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REAL ESTATE LAW & INDUSTRY



REPORT

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HANDICAPPED PARKING

Fair housing mandates compel those responsible for management of condominiums and co-ops, as well as developers, to make specific arrangements for the parking needs of disabled persons. In this article the authors provide detailed reviews of the legal requirements to provide for handicapped parking facilities in multi-family housing facilities.

Disabled Resident Parking Spaces: Issues for Condo/Co-op Boards, Developers



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Until such time as society goes totally Green and automobiles disappear from our streets and highways, the need to have parking spaces adjacent to apartment buildings for residents and guests will continue to exist. Coupled with that need are laws and rules governing the use and assignment of parking spaces by and for persons with disabilities. All levels of government (federal, state, and local) have enacted laws and regulations to ensure that disabled persons are not denied parking spaces because of their disability and that the parking spaces for such persons provide ease of access to the buildings they live in or visit as guests.

However, compliance with these laws also affects and limits the rights of non-disabled residents in both newly constructed condominiums and old building co-ops. In addition, for developers of newly constructed buildings, compliance may impose legal obligations, previously overlooked by sponsors and buyers alike, that could require the re-drafting or amendment of new offering plans and that may provide condo boards with newly discovered claims against their sponsors.

This article will summarize the laws involved, note what condo and co-op boards must do to comply, and

discuss the obligations that developers have to provide handicapped parking spaces in connection with new construction.

The Federal Law

The applicable federal law that governs the provision for and allocation of parking spaces for people with disabilities at a multiple dwelling is the Fair Housing Amendments Act of 1998 (FHAA). Section 6(a) of the FHAA, codified at 42 USC § 3604(f)(2)(A), provides that it is unlawful:

[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of that person.

Section 3604(f)(3)(B) defines “discrimination” to include:

a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to use and enjoy a dwelling.

The above provisions of the FHAA were interpreted and applied by the federal Court of Appeals for the Second Circuit in the case of *Shapiro v. Cadman Towers, Inc.*¹

In the *Cadman Towers* case, the Second Circuit noted that a regulation promulgated by the U.S. Department of Housing and Urban Development (HUD), 24 CFR § 100.204(b), provides an example of a “reasonable accommodation” under the FHAA.

The example set forth in section 100.204(b) posits a building with 300 apartments and 450 parking spaces available on a first-come/first-served basis, and states that the duty to make “reasonable accommodations” obligates the building management to reserve a parking space for a mobility-impaired tenant near that tenant’s apartment. The regulation explains the reasons for this as follows:

Without a reserved parking space, [the tenant] might be unable to live in [the apartment] at all or, when he has to park in a space far from his unit, might have difficulty getting from his car to his apartment unit. *The accommodation therefore is necessary to afford [the tenant] an equal opportunity to use and enjoy a dwelling.* The accommodation is reasonable because it is feasible and practical under the circumstances. (Emphasis added)

As noted by the District Court for the Southern District of New York, in *Hubbard v. Samson Management Co.*,² “[r]easonable accommodations ‘can involve changing some rule that is generally applicable so as to make its burden less onerous on the handicapped individual,’ ” but “[w]hether a requested accommodation is required under the [FHAA] is ‘highly fact-specific, requiring case-by-case determination.’ ”

In *Cadman Towers*, the Second Circuit noted that the building’s management had argued that a reasonable accommodation under the FHAA cannot include displacing tenants who already have parking spaces assigned to them or interfering with the expectancy of persons already on the waiting list. The Court addressed this argument as follows:

The extent to which a “reasonable accommodation” for a handicapped individual can burden or take away rights or privileges enjoyed by non-handicapped persons is an important question of first impression in this Circuit, particularly in the non-workplace context. However, it would be premature for us to reach this issue now. *The district court found that Shapiro could be accommodated without displacing any existing tenants, because three parking spots are reserved for building personnel and these workers could park in a commercial garage.* (Emphasis added).

Nevertheless, in *Samson Management*, the District Court said that “[t]o determine whether the [FHAA] requires a proposed accommodation, courts generally balance the burdens the contemplated accommodation imposes on the defendant against the benefits to the plaintiff.” As the Court explained:

As the balancing test suggests, courts typically find an accommodation reasonable “when it imposes no undue financial or administrative hardships on the defendant . . . and when it does not undermine the basic purpose of the [challenged] requirement.” It is clear under the [FHAA] that a landlord may be “required to incur reasonable costs to accommodate [a tenant’s handicap] provided such accommodations do not pose an undue hardship or a substantial burden.”

In *Samson Management*, the building owner was found to have discriminated against the plaintiff by having failed to offer her a free, reserved parking space sufficiently near her apartment to meet her needs. The Court acknowledged that the building owner had argued “correctly” that:

[I]f they were required to supply free, reserved parking for Hubbard, they might be similarly required to provide parking near the apartment of every handicapped tenant in the complex. *If the current allocation of parking spaces disadvantages handicapped tenants, then Samson might indeed be required to allocate parking so as to assure handicapped tenants an opportunity equal to that of their non-handicapped neighbors to use and enjoy their dwelling.* (Emphasis added).

