

C O V E R

S H E E T

FAX

To: STEVEN INGLIS, PCAM - Bristol Management Services, Inc.
Fax #: 1-561-575-5423
Phone#: 1-561-575-3551
Subject: The Pointe at Jupiter Yacht Club Condominium Association, Inc.
File #: 2030112
Date: June 28, 2007
Pages: 11, including this cover sheet.

COMMENTS: See attached opinion as requested..

HARD COPY: WILL NOT BE SENT
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From the desk of...

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REPLY TO WEST PALM BEACH OFFICE

June 28, 2007

ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIALVIA FACSIMILE (561) 575-5423AND REGULAR MAILSteve Inglis, PCAM
Bristol Management Services, Inc.
1930 Commerce Lane, Suite #1
Jupiter, FL 33458Re: The Pointe at Jupiter Yacht Club Condominium Association, Inc.
("Association")

Dear Steve:

This letter is in response to the Association's request for an opinion as to whether the Association is required to move, transfer or re-assign parking spaces when a unit owner or resident requests a transfer or re-assignment of their parking space in order to accommodate a handicap. Specifically, we have been advised that there are 48 units in the condominium and a total of 97 parking spaces in the Association's parking garage. Each unit has two (2) assigned parking spaces in the garage, leaving one (1) common element parking space left over. We have also been advised that at least three (3) of the 97 parking spaces are designated as handicapped spaces (identified with the blue paint and wheelchair icon), and were assigned to certain units as those units' limited common element parking spaces by the developer. Those three (3) handicapped spaces in the parking garage are not, nor have they ever been, common elements or guest spaces. Additionally, there are two (2) common element handicapped parking spaces in the "drop off area" which adjoin approximately eight (8) other common element parking spaces, for a total of 107 parking spaces.

This opinion is based upon a review of multiple resources, including the Association's Declaration of Condominium ("Declaration"), case law, 42 U.S.C. 3604 et seq. (the Fair Housing Amendments Act, hereinafter "FHAA"), Part 100 of Title 24 of the Code of Federal Regulations, 42 U.S.C. 12101 et seq. (the Americans with Disabilities Act, hereinafter "ADA"), Title XLIV, Chapter 760, Part II, Florida Statutes, entitled "Fair Housing Act", Sections 553.501 through 553.513, entitled the "Florida Americans With Disabilities

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Accessibility Implementation Act" ("Florida ADA"), and the Palm Beach County Code of Ordinances (the "Code").

Handicapped and disabled individuals are protected under federal, state and local laws regarding fair housing practices including the FHAA, the ADA, the State of Florida FHA, the Florida ADA, and local ordinances such as the Palm Beach County Code. All apply to condominium associations, but in differing contexts.

Applicability of the FHAA and the FHA to condominium associations:

The FHAA and the FHA apply to condominium associations where to deny a resident's request for an accommodation to facilitate a handicap in the condominium association's rules, practices, policies or services, would be a violation. Section 760.23, Florida Statutes, entitled "Discrimination in the financing of housing or in residential real estate transactions," provides:

For purposes of subsections (7) and (8), discrimination includes:

- (b) 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.

Section 3604(f) of the FHAA provides, in part, as follows:

- (3) For purposes of this subsection, discrimination includes -
 - (A) A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

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- (B) 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.

The federal courts have held that the FHAA applies to condominium associations. 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." Schroeder v. De Bertolo, 879 F. Supp. 173 (D.C.P.R. 1995) (Where deceased condominium owner's heirs brought action under the Fair Housing Amendments Act against members of condominium association's board of directors alleging that they intentionally prohibited owner from using condominium common areas because of her mental illness.) In Schroeder, where the defendant condominium association argued that the FHAA provisions prevent discrimination only in the sale or rental of housing accommodation, the *court held that* the FHAA's discrimination prohibition is not limited to the sale or rental of housing accommodations or housing providers and that *the FHAA's prohibitions are applicable to condominiums*:

The language of the statute does not lend itself to such a narrow interpretation. The phrase "to otherwise make unavailable or deny" sweeps activities which go beyond the initial sale or rental transaction under the scope of the section. Once Ms. Maeso Schroeder became the owner of the unit, her housing rights did not terminate. She had the continuing right to quiet enjoyment and use of her condominium unit and common areas in the building. Her right to obtain a dwelling free from discriminatory conduct of others encompassed the right to maintain that dwelling....

Neither the statutory language, legislative history, nor cases in other jurisdictions suggest that Congress intended such a narrow construction of the statute and its amendments. The FHAA "is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.

Id. at 176-77.

The Court in Schroeder further held that the FHAA applies to condominium association's boards of directors.

