whether a requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled person’s quality of life by ameliorating the effects of the disability. *Dadian, supra*. The focus is on whether the accommodation in the case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change. *Dadian, supra* (allowing front driveway access to elderly landowners’ home, one of whom suffered from osteoporosis and had difficulty walking, was not so at odds with village’s general prohibition against such driveways and would not cause an unreasonable change to the ordinance because the plaintiffs were not requesting a change to the ordinance itself, but application of the hardship exception in their case). 28 C.F.R. § 35.130(b)(7).

Reasonable accommodation is not mandated when zoning laws are applied in a non-discriminatory manner. *Get Back Up, Inc. v. City of Detroit*, 2015 WL 1089662 at 4 (6th Cir. 2015) (where zoning regulations required conditional use permit for substance abuse facility in business zoning district, facial challenge to the zoning ordinance failed because the ordinance did not allow any materially similar use to operate by right in the zoning district and, therefore, the ordinance did not discriminate against the disabled).

For example, the Department of Justice has explained to a complainant why a city's denial of a rezoning that would have allowed an office use in a predominantly single family neighborhood did not violate the ADA. The complainant was the owner of a consulting firm that employed 5 people, two of whom had disabilities (one recovering from alcoholism; the other having chronic depression) who sought the rezoning to relocate his business in the neighborhood. The letter explains:

The evidence shows that the City's decision to deny the rezoning application for your property has the same effect on your employees without disabilities as it does on your employees with disabilities. Further, the evidence shows that the City has an established policy of maintaining the area where your property is located as a predominantly single family area, and that this policy has the same effect on people without disabilities as it does on people with disabilities. The evidence shows that the City's decision to deny your rezoning application was made for reasons that are not discriminatory under the ADA. Therefore, we have determined that no violation of title II occurred.

Letter dated March 14, 1994, Coordination and Review Section of the Civil Rights Division of the United States Department of Justice.

32-220 Examples of typical zoning cases in which the ADA is in issue

Following are some examples of the types of cases that appear to dominate the zoning case law in which the ADA is in issue:

- *Drug and alcohol rehabilitation programs*: The anti-discrimination provision of the ADA prohibits zoning decisions by a locality that discriminate against drug and alcohol rehabilitation programs, the clients of which are "qualified individuals with a disability." *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 345 (6th Cir. 2002) (agreeing with the trial court's finding that "the blanket prohibition of all methadone clinics from the entire city is discriminatory on its face."); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999) (holding that the ADA applied to zoning ordinance barring methadone clinics within 500 feet of residential areas); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2^d Cir. 1997) (holding that the ADA applies to zoning decisions involving a drug and alcohol rehabilitation center); *Habit Management, Inc. v. City of Lynn*, 235 F. Supp. 2d 28 (D.Mass. 2002) (no showing that the placement of methadone clinics in industrial or business zones poses any significant risk); *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008).
- *Mental health facilities*: The anti-discrimination provision of the ADA applies to mental health facilities. *Pathways Psychological v. Town of Leonardtown*, 133 F. Supp. 2d 772 (D.Md. 2001).
- *Variance from regulations to allow reasonable use of home*: The anti-discrimination provision of the ADA prohibits zoning decisions by a locality that fail to reasonably accommodate persons with a disability to allow them the same housing opportunities without a disability. In *Trovato v. City of Manchester*, 992 F. Supp. 493 (D.N.H. 1997), a mother and daughter who both had muscular dystrophy were denied a variance that would allow them to build a paved parking space in the front of their home. The court found that the denial of the paved parking space adversely affected the plaintiffs' use and enjoyment of their home, and that their request was reasonable. In *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001), an elderly couple, one of whom suffered from osteoporosis and had difficulty walking, sought a hardship exception from the village's prohibition against front

driveway accesses. The court found that in denying the permit, the village failed to provide a reasonable accommodation from its regulations.