New York State Law

The principles set forth in the *Cadman Towers* case and in the *Samson Management* case apply with equal force under the New York State’s Human Rights Law (Executive Law § 296[18][2]) which provides that it is an unlawful discriminatory practice to:

Refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling.

The Appellate Division of the New York State Supreme Court, Second Department has held, citing *Cadman Towers* and *Samson Management*, that “[u]nder certain circumstances, a building owner may be required to grant a disabled tenant a parking space for his or her own use, as a reasonable accommodation for the tenant’s disability.”³ (Emphasis added).

New York City Law

In addition to applicable federal and State law, the assignment and use of parking spaces in a multiple dwell-

¹ 51 F3d 328 (2d Cir. 1995)

² 994 F. Supp. 187, 189 (SDNY 1998)

³ *Lindsay Park Housing Corp. v. New York State Division of Human Rights*, 56 AD3d 477, 478, 866 NYS2d 771, 773 (2d Dept. 2008).

ing facility is also subject to requirements of the following provisions of the New York City Administrative Code:

New York City Administrative Code, Section 27-292.19.
Section 27-292.19 Parking Spaces

(a) Where parking areas or garages are provided, at least one parking space but not less than five percent⁴ of the total number of parking spaces provided shall be suitable for use by people having physical disabilities. Where determination by percentage results in a number containing a decimal of 0.5 or more, the next higher number shall be used.

(b) Location, space, size and signage for parking spaces suitable for use by people having physical disabilities shall comply with provisions set forth in reference standard RS 4-6.

New York City Administrative Code, Title 27, Ch. 1, App. (Ref. Stds.), RS 4. *RS 4.6.2 Parking Facilities*

Except as otherwise provided in § 4.6.2.2 and 4.6.2.3, accessible parking spaces shall be designated as reserved for physically handicapped people by a permanently posted sign showing the symbol of accessibility (See 4.28.5). Such signs shall not be obstructed by a vehicle parked in the space.

RS 4.6.2.1 Multiple Dwellings

In the parking facility of a multiple dwelling, where such a facility is used exclusively on an accessory basis for parking by residents of the multiple dwelling, or employees of the management of the multiple dwelling or of the parking facility, or as provided by § 25-412 of the Zoning Resolution, *the accessible parking spaces may be leased, rented or assigned to a person without a physical disability on a no longer than month-to-month basis. All leases, rentals, or assignments of such accessible spaces which are not made for the benefit of a person with a disability shall be on written condition that the space shall be relinquished immediately at the end of the term of lease, rental, or assignment to a person who requests of the parking facility's management that such accessible space shall be made available for the benefit of a person with a physical disability whose vehicle bears a special identification permit or license plate.* Such a beneficiary shall be a resident or employee of the multiple dwelling. *It shall be the responsibility of the Parking Facility Operator to inform the non-disabled user of the parking space that a request for the parking space has been tendered.* Signs stating these requirements shall be permanently and prominently posted at each entrance and office of the Parking Facility. (Emphasis added)

Violations of these NYC Code provisions subject the violator to both civil and criminal penalties.

Applying the Law to Possible Problems

The Multi-Building Co-Op Scenario. A three-building co-op apartment complex has 400 parking spaces for residents and employees distributed in four parking lots. There is one lot with 100 parking spaces adjacent to each building (the "building lots"), and the fourth lot with 100 spaces is located across from the complex on the opposite side of a busy street (the "off-campus" lot). There currently are no spaces set aside for persons with disabilities in any of the lots. All of the residential parking spaces are rented to shareholders on a first-come/

first served basis. There is a waiting list for spaces in each building lot and for spaces in the off-campus lot. Residents are assigned spaces in the off-campus lot before they can become eligible for a building lot space. All residents pay a monthly rental fee for their parking spaces. The fee for building lot spaces is slightly higher than the fee for spaces in the off-campus lot.

Analysis of the Scenario. Whether or not a particular resident is a person with a disability is subject to proof of the disability. The person claiming the disability bears the initial burden of proof on this essential fact. However, once the disability is established, the board must comply with the law. In this scenario, therefore, it seems clear, from the above summary of the law, that the co-op board would be required to make a parking space available to any resident with a disability (a) who requests a parking space, (b) who owns an automobile, and (c) who possesses a special identification permit or license plate. The fact that non-disabled residents may have been on one or more of the various waiting lists for extended periods of time does not override the law's requirements.

In addition, any parking space made available to a person with a disability would have to be sufficiently close to the building in which he/she resides to accommodate the severity of the person's specific disability, i.e., in one of the three building lots and not in the off-campus lot. The co-op would also need to issue written "month-to-month" rental agreements requiring that a space be relinquished immediately at the end of the rental term to any person with a physical disability who requests management to make a space available for his/her benefit.

