

## Legal Do's and Don'ts for Age-Restricted Communities

*Federal law imposes  
important constraints  
on providers of senior housing.*

**AGE-RESTRICTED** communities are growing in the United States, due in large part to aging baby boomers and longer life expectancy. In the year 2000, the portion of the population that was 60 years of age or older reached 45 million, a figure that is dwarfed by the almost 88 million people over 60 projected by the year 2030. If these demographic trends are any indication, age-restricted communities will continue to increase in number. There are advantages associated with these projects. For example, local governments often offer developers incentives to build housing for older persons, who make lower demands on public facilities such as schools and roads. Although many aspects

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of developing senior communities are the same as for traditional ones, this article discusses key legal considerations and issues that every developer should understand before embarking on a senior housing development.

#### FEDERAL FRAMEWORK

Federal law circumscribes the development of communities for older persons. In 1968, Congress enacted the Fair Housing Act to prevent discrimination in the housing market based on race, color, religion, or national origin. The Fair Housing Act was designed to address inequities in the rental and sale of real property and to create fair housing opportunities for everyone in the United States.

In 1988, Congress amended the Fair Housing Act with the Fair Housing Amendments Act (FHAA), which added “familial status” and “handicapped” as protected classes. “Familial status” was defined as one or more persons under the age of 18 who lived with a parent, a person who had legal custody, or the designee of such parent or person who had legal custody. While this law prohibited housing discrimination on the basis of familial status, exemptions were made for housing specifically intended for older persons.

The exemption for older persons stated that a project was statutorily allowed to

discriminate on the basis of familial status, first, as long as 80 percent of the dwellings in a housing community were occupied by at least one person age 55 or older and the project provided significant services and facilities for seniors; or second, as long as the project was reserved exclusively (100 percent) for persons age 62 or older. A third exemption applied to federal or state programs “specifically designed and operated to assist elderly persons.” The 55 or older exception is most prominently used in the development of private-sector age-restricted communities and will, therefore, be the focus of this article.

Congress added the “familial status” amendments to the Fair Housing Act due to the growing incidences of rental housing restricted to people without children. FHAA served as a protective mechanism so that families with children would not be denied opportunities to obtain affordable housing. However, Congress recognized the desire of many older Americans to live in communities without children. The prohibition of discriminating against familial status and the creation of an exemption for housing for older persons was intended to protect “families with children from discrimination without unfairly limiting housing choices for seniors.”

As originally enacted, communities seeking to qualify for the 55 and older exemption were required to have “significant services and facilities” designed to

meet the needs of older persons. The requirement for “significant services and facilities” was an undefined standard that left many uncertain as to what was required. The result was debate, criticism, and litigation. Congress reacted by amending FHAA and creating what is commonly referred to as the Housing for Older Persons Act of 1995 (HOPA). HOPA, which removed FHAA’s significant services and facilities requirement, has become the legal framework upon which residential projects for older persons have since been operated and developed. (To prevent confusion, the Fair Housing Act and the amendments made to it by FHAA will be collectively referred to as the Fair Housing Act. HOPA will be used when discussing the specific provision, 42 U.S.C. section 3607, of the Fair Housing Act relating to exemptions for older persons.)

HOPA requirements are at the center of legal considerations for age-restricted communities. The federally mandated requirements must be strictly adhered to in order to create a sound legal foundation for such housing developments. This means that *all* the requirements under HOPA must be met in order to comply with federal law. In fact, the courts have construed HOPA requirements narrowly and the burden of proving that a community meets the legal requirements is placed on the defendant. Although there is a recognized need for communities for older

persons, preventing housing discrimination remains a highly protected goal of the act. Thus, projects that do not meet all of the HOPA requirements are precluded from discriminating against families with children.

#### DO’S AND DON’TS

Set forth below are some of the key legal considerations that need to be understood by all developers of senior housing. They focus on the HOPA standards and legal requirements that must be adhered to in order to create and maintain a community that can lawfully restrict children.

1. *Be certain at least one occupant per unit is 55 or older.* Under HOPA, a minimum of 80 percent of the occupied units in the community must have at least one resident per unit who is 55 years of age or older. However, in the case of housing that was constructed after March 12, 1989 or renovated to such a degree that the entire project was unoccupied for at least 90 days before it was reoccupied, the 80 percent requirement does not apply until at least 25 percent of the units are occupied. Once 25 percent of the units are occupied, at least 80 percent of occupied units must have at least one resident 55 years of age or older.

2. *Don’t use unqualified units in your calculations.* Unoccupied units are not included in the total when calculating the

80 percent minimum. If a unit is temporarily vacant, but the occupant has resided there during the past year and intends to return on a periodic basis, it is considered “occupied.” This is an important consideration, since many of these communities serve as second homes for their residents. Units occupied by association employees who are under the age of 55 and who perform substantial duties related to the management or maintenance of the community are exempt. If calculating 80 percent of the number of units results in a fraction of a unit, that unit must also be occupied by a person 55 years of age or older. For example, if 80 percent of the number of units equals 22.7 units, twenty-three units must each have a resident who is at least 55 years old.