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Members of the condominium board of directors are elected by the owners of units in the building to communally represent the interest of all owners.... Because of their duties and responsibilities, members of the board have the ability to exert indirect control over individual owners in the use of the common areas. Therefore,.... they [a]re in a position to deny or make available a portion of the building to plaintiff, or to discriminate against plaintiff in the provision of housing services or facilities.

Id. at 177-78.

Accordingly, a condominium association would be in violation of the FHAA and the FHA if it refused to make a reasonable accommodation or reasonable modification of the common areas or its policies, practices or services, in order to afford one if its members requesting an accommodation the full enjoyment of the premises.

The ADA, Florida ADA, FHA and FHAA vs. the Condominium Act:

It has been argued that to the extent that Chapter 718 (the "Condominium Act") or an association's Declaration of Condominium ("Declaration") may be read to require the consent of all or some of an association's unit owners for the installation of a handicapped accommodation on the common elements, both the Declaration and §§ 718.110(4) and 718.113(2)(a) must give way to the ADA. Pardi v. Kaiser Permanente Hospital, Inc., 389 F.3d 840 (9th Cir. 2004)(where the 9th Circuit held that under the Supremacy Clause of the United States Constitution, where a state law stands as an obstacle to the accomplishment of and execution of the full purposes and objectives of Congress, that federal interests must prevail and that this rationale applies to claims under the ADA). See Gittleman v. Woodhaven Condominium Association, Inc., 972 F.Supp. 894 (D.N.J. 1997)(where the district court found that the FHAA preempted a Declaration of Condominium).¹

The plaintiff in Gittleman sought the exclusive use of a common element parking space in his condominium to accommodate his handicap. His condominium association argued that it was powerless to grant his request, in the absence of a two-thirds (2/3) vote of all owners within the condominium, as required by the condominium's governing document, the Master Deed. The association put the matter before a vote of the owners, but failed to obtain the requisite two-thirds (2/3) favorable vote. The plaintiff then brought a claim under the FHAA for housing discrimination based upon his handicap.

¹ The FHAA pertains to housing accommodations, however the same standard applies to the ADA.

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While recognizing that parking spaces are common elements under the Master Deed, and that the Master Deed precluded the condominium association from granting a unit owner exclusive use of a parking space without the prior approval of at least two-thirds (2/3) of the unit owners, the Gittleman court nevertheless concluded:

It does not follow from these observations that the association is powerless to bring use of the common elements into compliance with federal law. Indeed, ... the Association is duty bound to: (1) avoid enforcing provisions of the Master Deed that have discriminatory effects; and (2) regulate use of the common elements so as to comply with the requirements of the FHAA. This conclusion rests on two primary grounds: (1) that to the extent the Master Deed contains provisions that, either on their face or as applied, violate the FHAA, they cannot be enforced as written; and (2) that the Association, in its role as manager of the common elements, is the entity charged with enforcing the Master Deed...

The provisions of the Master Deed, insofar as their application would compel the Association to violate [the plaintiff's] rights under the FHAA, are pro tanto unlawful, and the association's enforcement of them, therefore, subjects it to liability under the FHAA. (Emphasis added.)

Gittleman, 972 F.Supp. at 899.

After examining both federal regulations issued by the Department of Housing and Urban Development pursuant to the FHAA, and the legislative history of the FHAA², the Gittleman court concluded that a condominium association "cannot seek to avoid liability under the FHAA by using the terms of the Master Deed as a shield," and that "the FHAA was clearly intended to reach and invalidate those aspects of private agreements, such as the Master Deed, that have

² The Gittleman court cited to 24 C.F.R. §100.80(b)(3), and to House Report No. 100-71, 100th Cong., 2nd Sess., reprinted in 1988 U.S.C.A.N. 2173, 2184-85, which provides as follows:

The [FHAA] is intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

972 F. Supp. at 899-900.

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discriminatory effects." 972 F.Supp. at 900; see also n.9 listing other cases in which the courts have held that discriminatory restrictive covenants are within the purview of the FHAA.

The Gittleman court also concluded that, to the extent that the state condominium statute can be read to compel the Association to violate [the plaintiff's] FHAA rights, it is invalid." 972 F.Supp. at 902-03, citing 42 U.S.C. §3615 ("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 under [the FHAA] shall to that extent be invalid").

The ADA , Florida ADA, FHA and FHAA and The Pointe at Jupiter Yacht Club

In the instant case, where unit owners are requesting that the Association transfer or reassign parking spaces in order for them to use the handicapped spaces in the garage, the situation is distinguishable from that presented in Gittleman, above. It is our understanding that the transfers that are being requested are for those parking spaces that are designated as handicapped, but that have already been assigned to certain units, and are therefore, limited common elements appurtenant to those units.