Accommodating the individual requests of disabled resident shareholders in this scenario would not impose an undue hardship on management. Presuming that the disabled residents pay the rental fees otherwise required of non-disabled residents, management would suffer no loss of revenue. Moreover, since all residents with parking spaces are required to pay rent for their spaces, requiring the disabled person to also pay the requisite rental fee is not likely to be found discriminatory.

Both federal law and NYC law require that a minimum number of parking spaces for people with disabilities be made available in parking areas or garages. If the co-op does not have parking spaces reserved for visitors only, it would likely be required to set aside additional handicapped spaces for such visitors in the minimum number prescribed by law. The law is not clear on this point, but prudence would dictate that the co-op reserve the additional spaces and that it do so in areas adjacent to and easily accessible to the buildings.

Condo Issues. Developers of newly constructed condominiums typically reserve the right to sell all of the condominium's parking spaces separately from the condominium apartment units sold to the residential owners. The developers' ownership of the parking spaces and unsold units often extends into the period when the residential owners have taken control of the condominium board. This duality of control by the residential board and by the developer sponsor over adjacent areas of what is a single premises gives rise to many disputes between the board and the developer regarding the manner in which they exercise the respec-

⁴ The FHAA prescribes that not less than four percent of the total number of parking spaces provided shall be suitable for use by people having physical disabilities.

tive rights specified for each of them in the condominium offering plan, declaration, and by-laws. The control and disposition of condominium parking spaces is often an occasion for such disputes because, before the time when all parking spaces are sold, compliance with and administration of handicapped parking requirements tends to be a dual responsibility of both the developer and the residential board.

[A]fter the resident owners take control of the board, the board is responsible for administering and policing the residents' use of the handicapped parking spaces.

Initially, the developer decides which of the condominium parking spaces are to be reserved for people with disabilities. However, after the resident owners take control of the board, the board is responsible for administering and policing the residents' use of the handicapped parking spaces. During the time when the developer still retains ownership of some parking spaces, the situation may arise where handicapped residents who did not purchase any of the parking spaces offered to them decide to park in the designated spaces "illegally" – *i.e.*, without paying the sponsor for the space. The sponsor may then claim that the unit owner is "trespassing" on the developer's property and demand that the board act to stop the errant unit owner from using the sponsor's property as his/her private parking space.

In these circumstances, the law does not appear to require the available handicapped spaces to be used free of charge by handicapped residents who were offered the opportunity to purchase parking spaces but chose to not purchase. If those residents want to have handicapped parking spaces identified and reserved for them, the law does not preclude either the sponsor or the condo board from demanding that the unit owners involved purchase the right to the spaces they want. There is no discrimination if they are treated the same as all other unit owners.

The harder issue involves the situation where all of the available parking spaces have already been sold to non-disabled resident owners. In such a case, it would seem that, under the principles set forth in the *Camden Towers* and *Samson Management* cases, the condo

board might be required to compel a non-disabled resident to sell his/her parking space to the handicapped resident. The authors of this article do not know of any published decision on this issue, but it is certainly possible that such a case could be filed (by either the disabled resident, the non-disabled resident, or the condo board) where a court will be asked to decide whether the board has the power to compel the transfer of the parking space and, if so, whether the condo board must compel the transfer to be compliant with the law.

The most intriguing unresolved issue in this area is whether developers have an obligation not only to set aside the required number of handicapped parking spaces, *but also to identify them in the offering plan as additional common elements of the condominium in which all of the unit owners acquire an undivided ownership interest upon purchasing their apartment units.* There does not appear to be any distinction between the developer's mandatory legal obligation to provide the building with a roof, hallways, heating equipment, and other common elements, as required by the building code, and the developer's additional mandatory obligation, under the FHAA, the New York Human Rights Law, and the New York City Administrative Code, to provide a minimum number of parking spaces for persons with disabilities.

It would seem, therefore, that developers have no legal right to "sell" the parking spaces they designate for handicapped parking in the condominium garage. When parking is otherwise made available as part of the project, the developer assumes the obligation to provide those spaces as part of the building's common elements in the same way as it assumes the obligation to put a roof on the building and to install the required HVAC system, windows, and doors. Accordingly, upon the developer's transfer of its interest in the project to the residential board, there should be no requirement for either the board or any unit owner to purchase the "unsold" handicapped spaces from the developer. The condo already "owns" those spaces.

This is an issue that previously has been overlooked by buyers and developers alike, but, nevertheless, it is a real issue and one that could very well be raised in a future litigation. There are probably dozens of condominiums and hundreds of unit owners who have potential claims against their developers for refunds of the amounts they paid for parking spaces that were either initially designated by the developer as "handicapped" spaces or that should have been so designated, *i.e.*, spaces the developer "sold" and for which "sales" it should now be liable to pay refunds.