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OFFICE OF THE
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Opinion No. 03-067

Preemption of House Bill 275 by Americans with Disabilities Act

QUESTIONS

1. Under current law and proposed House Bill 275, who has authority to designate a “handicap van only” accessible parking space?
2. Does House Bill 275 with House Amendment #1 drafting code #00417875 conflict with the ADA (Americans with Disabilities Act) or the ADAAG (Americans with Disabilities Act Accessibility Guidelines) developed by the Access Board?

OPINIONS

1. Both under current law and proposed House Bill 275, the business, firm or other person providing the parking would designate the space. Those in the private sector who provide such parking, however, are subject to the ADA and the ADAAG. The ADAAG do not provide for spaces to be designated as “van-accessible only.”

2. House Bill 275, as currently drafted, conflicts with the ADA and the ADAAG. A disabled person not in a van would be denied parking if a parking lot has no available accessible spaces other than spaces that have been designated as “van only.” Under such circumstances, the state legislation would conflict with the ADA, because the state legislation would afford less protection to disabled persons than is provided under the ADA and the ADAAG.

ANALYSIS

Tennessee Code Ann. § 55-21-105, relating to parking privileges afforded to qualified disabled drivers and passengers, currently provides in part:

(b) Any business, firm, or other person transacting business with the public from a permanent location may provide specially marked parking spaces for the exclusive use of persons qualifying for the rights and privileges extended by this part.

(c) Each such parking space shall be marked and maintained with the stylized wheelchair symbol designated by § 55-21-104, after

July 1, 1983. Such marking may be by a sign on a pole. Nonconforming markings or signs shall be acceptable during the useful life of such markings or signs, which may not be extended by other than normal maintenance as long as such markings or signs provide reasonable notice of the specially marked parking space.

House Bill 275 (with Amendment No. 1) would revise Tenn. Code Ann. § 55-21-105 by adding the following sentence to the end of subsection (c):

If such parking space has been designated exclusively for van access, such parking space shall bear, in addition to the stylized wheel chair symbol, the language “Van Accessible Only” or “Vans Only” on a sign on a pole at least eye level from a seated position in a passenger motor vehicle designating such parking space as accessible parking. No person, otherwise authorized to park in such parking space, shall be cited for parking in a van accessible parking space if such parking space does not bear the language required pursuant to this subsection.

Thus, subsections (b) and (c) of Tenn. Code Ann. § 55-121-105 and House Bill 275 (HB 275) apply to those in the private sector who elect to “provide specially marked parking spaces for the exclusive use” of handicapped persons. HB 275 merely adds that if the person providing such parking designates a space for vans only, it must post a sign so indicating.

You ask whether House Bill 275, as amended, would conflict with the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 to 12213, and its companion regulations and guidelines pertaining to handicap accessible parking spaces. In general, Title III of the ADA, which applies to the private sector, is pertinent to this opinion request. Title III provides that: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by an person who owns . . . or operates a place of public accommodation.” 42 U.S.C. § 12182(a). Congress delegated to the Department of Justice (“DOJ”) the responsibility for issuing regulations in order to enforce this mandate. 42 U.S.C. § 12186(b). Accordingly, the DOJ, in conjunction with the Architectural and Transportation Barriers Compliance Board (“Access Board”), issued ADA Accessibility Guidelines (“ADAAG”).¹ The ADAAG, also set forth in 28 C.F.R., pt. 36, have the force of law. *See, e.g., General Electric Co. v. Gilbert*, 429 U.S. 125, 141, 97 S. Ct. 401, 410 (1976) (recognizing administrative regulations have the force of law).

¹42 U.S.C. § 12204 requires the DOJ regulations to meet the minimum guidelines and requirements issued by the Access Board. Therefore, the DOJ rules, found at 28 C.F.R. pt. 36, app. A §§ 4.1 - 4.35, incorporate as enforceable standards the ADAAG.