Section 718.106(2), Florida Statutes, entitled "Condominium parcels; appurtenances; possession and enjoyment" provides, in relevant part:

(2) There shall pass with a unit, as appurtenances thereto:

...

(b) The exclusive right to use such portion of the common elements as may be provided by the declaration, including the right to transfer such right to other units or unit owners to the extent authorized by the declaration as originally recorded, or amendments to the declaration adopted pursuant to the provisions contained therein. ... However, in order to be effective, the transfer of use rights with respect to limited common elements must be effectuated in conformity with the procedures set forth in the declaration as originally recorded or as amended under the procedures provided therein. ... (Emphasis added.)

Section 4.33 of the Declaration entitled "Limited Common Elements" provides, in relevant part:

Those portions of the Common Elements that are reserved for the use of a certain Unit or Units to the exclusion of the other Units,

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including without limitation, certain automobile garage parking spaces ... constitute Limited Common Elements reserved for the use of that Unit. ...

Section 5.4 of the Declaration entitled "No Separation of Common Elements or Limited Common Elements" provides:

Neither the use or any parcel of Limited Common Elements, nor any undivided interest in the Common Elements declared to be an appurtenance to a Unit, may be transferred, conveyed, devised or encumbered separately from the Unit to which appurtenant (sic), except as otherwise expressly provided in Section 14 with respect to certain Limited Common Elements.

Section 14.4 of the Declaration entitled "Parking" provides:

Each Unit shall always have the exclusive use of two allocated parking spaces in the garage, which shall be considered Limited Common Elements. Allocations will be made initially by the Developer by written assignment. No parking space may be assigned except as an appurtenance to a Unit. The Developer may make the assignment for a valuable consideration. No Unit may have assigned to it more than two (2) parking spaces. The parking spaces shall be maintained by the Association, and all expenses related thereto shall be paid by the Association as Common Expenses.

Section 14.6 of the Declaration entitled "Parking Spaces and Storage Lockers Exclusive Use and Transfer of Use Rights" provides:

The exclusive right to use a Limited Common Element is an appurtenance to the Unit or Units to which it is designated or assigned. If after all of the Units have been sold by the Developer, the exclusive use of any assignable Limited Common Element was not, for any reason, assigned to the use of a specific Unit or Units by the Developer, the Association may do so. The right of exclusive use of each Limited Common Element passes with the Unit to which it is assigned, whether or not separately described, and cannot be separated from it except that the use rights to particular parking spaces and storage lockers may be exchanged between Units, or transferred to another Unit, subject to the provisions of Sections 14.4 and 14.4, and as follows:

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14.6.1 the Unit Owners desiring to exchange such use rights shall execute a certificate of transfer in recordable form, which shall include the recording data identifying this Declaration, and be executed by the Unit Owners with the formalities required for the execution of a deed;

14.6.2 the transfer of use rights shall be complete and effective when the certificate is registered with the Association;

14.6.3 each Unit at all times shall have two (2) parking spaces assigned to such Unit.
(Emphasis added.)

Accordingly, the Condominium Act allows the transfer of limited common elements so long as the association's declaration provides for same, and so long as the transfer is effectuated in conformity with the procedures set forth in the declaration. §718.106(2), F.S. In this case, the Association's Declaration contains a specific provision allowing a Unit Owner to transfer a parking space to another Unit Owner, however, nowhere in the Declaration is there a provision allowing *the Association* to relocate, transfer or re-assign a limited common element parking space. Therefore, the Association does not have the power to transfer or reassign *limited common element parking spaces*, whether the parking spaces have the handicapped designation on them or not.

Compliance with ADA Guidelines and Handicapped Parking Spaces

Effective January 1993, all new construction is required to comply with the ADA accessibility guidelines in order to be readily accessible to, and usable by, individuals with disabilities. 42 U.S.C.A. §12183. Title III of the ADA, 42 U.S.C. § 12181, *et seq.* is implemented through regulations promulgated by the Department of Justice which include guidelines for new construction and alterations. Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd., et al., 146 F. Supp. 2d 1334 (S.D. Fla. 2001). These guidelines are called Americans with Disability Act Access Guidelines ("ADAAG") and they are drafted and proposed by the U.S. Architectural and Transportation Barriers Compliance Board ("Access Board"). Id.

