

**TOWNS
WITHIN
TOWNS**

**Age-restricted
communities**

55+ communities have become a way of life to more than just community residents. But their very survival depends on wading through a complicated morass of laws and regulations.

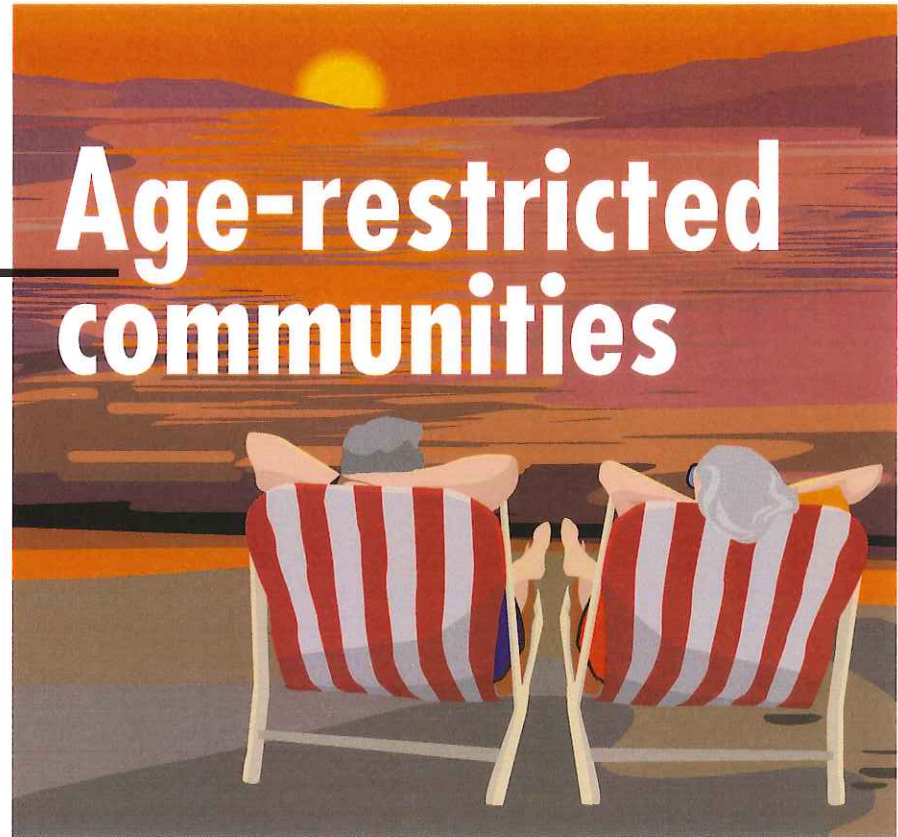
By **Christine Li**

"There are worlds within worlds."

— *Ferngully: The Last Rainforest*, 1992

Residential developments restricting occupancy on the basis of age have become both popular and prevalent in communities throughout New Jersey.

These developments require occupancy of at least 80 percent of the dwellings by residents 55 or older, or 100 percent of all dwellings where occupancy is restricted to occupants 62 and older. Regardless of age limit, these communities also restrict occupancy by children. These "adult" or "active adult communities" — descriptions without precision — have become popular with members of the Baby Boomer generation who wish to subscribe to a lifestyle supported by suitable common and recreational facilities in the company of similarly situated adults.



Unique governmental approvals, governing documents in the form of a declaration or master deed and related bylaws and procedures to ensure continued operation of a development as age-restricted serve as backdrop for these communities.

How it starts

The process begins with consideration of municipal zoning and planning issues; reconciliation of proposed municipal ordinances and federal anti-discrimination law; and the grant of governmental approvals for the development. The preparation of the community's governing documents memorializing the age-restrictive covenants and monitoring and enforcement obligations to ensure compliance

with the age-restriction requirements follow. The emphasis of this article will be on communities limiting occupancy to those who have reached the age of at least 55, as these communities have grown most rapidly in number in recent years and present the greatest operational challenges to its residents and the municipalities in which they are located.

Zoning considerations

The Municipal Land Use Law specifically includes among the legitimate purposes of land use control the encouragement of senior citizen housing. N.J.S.A. 40:55D-2.l. Senior housing facilities have existed historically in a variety of forms, including retirement villages, congregate care complexes and adult mobile home parks. In two companion

cases, *Shepard v. Woodland Tp. Comm.*, 71 N.J. 230 (1976) and *Planning Bd. and Taxpayer Assn. of Weymouth Tp. v. Weymouth Tp.*, 71 N.J. 249 (1976), the New Jersey Supreme Court upheld against equal protection challenge the validity of zoning for age-restricted, planned communities. The court upheld the validity of zoning ordinances permitting (i) establishment of an adult community and (ii) a mobile home retirement community. *Shepard* incorporated the "rational relationship" test, determining that age does not qualify as a suspect classification under the constitution. The court also concluded that a special exception use permitting an adult community restricted to persons 52 years and older advanced the purposes of the zoning enabling act by providing housing for a needy segment of the community.

