

Property Owner Considerations Around Electric Vehicle Bans

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The Canadian Broadcasting Corp. recently reported that Oberon Development Corp., a Toronto property management company and apartment project owner, banned the use and storage on its properties of electric vehicles like cars, as well as electric mobility devices like motorcycles, bicycles, scooters, hoverboards, mopeds, Segways and other small modes of transport.

Oberon referred to the ban as a response to the potential fire hazard created by lithium batteries.^[1]

While Oberon's decision may be challenged, it raises the question whether landlords may prohibit tenants from using, storing or charging electric vehicles and mobility devices on their properties.

Currently, the future appears electric, but that may not last. The electric vehicle market has grown to nearly 8% of the total vehicle sales in the U.S. However, that figure does not account for the electric mobility device market, which in 2021 was valued at \$29.5 billion. By the year 2030, some forecasters have predicted it will reach \$120 billion, a compound annual growth rate of 20.8%.

However, not everyone is thrilled to ride the wave of electric vehicles and mobility devices, for various reasons.

Electric vehicles cost significantly more than gasoline and diesel-powered vehicles, making them unaffordable for many.

Additionally, there are legitimate concerns, as reported in the Miami Herald on Feb. 23,^[2] that lithium batteries used to power electric vehicles and mobility devices have adverse environmental impacts, starting with the mining of the raw materials needed to produce them, typically obtained in countries with lax environmental and labor standards, and the energy required to manufacture them, typically generated from nonrenewable sources like coal and natural gas.

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Another concern is about the toxins they emit for up to 100 years after their useful life, meaning they can potentially cause more pollutants and more damage than traditional fuels.

All of these concerns cast doubt on the proposition that electric vehicles are a cleaner and more sustainable alternative to gasoline- or diesel-powered vehicles.

Also, the cost of the raw materials required to manufacture lithium batteries keeps rising, triggering higher prices for both electric vehicles and replacement batteries.

Lithium batteries may need to be replaced at great expense well before the end of the useful life of the vehicle in which they are installed.

Lithium battery fires can occur due to a number of factors, including manufacturing defects, physical damage, improper handling and storage, overcharging, overheating, and exposure to water, high temperatures or fire, not to mention motor vehicle accidents.

Given the fire risks presented by lithium batteries, some governmental authorities have restricted the storage of electric vehicles and mobility devices indoors, or are implementing policies to educate the public about safety precautions involving such batteries.

For example, according to its website, New York City adopted a policy on March 20 "[P]romoting and incentivizing safe battery use, increasing education and outreach to electric micromobility users, advocating for additional federal regulation of these devices, and expanding enforcement against high-risk situations."^[3]

Stories abound of motorists who are reluctant to take long trips in their electric vehicles due to the current inadequacy of the nation's electric vehicle charging infrastructure, e.g., insufficient numbers of charging stations, charging failures or equipment malfunctions such as unresponsive or unavailable screens, payment system failures, charge initiation failures, network failures, and broken connectors, as well as the time required to complete a full charge.

As a result of these and other issues, Fox Business reported on Oct. 29 that "(t)he electric vehicle push at Ford and General Motors hit a speed bump that's cutting into the automakers' profits and causing them to reevaluate their EV plans amid a price war and supply chain challenges."^[4]

Automakers have lamented growing losses in the profitability of their electric vehicle manufacturing units, and some have announced cutbacks in electric vehicle production.

If other landlords adopt electric vehicle or mobility device bans similar to Oberon's, it may portend more problems for enthusiasts of electric transportation.

Potential Reasons for Landlords to Ban Electric Vehicles

A primary reason why commercial landlords may consider such bans is cost.

Older commercial buildings are not equipped with the electrical infrastructure needed to support the growth of the electric transportation market. In order to accommodate the increase in the use of electricity, many landlords will need to retrofit the electric infrastructure servicing their properties, which may be expensive.

For example, according to the city of Orlando's EV Ready Code published on March 17, 2021, it would cost landlords approximately \$3,500 per parking space to retrofit their electrical infrastructure to accommodate a level-2 charging station. That figure is estimated to be approximately 75% higher than if such electrical infrastructure was built during initial construction of a commercial project.

After installation, the use of charging stations will increase the cost of electricity provided in the common areas, unless the charging stations accommodate network subscriptions or credit cards for payment by users.

In addition, as was the case with Oberon, landlords may consider banning electric vehicles or mobility devices due to potential fire hazards caused by lithium batteries. These fires are typically triggered by damaged or unstable batteries due to faulty manufacture, improper maintenance, charging, storage or disposal.

Lithium batteries contain flammable materials that may spark a fire even when the vehicle is not in use, and this may be more of a problem as the batteries begin to erode. Additionally, as occurred following Hurricane Ian in 2022, exposure to water can cause lithium batteries to erode and catch fire.