Section 4.1.2(5)(a) of the ADAAG, provides for the required number of handicapped accessible parking spaces in a parking area. The number of required parking spaces set forth in the ADAAG is based upon the total number of parking spaces in a lot. Pursuant to Section 4.1.2(5)(a) of the ADAAG, a parking lot with 101 to 150 total parking spaces must have five (5) handicapped accessible parking spaces. While we have not been asked to comment on whether the condominium is in compliance with the ADA, it appears that when the condominium was built, the developer created the required amount of handicapped parking spaces – five (5), based upon the total number of parking spaces available, 107. However, we are unaware of whether the developer obtained a variance

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from the Town of Jupiter or Palm Beach County, since three (3) of the five (5) handicapped parking spaces are assigned to specific units as limited common elements, and are otherwise not available for use by the public.

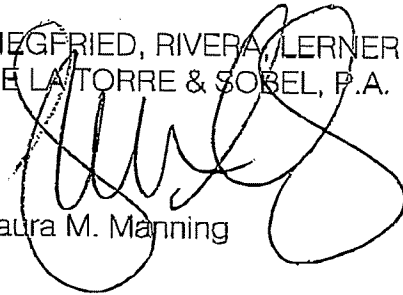
In light of the fact that not only the federal courts, but also the state and local governments have found that the FHA and ADA are applicable to condominium associations, it is in the best interests of the Association to attempt to make a reasonable accommodation to those owners requesting an accommodation for parking. Because the Declaration provides that the parking spaces may only be relocated *by unit owners*, the Association may want to speak with the unit owners who have the assigned handicapped spaces to determine whether those unit owners are willing to swap their spaces. Otherwise, the Association, under Gittleman, has the other nine (9) common element parking spaces to work with as it pertains to accommodating a unit owner's request. One other alternative may be to allow a unit owner requesting the use of a handicapped parking space to use those spaces in the "drop off area".

As discussed, I am also enclosing a Reasonable Accommodation Request Verification form for the Association's use when a unit owner is requesting an accommodation.

I hope that the above has been of assistance to you and the Board. Once you have had an opportunity to review the above, please feel free to contact me directly should you have any additional questions.

Very truly yours,

SIEGFRIED, RIVERA, LERNER,
DE LA TORRE & SOBEL, P.A.


Laura M. Manning

LMM

cc: President

Board of Directors

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**THE POINTE AT JUPITER YACHT CLUB CONDOMINIUM ASSOCIATION, INC.
REASONABLE ACCOMMODATION REQUEST VERIFICATION**

Date: _____

To: _____
Health Care Provider's Name

Health Care Provider's Address

From: The Pointe at Jupiter Yacht Club Condominium Association, Inc.
340 S. US Highway One
Jupiter, Florida 33477**RE: REQUEST FOR ACCOMMODATION**

MEMBER'S NAME: _____ ("Member")

ADDRESS: _____

The Member named above has requested that the Association accommodate his/her disability by (state nature of accommodation request) _____

Under normal circumstances, our policies would require us to deny the request. However, under federal law, if an individual with disabilities requests a reasonable accommodation due to that disability, we must consider the request. To do this, we must verify that the individual qualifies under federal law and requires the accommodation in order to have an equal opportunity to use and enjoy the his/her home.

We would appreciate your cooperation in answering the questions on this form and returning it to the Association's address listed above. Enclosed is a stamped, self-addressed envelope for this purpose. The Member has consented to this release of information as shown below.

INFORMATION REQUESTED

1. Is the Member disabled as defined below? Yes No
2. In your professional opinion, does Member need the accommodation requested in order to have the same opportunity that a non-disabled individual has to use and enjoy the living quarters? Yes No
3. If you answered "Yes" to question number 1, can the Member's condition be otherwise treated to prevent any substantial limits in any of his/her major life activities?

DEFINITION OF "DISABLED"

Under federal law, an individual is disabled if he/she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction and alcoholism. This definition doesn't include any individual who is a drug addict and is currently using illegal drugs, or an alcoholic who poses a direct threat to property or safety because of alcohol use.

NAME & TITLE OF PERSON SUPPLYING INFORMATION: _____

FIRM/ORGANIZATION: _____

Would you be willing to testify in any court action or related proceeding as to the Member's need for the requested accommodation? Yes No

HEALTH CARE PROVIDER'S SIGNATURE: _____

MEDICAL LICENSE NO. (IF PHYSICIAN): _____ DATE: _____

RELEASE

TO THE MEMBER:

YOU DO NOT HAVE TO SIGN THIS FORM IF THE NAME OR ADDRESS OF EITHER THE ASSOCIATION OR THE HEALTH CARE PROVIDER IS LEFT BLANK.

RELEASE: I hereby authorize the release of the requested information. The information obtained under this consent is limited to information that is no older than twelve (12) months. There are circumstances that would require the Association named above to verify information that is up to five (5) years old, which would be authorized by me on a separate consent, attached to a copy of this consent.

SIGNATURE: _____ DATE: _____