

***Our Zoning Board of Adjustment (ZBA) received a request for a variance to construct a handicapped entrance ramp that does not meet our town's set-back requirements. Does the Americans with Disabilities Act of 1990 (ADA) require that the ZBA grant the variance regardless of whether the project meets Vermont's variance criteria? Does the ADA exempt a person with a disability from even having to apply to construct a handicap accessible structure under local zoning bylaws?***

This is a very complicated issue that represents a classic gray area of the law. The short answer is that the ADA does not exempt people with disabilities covered by the Act from compliance with local zoning bylaws nor does the Act explicitly state that municipalities must grant variances to construct a handicapped entrance ramp or other handicap accessible structures. However, as discussed below, a municipality may be subject to a claim that it has discriminated against a disabled person by denying a request to make improvements to property to accommodate the needs of that disabled person.

If faced with this situation, the most prudent advice we can provide is that you should contact your municipal attorney to discuss the matter before taking any action. At this time it is simply not clear what a municipality's obligations are with regard to accommodating requests to make private property handicap accessible, and the facts of each particular situation will dictate the course of action that a municipality should take. However, to help you and your attorney evaluate your options and point you in the right direction if this issue arises in your town, VLCT is providing a brief legal analysis of this complex question.

#### *The ADA*

Title II of the ADA prohibits a public entity from discriminating against an individual on the basis of disability or from excluding an individual from public services, programs or activities. 42 U.S.C.A. § 12132. Although activity is not explicitly defined in Title II of the ADA, several federal district courts, including the second circuit court which Vermont is part of, have held that zoning qualifies as an activity because making zoning decisions is a normal function of a governmental entity. What this all means is that when your town takes an action under your zoning program (e.g. reviewing a permit application or taking an enforcement action) this action triggers an obligation to comply with the ADA.

#### *Other Federal Laws*

In addition to the ADA, your actions to implement zoning programs may trigger rights that people with disabilities have under federal laws other than the ADA. For example, if a permit for access to a residential structure is requested, people with disabilities may have rights under the Fair Housing Amendments Act (FHAA) in addition to the ADA.

#### *The Legal Issues*

Unfortunately, the clash between local zoning programs and federal laws protecting people with disabilities raise many questions for which there are few clear answers. However, one question that is answerable is that people applying to construct handicap accessible structures are not automatically exempt from local zoning. After all, not all people with disabilities are protected by federal law. Even if municipalities are inclined to grant exceptions from zoning to people

with disabilities, they must have an opportunity to inquire about whether the person and proposed handicap structure is even protected by federal law.

Accordingly, if an individual wishes to construct a handicap accessible ramp and your bylaws do not exempt such ramps from the definition of structure or land development in your zoning bylaws, a permit is required from the Zoning Administrator (ZA). If the ramp does not meet setback or dimensional requirements in your zoning bylaws, under Vermont law the ZA must literally interpret the bylaws and deny the application. The fact that the person is disabled and may be protected under the ADA or FHAA is not an issue that the ZA should attempt to address.

The issue becomes murkier if the individual appeals the ZA's decision and applies to the ZBA for a variance. If the individual can meet the variance criteria that are set in state law (24 V.S.A. § 4468) there is no problem. The variance can be granted and no issue with regard to the municipality discriminating against the disabled person exists. However, Vermont's variance criteria allow applicants to deviate from compliance with zoning bylaws if there are unique characteristics of the *land* not the *person*. The variance criteria simply do not authorize the ZBA or Development Review Board to grant variances to accommodate the needs of the people applying. The criteria focus instead on reasonable use of the property.

So what happens if an individual with a disability wishes to construct an improvement designed to provide handicap access to private property and the proposal does not meet the zoning bylaws or the variance criteria? This very issue arose in the city of Manchester, New Hampshire. In the New Hampshire case the ZBA decided not to address the issues of compliance with federal law. Rather, the ZBA based its decision on its zoning bylaws and denied the variance request.

The applicants in the case appealed the ZBA decision to federal court claiming the City discriminated against them under the ADA and FHAA. The federal court ruled in favor of the appellants, holding that by denying the variance to promote handicap access to the property the City failed to reasonably accommodate individuals with disabilities. *Trovato v. City of Manchester*, 992 F.Supp. 493 (1997). In its decision the federal court chastised the ZBA for not considering the protections afforded to the applicants under the ADA and FHAA.

### *Conclusion*

The New Hampshire case is *not* binding in the State of Vermont. However, it is an example of how a federal court in a neighboring state addressed this difficult issue. VLCT does not agree with the New Hampshire court's decision. For example, VLCT questions the authority of a local board like the ZBA to weigh issues of federal law and procedurally how a ZBA is authorized to deviate from its mandate to enforce the state variance criteria. Nevertheless, there is no guarantee that a Vermont federal court would not adopt the reasoning of the New Hampshire court if such a claim is brought. This is why it is crucial for you to work with your town attorney and even contact your insurance carrier if this issue arises.

As a preventative strategy it is possible to exempt clearly defined handicap accessible structures designed to meet the needs of handicap persons covered by federal law from zoning. If you wish to pursue such a bylaw you may want to allow the structure to exist as long as it is necessary to accommodate the person with a disability. This way you will minimize the noncompliance with

dimensional zoning requirements. Addressing this issue proactively in your bylaws will help your town to avoid the unpleasant clash between state and federal law and potentially avoid litigation.

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