- *Variance from setback for ramp to provide access to building*: If a zoning ordinance requires a certain setback between a business entrance and a curb, but the business must encroach into the setback to ramp its entrance, the zoning authority may be required to issue a variance as a reasonable modification to the setback regulations. *ADA Best Practices Tool Kit for State and Local Governments* (last updated September 14, 2009) (granting a variance to allow a ramp to be built in a setback is a reasonable modification of a locality’s rules and policies to avoid discrimination against people with disabilities). Thus, the zoning procedures must allow for some process whereby requests for exemptions or special permits for such purposes may be considered. These requests must be granted where reasonable.

The ADA Amendments Act of 2008 (“ADAAA”) changed the burden of proof that must be shown to establish a disability. As amended by the ADAAA, “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if 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.” 42 U.S.C. § 12102(3)(A). *CRC Health Group, Inc. v. Town of Warren*, 2014 WL 2444435 at 10 (D. Me. 2014) (partial grant of summary judgment for methadone treatment facility on ground that moratorium on facilities was intentional facial discrimination under the ADA; facility made requisite threshold showing that its prospective clients were disabled for purposes of the ADA); *compare RHJ Medical Center, Inc. v. City of DuBois*, 564 F. App’x 660 (3rd Cir. 2014) (under the Under the “regarded as” test, methadone treatment facility failed to show that the city regarded the clinic’s potential patients as suffering under an impairment that “substantially limits one or more major life activit[y]”).

This section has provided only a brief overview of the application of the ADA to local zoning regulations. Zoning issues arising under the ADA may also trigger the application of the Fair Housing Act.

32-300 The FHA prohibits discriminatory housing practices

The FHA operates to invalidate “any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice. . .” 42 U.S.C. § 3615. The *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999, explains that the FHA prohibits localities from:

- Using land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example of this situation would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.
- Taking action against, or denying a permit, for a home because of the disability of individuals who live or would live there. An example of this situation would be a decision that denied a building permit for a home because it was intended to provide housing for persons with mental retardation.
- Refusing to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.

A locality will most often face a challenge to its zoning laws when they are applied against handicapped persons in such a way that: (1) handicapped persons are prevented from using and enjoying their home in the same manner as non-handicapped persons, *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001) or (2) the locality defines *family* in a way so that persons with handicaps are disqualified from living in single family residential neighborhoods. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643 (W.D.Pa. 2003).

32-310 The use and enjoyment of the home

The FHA prohibits zoning regulations and decisions that fail to reasonably accommodate persons with a handicap to allow them the same housing opportunities without a handicap.

In *Trovato v. City of Manchester*, 992 F. Supp. 493 (D.N.H. 1997), a mother and daughter who both had muscular dystrophy were denied a variance that would have allowed them to build a paved parking space in the front of their home. The court found that the denial of the paved parking space adversely affected the plaintiffs' use and enjoyment of their home, and that their request was reasonable.

In *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001), an elderly couple, one of whom suffered from osteoporosis and had difficulty walking, sought a hardship exception from the village's prohibition against front driveway accesses. The court found that in denying the permit, the village failed to provide a reasonable accommodation from its regulations.

These cases are also discussed in the context of the ADA in section 32-220.

32-320 Allowing persons with disabilities to live in facilities within single family residential neighborhoods

Congress intended for the FHA to apply to zoning ordinances and other laws that would restrict the placement of group homes. H.R.Rep. No. 100-711, at 24 (1988), reprinted in 1988 U.S.C. . C.A.N. 2173, 2185 (stating that the amendments "would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps").

The United States Supreme Court has instructed that zoning regulations describing who or how many people may compose a family unit so as to include any number of people related by blood, marriage or adoption but no more than a limited number of unrelated people living together as a household unit, are subject to review under the FHA. *City of Edmonds v. Oxford House*, 514 U.S. 725, 115 S. Ct. 1776 (1995); see 42 U.S.C. § 3607(b)(1), exempting from FHA scrutiny reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling, and removing from the FHA's scope only total occupancy limits, *i.e.*, numerical ceilings that serve to prevent overcrowding in living quarters.