3. *Don't confuse ownership with occupancy.* It is important to note the exact wording of HOPA. It states that the units must be *occupied* by at least one person who is 55 or older. HOPA is not concerned with the ownership of units. Instead, a unit only needs to be occupied by one individual who is 55 years of age or older. Therefore, even if a unit is owned by someone under the age of 55, as long as a 55 or older resident lives in the unit, it will be counted towards the 80 percent minimum. Conversely, if a unit is purchased by someone 55 or older, but occupied by younger individuals, that unit will not count towards the 80 percent requirement.

Additionally, only one person in the unit must be at least 55 years of age. For example, if a 56-year-old and a 52-year-old both reside in a unit, it can be counted towards the 80 percent minimum.

4. *Comply with more stringent local laws.* The Fair Housing Act does not prevent enactment or imposition of more stringent state or local laws, as long as they do not promote or require any discriminatory housing practices. For example, a local law could require that all residents in 100 percent of the units be at least 55 years of age or older. But local law requirements cannot be less stringent than the federal law. For example, if a local ordinance for a senior housing zone stipulated that all residents must be 50 years of age or older, then the application of the local law and the federal law together would require at least one resident to be 55 years of age or older and all other residents be at least 50 years of age or older.

5. *Publish and adhere to policies and procedures and show an intent to comply.* An age-restricted community must not only meet HOPA requirements, it also must publish and adhere to policies and procedures that show the community intends to operate as housing for people 55 years of age or older. Intent to comply is most often demonstrated in the covenants, conditions, and restrictions of a community. However, there may be additional policies and procedures in

rules or other community manuals or books. For example, advertising or describing a community as a 55-or-older community, including lease and purchase agreement provisions containing 55-or-older language, and including language in the governing documents that a community is intended for 55-or-older residents, may be used to show the community's intent to comply with HOPA.

Several factors will be taken into consideration in order to determine whether a facility or community has shown the requisite intent and is in compliance with the policies and procedures test. These factors include the community's written rules and regulations, the way the housing is described to prospective occupants, the nature of advertising, lease provisions, public posting in common areas with statements that the community is for people 55 years of age or older, and the actual practices of the community. Simply marketing a community with such phrases as "adult living" or "adult community" does not create the requisite level of intent. Indeed, if such terms are used, it is important to also indicate that the project is "senior housing," "retirement housing," or "55-or-older housing" to clearly demonstrate the intent to comply with HOPA.

Intent to comply with federal law is not demonstrated simply through maintaining a project reputation for being a facility for older persons. In order to demonstrate a

clear intent to operate as a 55-or-older project, documents that are binding on all occupants should include provisions stating that unless an exception is granted in accordance with HOPA, every occupied unit must have at least one permanent occupant who is 55 years of age or older. Although federal laws do not provide a definition of a "permanent occupant," it is wise to include a measurable amount of time and an enforceable standard in the binding document. This avoids sticky situations when, for instance, a person over the age of 55 who visits his or her under-55-year-old children on weekends claims to be the "permanent occupant."

6. *Verify age initially and every two years thereafter.* HOPA requires that an age-restricted community comply with rules for verification of occupancy through reliable surveys and affidavits. This requires procedures for regularly determining the ages of residents and ensuring that at least one occupant is 55 years or older. Surveys that gather information on the ages of unit occupants and whether association employees reside in units are useful for obtaining information. Driver's licenses, passports, immigration cards, military identification cards, birth certificates, and any other government document that shows a date of birth are considered reliable documentation of the age of an occupant. A signed certification by any member of a household 18 years of age or older

stating that at least one resident of the unit is 55 years of age or older can be made part of a contract, lease, or application, and is also considered reliable documentation of the ages of unit residents.

If an occupant refuses to provide evidence of age, an affidavit from a person not in the household who has personal knowledge that the resident is at least 55 years of age is acceptable. The affidavit must state how the person knows the resident's age and must be signed under the penalty of perjury. Government documents such as local household census reports that demonstrate a unit is occupied by an individual who is at least 55 years of age or forms or information previously completed that verify the ages of occupants can also be used when an occupant refuses to provide information relating to his or her age.

Verification procedures are a continuing process and must be done on an ongoing basis. While it may be obvious that new prospective occupants must be subjected to the verification procedures at the time of contract, ages of occupants must be re-verified at least every two years. It is not that information must be re-gathered; it must be reconfirmed so that the project will accurately meet the 80 percent minimum requirements. Attempts to guess the ages of residents or to verify the ages of residents after compliance with age requirements have been

challenged are not looked upon favorably by the courts.

Verification of age is not always easy. For various reasons, it is often difficult to obtain the ages of residents. Due to this obstacle, it is legally wise to incorporate covenant provisions that require residents to subject themselves to the community's age verification process. Provisions setting forth procedures and enforcement mechanisms also ensure that information can be obtained and verified in a timely and effective manner. This puts residents on notice of what will be expected of them and will often allow a smoother completion of the verification procedure. Furthermore, provisions could be incorporated into sales contracts that require the person signing the agreement to assure the owner that at least one of the occupants in the unit will be over 55 years of age.