Weymouth reached the same general conclusions of *Shepard*; however it was more expansive than the *Shepard* analysis of the constitutional equal protection and due process issues. It reiterated that housing was not a fundamental right protected by the 14th Amendment and age not a suspect criterion. The court found a local zoning ordinance permitting a minimum 52-year age mobile home community well within the purview of the general welfare provisions of the zoning-enabling act. As stated by the court, the underlying reasons for the decision were both the demographic increase in the elderly population and their need for affordable housing and supporting social factors characteristic of the elderly.

Fair Housing Amendments Act of 1988

The Fair Housing Amendments Act of 1988 (FHAA) significantly impacted legal viability of age-restricted communities. It added "familial status" to the list of classes protected from discrimination in housing. Accordingly, it became unlawful to deny housing because of:

"[O]ne or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or other person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody..." 42 U.S.C. §3602(k).

Notwithstanding the protection granted based on familial status, three types of "housing for older persons" were exempted from FHAA protection against discrimination because of familial status. Specifically, exemptions were provided for (1) certain state and federal elderly housing programs determined by U.S. Department of Housing and Urban Development (HUD) to be "specifically designed, and operated to assist elderly persons"; (2) housing "intended for and solely occupied by, persons 62 years of age or older"; and (3) housing "intended and operated for occupancy by at least one person 55 years of age or older" provided at least 80 percent of the occupied units are occupied by at least one person meeting the age requirement. 42 U. S. C. §3607 (b)(2)(C). Note the distinction: While communities subject to the 55 or older restriction require occupancy of at least 80 percent of the dwellings in the community by such persons, housing restricted to occupancy by persons 62 or older is required to be entirely occupied by such age-qualified residents. 42 U.S. C. §3607 (b)(2)(B).

Under the 55-or-older exemption, the FHAA originally included an additional qualification: For a community to be exempt it must also provide "significant facilities and services specifically designed to meet the physical or social needs of older persons." Alternatively, if it was impractical to provide such facilities and services, the housing was required to provide important housing opportunities for older persons.

In December 1995, the FHAA was amended with the Housing for Older Persons Act of 1995 (HOPA), which eliminated the "significant facilities and services" required to qualify for the exemption. Instead, to qualify for exemption from the "familial status" provisions of FHAA all that is required is verification of occupancy of at least 80 percent of the occupied units in the community by at least one person 55 or older in accordance with rules adopted by HUD.

Impact of the FHAA

Federal legislation generally pre-empts state law and local ordinances when the federal statute contains express preemption language or when there is an actual conflict with state law.

The FHAA contains no express preemption provisions; rather, FHAA age-restricted community provisions are incorporated as conditions for exemption from the "familial status" anti-discrimination prohibition.

Any state or local zoning ordinances or approvals which, before the adoption of the FHAA, permitted communities for persons under age 55 did not qualify for the "familial status" exemption for age-restricted communities under the FHAA and, therefore, were unenforceable. Subsequent to FHAA's implementation, many local zoning authorities increased the age restriction in their ordinances. Additionally, many age-restricted communities were required to amend their governing documents to qualify for the 55 and older exemption from the prohibition against discrimination in housing because of "familial status." However, in some instances, the lower age threshold or other conflicting provisions in the ordinance remained unchanged.

Towns can be tougher

Municipalities are permitted to impose more restrictive requirements than those in the FHAA, since the FHAA neither contains express preemption provisions nor imposes any standards that could conflict with state and local requirements. Some municipalities have adopted ordinances requiring 100 percent of dwellings be occupied by occupants age 55 or older. Furthermore, while age restrictions under the FHAA apply to occupancy and not ownership of a dwelling, some municipal ordinances require both owner and occupant be age qualified.

In interpreting the FHAA, there continues to be ample discussion of the 80 percent requirement for entitlement to the "55 or older" exemption.

When FHAA passed into law, this provision was viewed as transitional in nature. It was not intended to permit marketing up to 20 percent of the dwellings to persons under age 55 under any circumstances. The 20 percent leeway has practical application, allowing non age-qualified spouses or companions to continue to reside in a dwelling after the death of the age-qualified occupant. Somewhat expectedly — especially in a weak real estate market — there is support for interpreting this margin as

allowing marketing for occupancy by persons under age 55, provided the 80 percent threshold of age-qualified residences is maintained. In any event, there must be strict compliance with the age restrictions that have been imposed governmentally or by virtue of covenants in the community's governing documents so the community does not find itself in violation of its age restriction.