Landlords have a legitimate concern that an increase in the use, charging and storage of lithium batteries also increases the likelihood of property damage and personal injury. Consequently, if fires caused by lithium batteries continue to rise, insurance companies may exclude such claims from policy coverage, or require specific endorsements with higher premiums to cover them.

Landlords should verify coverage for such claims with their insurance carriers, that are closely monitoring the evolving issues presented by lithium battery fires. A landlord's lender may require additional insurance coverage as a condition to making a mortgage loan, and a landlord's investors may have similar concerns.

Finally, a landlord who takes no steps to protect occupants and others from personal injuries and property damage that could be caused by lithium battery fires on its property may be liable under certain circumstances to those who are injured or suffer property damage.

Florida law is well settled that an owner has a duty to exercise ordinary care in the management of its property. Courts have interpreted this duty to include the obligation to discover dangerous conditions on the property and to protect occupants and visitors from those conditions.

The owner's breach of this duty can give rise to a cause of action for negligence. In imposing liability, courts consider the following factors: (1) the foreseeability of the danger and likelihood of harm to occupants or visitors; (2) the public policy of preventing future harm; (3) the extent of the burden on the owner; and (4) the consequences to the community of imposing a duty on owners to exercise care, with attendant liability for breach.

In Florida, if an owner is, or should be, aware of the fire risks presented by electric vehicles and mobility devices kept inside its parking garage and other buildings and makes no effort to ameliorate them, the owner might be found negligent if a fire occurs and causes personal injury or property damage.

Potential Legal Ramifications of Banning Electric Vehicles

A landlord who decides to ban electric vehicles or mobility devices from its property may face legal issues in Florida.

First, landlords may face opposition from local, state and federal governmental authorities that are promoting their use. In an effort to reduce emissions and improve air quality, both the federal and state governments are investing heavily in overhauling the electric charging infrastructure and promoting further growth of the electric vehicle and mobility device market.

Florida, for example, has deployed \$1.5 billion in 2023 through the Florida Electric Vehicle Infrastructure Deployment Plan to continue the development of the electric charging infrastructure on the state's highways. Additionally, Florida offers both public and private incentives, rebates and even financing to property owners to assist in the installation of electric vehicle charging stations.^[5]

However, as discussed in USA Today,^[6] there is growing concern about the unreliability of public electric charging infrastructure. Approximately 21% of consumers encounter issues and malfunctions when attempting to use public electric charging stations.

In order to combat the issues surrounding the unreliability of public charging, many states have begun enacting policies to ensure that residents of multifamily apartments, condominiums and even single-family planned developments have access to private charging stations.

For example, the Florida Condominium Act^[7] was amended to state that a condominium developer or association may not prohibit a unit owner from installing a charging station in the unit owner's limited common element or exclusively designated parking area.

Some local governments have gone a step further and required multifamily and single-family developers to include access to electric charging stations within the common areas of new developments.

Another possible legal issue for landlords seeking to ban the use, storage or charging of electric vehicles and mobility devices is the potential for violation of the federal Fair Housing Act under Title 42 of the U.S. Code, Chapter 45, and the Florida Fair Housing Act under Florida Statutes, Chapter 760.

The federal and Florida Fair Housing Acts prohibit discrimination in housing against persons with disabilities, and require landlords to make reasonable accommodations for such persons to allow them equal opportunity to use and enjoy a dwelling. These may include changes to a dwelling unit and to the landlord's rules, policies, practices or services, if necessary.

While the prohibition of electric mobility devices on its face does not appear to be discriminatory, landlords need to be wary that the application of a ban on electric mobility devices does not inadvertently target those with disabilities who rely on them as their sole means of transportation, e.g., electric mobility scooters and wheelchairs.

Accommodations may be denied if they pose a direct threat, but an assessment of the risk of lithium battery explosions or fires must consider: (1) the nature, duration and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat.

Accordingly, landlords may need to consider alternatives short of a complete ban of electric mobility devices on its properties if a disabled tenant seeks a reasonable accommodation related to their use of an electric mobility device.

Bans on electric mobility devices also potentially implicate the Americans With Disabilities Act, which prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

Like fair housing laws, the ADA can require an owner of a leased premises to make reasonable accommodations for persons with disabilities, who may be employees, tenants or visitors.

It should be noted that lithium batteries are not the only type of batteries that can be used to power electric mobility devices for disabled persons. Lithium batteries have advantages over other types, since they are generally smaller, lighter, quicker to recharge and more efficient.

However, other types present fewer safety issues. If a ban on electric mobility devices was limited only to those with lithium batteries, perhaps it would be more likely to pass muster under fair housing laws and the ADA.

Conclusion

Landlords concerned about electric vehicle and mobility device battery fires on their properties should establish rules and regulations narrowly crafted to address the potential dangers presented by lithium batteries without necessarily banning all electric vehicles and mobility devices.