Occupants should also be made aware that information received through the verification process may be shared as required by law. In fact, the association must make a summary of occupancy surveys available for inspection upon reasonable notice and request by any individual.

7. *Don't mislead purchasers.* Senior housing purchasers, perhaps more than other buyers, are often reliant upon brochures, marketing materials, and oral conversations to make a decision to purchase a unit. The purchaser's vision of the finished community and the individual

unit is often based on such materials. While marketing is part of all sales, sellers must be aware of the difference between promoting the verifiable attributes of the community and making lofty promises that cannot be kept. When such expectations cannot be met or the purchaser is led to believe the community will be something it is not, a lawsuit may result. All staff associated with sales, marketing, and development of the project should be clear on how the finished project will look, what amenities it will contain, and the scope of services to be offered. Although this may be obvious, promises and assurances that cannot be kept should not be made. Good sales and marketing practices produce happy homeowners—and happy homeowners, especially seniors, provide many referrals. However, the reverse is true as well. Meeting or exceeding purchaser expectations is critical to the success of a senior housing development.

8. *Anticipate situations that could jeopardize HOPA compliance.* The importance of maintaining the 80 percent occupancy requirement has already been discussed. This requirement can be obtained and maintained through anticipating potential obstacles by including necessary provisions in the governing documents. For example, it is likely that some of the residents within a community may have their under-55-year-old children living with them as caregivers. While this is not a problem during

the parent's life, it could pose difficulties after the death of the parent. If children decide to remain within the community after the parent dies, this could jeopardize the 80 percent occupancy requirement. The governing documents must anticipate this type of situation by including a provision that clearly prohibits a child from remaining in the community if this jeopardizes the 20 percent allowance for occupants under the age of 55.

9. *Consider the interests of the people who will live in the community.* An all-seniors community does not necessarily mean a homogenous community. Many age-restricted communities are home to a diverse group of people with diverse needs. While HOPA requirements must be strictly adhered to, the documents can be flexible and still meet all federal and state legal requirements. A community can be legally sufficient and address the diverse interests of the residents. Given the diversity of the community, it is imperative that planning and forethought are invested in creating an effective governance structure. Although HOPA requires at least one resident in 80 percent of the units to be at least 55, the age composition of the other residents is largely dependent on the marketing goals and objectives of the developer. Should the governing documents for the community include a minimum age for all residents? How should hardships be addressed? For example, if the minimum age for all resi-

dents is 50, should an exception be made for caregivers who are required to live in the home to provide assistance to the age-qualified residents? What about college-age children? Should they be allowed to live with their age-qualified parents during college breaks? (The answer may be “yes” if your prospective purchaser is a couple with college-age children or “no” if the prospective purchaser is seeking peace and quiet!) These are but a few of the issues that must be carefully considered by the developer.

10. *Don't invite noncompliance or litigation.* Obviously, litigation and any challenge that a community has violated the Fair Housing Act are to be avoided. However, housing providers should be aware that litigation could result not only in an award of the actual damages incurred by the plaintiff, but also in punitive damages. Punitive damages may be awarded in housing discrimination cases, particularly in cases where the defendant shows a reckless or callous disregard for the plaintiff's rights. The size of punitive awards depends on a number of factors, but they are usually seen as deterrents as well as punishments. Depending on the facts involved, other equitable remedies such as injunctive relief may be ordered by the court. Perhaps the most severe sanction is the loss of a project's status as a qualified age-restricted community. The project may thereafter be forever-barred from restricting children, and residents who may have relied upon

the senior housing status of the project may have their goals thwarted. In *HUD v. Murphy*, for example, complainants claimed a community discriminated against individuals on the basis of familial status. Although the project was initially developed and operated for families with no age restrictions, in 1988 the owners claimed the community was converted to a 55-or-older community. The administrative judge found that only 70 percent of the units were occupied by individuals 55 or older. Although the project was described as an “adult park,” it did not demonstrate through policies and practices that it was intended for seniors. The judge found that the project failed to meet the criteria needed to qualify as a 55-or-older residential community. Without this exemption, the owner was found to have been discriminatory in refusing to rent dwellings to individuals based on familial status. Compensatory damages, including actual and economic losses as well as emotional damages, were awarded, as well as punitive damages. Moreover, the project was ordered to discontinue operating as an “adult” community and to cease employing any policies or practices and implementing any rules, including their 55-or-older policy, that would discriminate based on familial status.

There is slight comfort in knowing that a good faith defense exists for people (not corporations) who believed that an associ-

ation qualified for the 55-and-older exemption. However, this is a narrow defense that applies only if a person has actual knowledge before any alleged discrimination occurred that the community's authorized representative certified, both in writing and under oath, that the community qualified for the fair housing exemption.

### **C O N C L U S I O N**

The development of an age-restricted community must follow specific statutory guidelines. Due to these requirements and other community issues particular to residents in age-restricted developments, much thought must be put into the creation of a governance structure, the governing documents, and all marketing materials. Furthermore, to be a success, all those involved in the project must understand and be aware of the impact that legal requirements will have on the project. While certainly not the only factor, adherence to legal requirements is a major factor in the creation of a successful and lasting senior housing community.