In multiple cases, the courts have found a violation of the FHA where localities attempted to prevent or restrict persons with disabilities from living in the single family-zoned homes of their choice, even when the occupancy did not meet the locality's definition of a *family* under the applicable zoning ordinances. See, *e.g.*, *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (violation of the FHA even though the occupancy did not meet the town's definition of *family* and was not the "functional and factual equivalent of a natural family" as provided under the zoning ordinance); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992) (proof of permanency and stability not required for related occupants, but required for nonrelated occupants, was held to be discriminatory); *Oxford House Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (occupancy limitations were discriminatory); *United States v. Town of Garner*, 720 F. Supp. 2d 721 (E.D.N.C. 2010) (in denying town's motion to dismiss on ripeness grounds, the court held that the town may have constructively denied Oxford House's reasonable accommodation request either by granting an accommodation in the form of a zoning text amendment that left the proposed use as still being in violation of the zoning ordinance or by failing to act on subsequent requests for reasonable accommodation).

The purpose of the FHA's requirement for reasonable accommodation is to facilitate the integration of persons with disabilities into all communities. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F. Supp. 2d 643 (W.D. Pa. 2003). Thus, the FHA "prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled." *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002).

Note that Virginia Code § 15.2-2291 imposes a limitation on a locality's zoning power by requiring that a zoning ordinance consider a residential facility in which no more than eight mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, as residential occupancy by a single family. A *residential facility* means any group home or other residential facility for which the Department of Behavioral Health and Developmental Services is the licensing authority. *Virginia Code § 15.2-2291(A)*. A zoning ordinance may not impose conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. *Virginia Code § 15.2-2291(A)*. A group home serving eight unrelated adults who do not meet these criteria does not qualify under Virginia Code § 15.2-2291(A) for treatment as a single-family residence insofar as zoning is concerned. *1995 Va. Op. Atty. Gen. 286*.

32-330 Examples provided by the Department of Justice and the Department of Housing and Urban Development

The *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999, provides several useful examples as to how the FHA applies to zoning regulations:

- *Regulations must treat groups of unrelated persons equally:* Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the FHA. For example, assume that a city's zoning ordinance defines a *family* to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires the home to seek a use permit, the ordinance's requirements would conflict with the FHA because it treats persons with disabilities differently than persons without disabilities.
- *Regulations may generally limit the number of unrelated persons who may live together; reasonable accommodation may be required:* A locality may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the FHA if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waiver. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.
- *Regulations may impose on group homes the same restrictions as on other groups of unrelated persons; reasonable accommodation may be required:* Even though a zoning ordinance imposes on group homes the same restrictions it imposes on other groups of unrelated people, a locality may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. For example, it may be a reasonable accommodation to waive a setback requirement so that a paved path of travel can be provided to residents who have mobility impairments. A similar waiver might not be required for a different type of group home where residents do not have difficulty negotiating steps and do not need a setback in order to have an equal opportunity to use and enjoy a dwelling.
- *Reasonable accommodation determined on a case-by-case basis:* Not all requested modifications of rules or policies are reasonable. Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. What is reasonable in one circumstance may not be reasonable in another. For example, assume that a locality does not allow groups of four or more unrelated people to live together in a single-family neighborhood. A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an "ordinary family." In this circumstance, there would be no undue burden or expense for the locality nor would the single-family character of the neighborhood be fundamentally altered. Granting an exception or waiver to

the group home in this circumstance would not invalidate the ordinance. The locality would still be able to keep groups of unrelated persons without disabilities from living in single-family neighborhoods.

- *Reasonable accommodation not required if significant burden on the locality or fundamental change to the neighborhood:* A 50-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood, for obvious reasons having nothing to do with the disabilities of its residents. Such a facility might or might not impose significant burdens and expense on the community, but it would likely create a fundamental change in the single-family character of the neighborhood. On the other hand, a nursing home might not create a “fundamental change” in a neighborhood zoned for multi-family housing. The scope and magnitude of the modification requested, and the features of the surrounding neighborhood are among the factors that would be taken into account in determining whether a requested accommodation is reasonable.
- *Whether a locality can assure that a neighborhood does not have more than its fair share of group homes:* The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the FHA. However, if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.