These guidelines establish the minimum number of accessible spaces² required in parking lots maintained in the private sector. For example, if the parking lot has a total of one to 25 spaces, at least one space must be accessible to disabled persons. *See* 28 C.F.R. pt. 36, app. A § 4.1.2(5)(a) (1999). The required number of accessible spaces increases as the total number of spaces in the parking lot increases. In addition, the DOJ requires that a specific proportion of total parking spaces in every parking lot must be served by a van-access aisle: “One in every eight accessible spaces, but not less than one, shall be served by an access aisle 96 [inches] . . . wide minimum and shall be designated ‘van accessible. . . .’” 28 C.F.R. pt. 36, app. A § 4.1.2(5)(b) (1998). Thus, the guidelines regulate the dimensions of the van-accessible parking space, *see id.* §§ 4.1.2(5)(b), 4.6.3 & fig. 9, and provide that the space may not slope more than a certain percentage, *see id.* § 4.6.3. Also, van-accessible parking spaces must be designated with special signs. *See id.* § 4.6.4.

Your question concerns whether House Bill 275, as amended, is preempted by the ADA and the ADAAG. Although the ADA does not contain an explicit preemption provision, federal courts have held that state laws that afford *less* protection to the disabled are preempted by the ADA. *See United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1118 (C.D. Ca. 2002); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F. Supp. 2d 941, 952 (E.D. Wisc. 1998). *See also* 42 U.S.C. § 12201(b) (providing exemption from preemption for only those state or local laws that provide greater protection to the disabled).

In light of the courts’ finding of an implied preemption, we must examine whether HB 275 gives less protection to the disabled than is provided under the ADA and the ADAAG. As noted earlier, HB 275, which amends Tenn. Code Ann. § 55-21-105(c), adds language requiring that parking spaces “designated exclusively for van access . . . shall bear, in addition to the stylized wheelchair symbol, the language ‘Van Accessible Only’ or ‘Vans Only’ on a sign on a pole. . . .” In effect, HB 275 creates two categories of parking spaces for vehicles used by disabled persons — spaces for any vehicle displaying a disabled placard or license plate, and spaces for vans only.³ This setup could afford less protection to handicapped persons in contravention of the ADA if a handicapped person in a car were denied parking solely because he or she is not in a van. For example, the federal regulation requires lots with 25 or less spaces to have at least one accessible parking space. It further requires one out of every eight accessible spaces to be van accessible. Thus, a lot with 25 or fewer spaces must have at least one accessible space and that space must be van-accessible. Under the ADA, the van-accessible space may be used by persons in cars *or* vans. Under Tenn. Code Ann. § 55-21-105(c), as amended by HB 275, however, if the spot has been designated as “van only,” then a handicapped person in a car would be denied an accessible parking

²28 C.F.R., pt. 36, § 3.5 defines the term “accessible” as “a site, building, facility or portion thereof that complies with these guidelines.” Similarly, the term “accessible space” is a “space that complies with these guidelines.”

³Neither Tenn. Code Ann. § 55-21-105 nor its companion laws concerning disabled parking privileges make reference to the ADA or the ADAAG even though the private sector is subject to Title III of the ADA and the ADAAG. Therefore, this opinion, assumes that the person or business designating the space as “van only” would otherwise comply with the specifications set forth in the ADAAG, such as those relating to dimensions of van-accessible spaces.

space. Consequently, this person would be afforded less protection under Tennessee's law.⁴

A review of the ADAAG supports the conclusion that HB 275 would be preempted. Nothing in the regulations indicates that spaces should be restricted only to vans. The guidelines merely refer to "van-accessible" spaces. They also direct that the signage say "van-accessible." Further, the Access Board has addressed this very issue in Bulletin #6, which was attached to the opinion request. The bulletin contains the following question and answer regarding van-accessible spaces:

Must van-accessible spaces be restricted to van use? The required "van-accessible" designation, which should be located beneath the international symbol of accessibility, *is intended to be informative, not restrictive*, in identifying those spaces that are better suited for van use. *It should not be interpreted as restricting the use of spaces to vans only.* Additional signage may be provided recommending that cars not be parked in van-accessible spaces unless no other accessible parking space is available. This distinction could be particularly helpful in those lots where only one accessible space is required, since ADAAG requires that space to be van-accessible.

(Emphasis added.)

In summary, HB 275, as currently drafted, conflicts with the ADA and the ADAAG. A court might well find that the legislation affords less protection to disabled persons in certain situations, especially where there is a small number of accessible spaces and a portion of those are designated as "van only" spaces.

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⁴There, of course, would be situations in which a person would not be afforded less protection, the clearest example being a parking lot with more accessible spaces than the ADAAG require.

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