The needs of disabled persons should be carefully considered, and any policy should minimize adverse impacts on such persons, addressing only legitimate safety concerns.

Such a policy should also include provisions governing the proper charging, use, disposal and recycling of lithium batteries, which should not be left in waste bins or trash dumpsters. Proper disposal is important, since lithium batteries contain various heavy metals and toxins within their cells that present hazardous waste and potential environmental concerns.

If lithium batteries are improperly disposed of, their cells deteriorate and release toxins that may contaminate soil and groundwater. Residential and commercial landlords with mortgage loans are likely required by their loan documents to (1) ensure that their properties remain free from environmental contamination, and (2) remediate any such contamination that occurs.

The state of Florida recommends that lithium batteries be recycled with the local government's household hazardous waste program, as opposed to being disposed of with other trash. As the use of electric vehicles and mobility devices grows, one can anticipate further federal, state and local regulations governing their use, as well as the disposal and recycling of lithium batteries.

Landlords should review their leases to ensure that they permit the landlord's adoption and enforcement of rules and regulations with which its tenants and their visitors must comply. It may be appropriate in new leases to modify and expand the landlord's existing language on rules and regulations to ensure that it is broad enough to capture the foregoing types of concerns.

Most leases already contain a provision whereby the tenant indemnifies the landlord against damages caused by the tenant, as well as liability associated with the tenant's activities. Perhaps this should be expanded to require the tenant to assume all risks and indemnify the landlord and its property manager against all liability associated with the tenant using or keeping electric vehicles and mobility devices on the property, or allowing others to do so.

Most leases also contain a provision requiring the tenant to comply with all governmental requirements. This might be expanded to specifically include those involving the charging, use, disposal and recycling of environmentally hazardous materials like lithium batteries.

Are all tenants required to carry liability and property damage insurance naming the landlord as additional insured, with limits acceptable to the landlord? If so, the landlord should verify that it covers liability and damage resulting from electric vehicle or mobility device battery fires, whether in the leased units or in the common areas, like a parking lot or garage. This is customary in commercial leases, but less so in residential ones.

Residential tenants can obtain what is commonly called renters insurance to provide some protection against liability and property damage for electric mobility device fires within their leased units, but that policy may not cover an electric vehicle or mobility device fire that occurs outside the renter's unit, will have caps on coverage, and will not provide protection to the landlord unless it is named as an additional insured.

While it is not unusual for a tenant to be required to carry renters insurance, not all leases provide for this.

An owner of an electric vehicle may elect, but is not required in Florida, to obtain a comprehensive auto insurance policy to cover that owner's liability, but electric mobility devices are not typically covered by such a policy.

Furthermore, like every other insurance product, this type of policy has exclusions from coverage, caps on coverage and will not cover a negligence claim made by an injured third party against a landlord unless the landlord is named as an additional insured.

It is not unusual for auto insurance policies for commercial vehicles to name other parties as additional insured, but this is less common with personal vehicles and may be resisted by the insurance carrier.

If the rental market makes it difficult for a landlord to require that all residential tenants carry acceptable insurance covering electric vehicle and mobility device battery fires, assuming it is available, perhaps the lease could require it from any tenant who elects to keep an electric vehicle or mobility device on the property.

This would present monitoring and enforcement issues, but if the property has controlled vehicular access or parking that requires registration of a vehicle with the landlord, such a requirement may be feasible, although the landlord would need to consider whether it applies to electric vehicles only, or also to electric mobility devices.

The bottom line regarding insurance provisions in a landlord's lease form is that (1) they must be acceptable to most tenants, or the landlord may lose potential renters, (2) they must be vetted by the landlord's insurance agent or consultant to confirm that they provide the best protection available in the then-current market, and (3) they must be updated periodically as insurance industry standards change due to evolving electric vehicle and mobility device issues.

The electric vehicle and mobility device market presents landlords with many questions regarding how to address the presence of such vehicles on their properties, and the charging, storage, maintenance and disposal of lithium batteries.

It is best practice for landlords to be proactive about reviewing relevant lease provisions and crafting rules and regulations on this subject prior to implementation in order to minimize legal risks and liabilities.

[1] <https://www.cbc.ca/news/canada/toronto/e-scooters-ban-parkdale-building-tenants-1.6966666>.

[2] <https://www.miamiherald.com/contributor-content/article272574443.html>.

[3] <https://www.nyc.gov/office-of-the-mayor/news/195-23/mayor-adams-plan-combat-lithium-ion-battery-fires-promote-safe-electric-micromobility#/0>.

[4] <https://www.foxbusiness.com/markets/evs-profit-potholes-major-us-automakers-gm-ford>.

[5] See Florida Statutes Section 163.08.

[6] <https://www.usatoday.com/story/money/cars/2023/06/14/public-ev-chargers-jd-power-reliability-study/70279294007/>.

[7] See Florida Statutes, Section 718.113(8).