



Chapter

Accommodations for the Disabled

The Americans with Disabilities Act (ADA) requires local governments to make “reasonable accommodations” (modifications or exceptions) to rules, policies, practices, or services when necessary to afford persons with disabilities equal access to public accommodations such as restaurants, retail establishments, or other businesses normally open to the public. Similarly, the federal Fair Housing Act, and more specifically, Wisconsin’s Fair Housing Law¹⁶⁷ requires local governments to make reasonable accommodations to provide equal access to housing for persons with disabilities. These laws must be considered when making local land use and zoning decisions, but do not specifically preempt or invalidate local zoning.

In many instances, local zoning regulations are designed to accomplish public health and safety goals and appear to be neutral, but may in fact adversely impact individuals with disabilities. Consider for example, the case of a zoning ordinance that requires homes to be set back twenty feet from the street to ensure the visibility and safety of passing vehicles and pedestrians. If an existing home is built to the setback line, installing a ramp to enable a person with a disability to enter their home would be impermissible without a modification or exception. In such

¹⁶⁷ Wis. Stat. § 106.50 and Wis. Admin. Code § DWD 220

cases, local governments are required to make reasonable accommodations to prevent the discrimination of persons with disabilities.

What is a “reasonable accommodation”?

What constitutes a reasonable accommodation must be made on a case-by-case basis and depends on the facts of the situation. A reasonable accommodation might entail modifications to existing ordinances, regulations or policies, or a waiver of such requirements for persons with disabilities. If a requested modification imposes an undue financial or administrative burden on a local government or if the modification fundamentally alters the local government’s land use or zoning scheme, it is not considered a “reasonable” accommodation and the local government is not required to meet that request.¹⁶⁸

When considering the extent to which a modification is reasonable (for example, how much of setback reduction should be allowed), local governments may wish to refer to ADA standards. Although these requirements do not apply to housing, they may provide guidance in terms of how large of a ramp or other structure is generally necessary to afford accessibility.

What is the recommended approach for providing reasonable accommodations?

Communities use a variety of approaches to provide reasonable accommodations for persons with disabilities—common tools include variances, conditional use permits, special exceptions, permitted uses and waivers of zoning regulations. Strengths and weaknesses associated with each of these tools are considered in turn.

Variance

Granting a variance requires the finding of three conditions: unnecessary hardship, unique property limitations, and no harm to public interest. Applicants must satisfy all three requirements in order to be granted a variance, even in the case of persons with disabilities. While not illegal, we do not recommend the variance approach for several reasons. First, the physical limitations of a

¹⁶⁸ Group Homes, Local Land Use, and the Fair Housing Act. Joint Statement of the Department of Justice and the Department of Housing and Urban Development. Available: http://www.usdoj.gov/crt/housing/final8_1.htm. Retrieved 5-9-06.

disabled applicant do not substitute for the physical limitations of the property.¹⁶⁹ Second, a hardship cannot be self-created. Since the need for a variance arises from an applicant's physical disability it is often difficult to justify both the unnecessary hardship and unique property limitations tests. If the variance technique is considered, applicants should be encouraged to find a suitable site arrangement that does not necessitate the variance (for example, constructing a ramp to the side door rather than the front door).

Conditional Use/Special Exception

Granting a conditional use or special exception is also commonly used to accommodate persons with disabilities. In particular, communities utilize these tools frequently to allow group homes, which is an acceptable use of the technique.¹⁷⁰ In the case of physical or dimensional requests, additional consideration should be given to the use of this technique. First, many communities define conditional uses to include only uses of the property, not physical or dimensional requirements. Second, much like a variance, a conditional use “runs with the property,” meaning all subsequent property owners are entitled to continue the use or exception subject to any limitations specified at the time of granting. If the public purpose of enforcing the regulation is so great that the accommodation should be discontinued after the disabled person vacates the property, the zoning administrator may impose a condition to that effect or should consider using an altogether different technique.

Permitted Use/Waiver of Zoning Restrictions

A technique that many communities find works very well for granting reasonable accommodations is the use of an administrative permit or simple waiver of zoning restrictions made by the zoning administrator. Barron County includes the following language in their local zoning code to accomplish this purpose:¹⁷¹

¹⁶⁹ Sawyer County Zoning Bd. v. Wisconsin Dept. of Workforce Development, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App., 1999) involves a request for a variance to accommodate a person with a disability. This case reiterates the unique property limitations standard found in State v. Kenosha County Bd. of Adj., 218 Wis. 2d 396, 413-14, 577 N.W.2d 813, 821-22 (1998).

¹⁷⁰ Many local governments allow group homes as a conditional use. This is a valid use of this procedure, assuming group homes are not discriminated against or treated less favorably than groups of non-disabled persons. For a case regarding conditional use permits see State ex rel. Bruskevitz v. City of Madison, 2001 WI App 233; 248 Wis. 2d 297; 635 N.W.2d 797.

¹⁷¹ Barron County Code of Ordinances, Chapter 17: Zoning, Land Divisions, Sanitation 17.74(5)(h). Available: http://www.co.barron.wi.us/forms/zoning_landuse_ord.pdf. Retrieved 5-10-06.

The County Zoning Administrator will use a zoning permit that waives specified zoning ordinance requirements, if the administrator determines that both of the following conditions have been met.

- a. *The requested accommodation (i.e., the requested waiver of zoning restrictions), or another less-extensive accommodation, is:*
 1. *Necessary to afford handicapped or disabled persons equal housing opportunity or equal access to public accommodations, and*
 2. *The minimum accommodations that will give the handicapped or disabled persons adequate relief.*
- b. *The accommodation will not unreasonably undermine the basic purposes the zoning ordinance seeks to achieve.*

Other Remedies

If no procedure is specified for accommodating persons with disabilities, these persons may request a reasonable accommodation in some other way, and a local government is obligated to grant it if it meets the criteria outlined for reasonable accommodations.

May local governments impose conditions on accommodations for the disabled?

Local governments may require that modifications granted to accommodate disabilities be removed after no longer necessary. For example, when authorizing a building addition or structure (such as a ramp) to a home, the zoning administrator may require that the alteration be removed after the disabled person vacates the property. Barron County requires applicants to sign and record an affidavit with the local register of deeds outlining conditions and removal procedures associated with allowing accommodations for the disabled. In other circumstances, communities may wish to allow ramps and other structures that serve the disabled to remain for a specified time period (eg. six months) to encourage other handicapped individuals to inhabit the property while at the same time avoiding some of the time and expenses involved in constructing handicap accessible structures.