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978-0-521-19393-1 - Land Use Law and Disability: Planning and Zoning for Accessible Communities

Robin Paul Malloy

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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).

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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.

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

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# Land Use Law and Disability

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COMMUNITIES

**ROBIN PAUL MALLOY**

Syracuse University



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*For*

*Margaret, Gina, and Giovanni*

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## 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

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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

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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

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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.

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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

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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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