There's another possible repercussion for violating the 80 percent rule: If the community has more than 20 percent of the units occupied by under-55s, the community will lose its "familial status" exemption under the FHAA and no longer have the right to bar occupants based on age. To do so would, in effect, be discriminatory.

Covenants in governing documents

The common practice is to record age restrictive covenants to run with title to the land and legally bind all subsequent owners and occupants. These covenants are usually embodied in the master deed or declaration governing the community, and/or the bylaws adopted by the community's association. The covenants must be consistent with the use contemplated by the zoning for the development. Unlike zoning, the imposition of such covenants is a private action, not subject to constitutional review unless the restriction imposes constitutionally impermissible discrimination, such as racial or religious discrimination.

The drafter of governing documents under the "55 or older" exemption of the FHAA should consider including the following provisions, which would be supplemented if the municipal ordinance imposes additional or more extensive restrictions of the occupants or owners of the dwellings:

1. Qualification under the FHAA. State the intention of the community to be "55 or older" within the meaning of the FHAA, so as to qualify as "housing for older persons" within the exemption provisions of the FHAA.

2. General age restrictions. Restrict occupancy of dwellings to use by permanent residents 55 or older with no children under 19 years of age in permanent residence. Provide for certain

permitted exceptions, such as: (a) a person under age 55 who is residing with his/her partner who is 55 or older; (b) admitting as a permanent resident one adult under 55 if it is established the presence of such person is essential to the physical care of one or more of the age-qualified occupants. Reserve to the community's association the right to permit residency should restrictions subsequently be amended by court order or otherwise to permit additional classes of residents; and (c) prohibiting occupancy of any dwelling by any child under the age of 19 years unless such person is a handicapped dependent protected by the FHAA.

3. Approval procedures. To enforce age restrictive covenants and ensure the community will always qualify for the exemption under the FHAA, place the obligation on the developer in connection with initial occupancy of the dwelling, and subsequently on the community's association as to all future occupancy of dwellings.

(a) Require owners who desire to transfer a dwelling disclose to the association the name, address and age of the prospective purchaser and all prospective residents of the dwelling, and submit evidence the prospective purchaser and residents meet all age qualifications. Consistent with 24 CFR Section 100.307, authorize the board to obtain verification of age of all proposed residents through copies of driver's licenses, birth certificates or similar recognized substantiation, and get the applicant to certify as to the age qualification of the proposed occupants.

(b) Include a mechanism by which an owner dissatisfied with the determination of the board may appeal such decision.

(c) Provide that, if all proposed residents are under age 55, provide the board with discretion to approve the application, except that the board shall not approve any application if:

(1) Any proposed resident child is under the age of 19 years; or

(2) Approving the application would cause or threaten to cause the community to have less than 80 percent of its dwellings occupied by at least one person over age 55, or otherwise to fail to continue to qualify for the "55 or over" exemption under the FHAA.

4. Biennial survey. Obligate the community's board to conduct an occupancy survey every two years as required by 24 CFR Section 100.37.

5. Restriction on children. Deny permanent residency by children under age 19 unless the person is a handicapped dependent protected by the provisions of the FHAA. Define permanent residency as a specific period of time — 60 consecutive days. Permit visitation by children under age 19 who are family members or guests of the residents by defining such visitation as not exceeding 60 consecutive days or more than a total of 61 days in any calendar year.

Continued compliance with age restrictions

The approval procedures embodied in the governing documents of the community obligate the community's developer to seek evidence from prospective purchasers of their age-qualified status at the initial sale of the dwellings. However, the FHAA obligates the community's association to conduct a survey at least once every two years to ensure continued compliance with the age restriction.

However, there is currently a potential void in enforcement efforts between the initial sale of a dwelling by the developer and the association's survey.

The lack of awareness by prospective purchasers a community is subject to age restrictions has become commonplace. Tales abound of unsuspecting purchasers well under age 55 who bought into such communities and the concomitant efforts to compel their removal. The failure of developers and associations to enforce age qualification requirements and perform ministerial requirements of the FHAA such as maintaining and making available for inspection the occupancy surveys is beginning to impact the protections of the FHAA and HOPA.

The need for oversight of the governance of these communities and ensuring better compliance with the FHAA is evidenced by the introduction of S-2274 Oct. 23, 2006. The bill inhibits sales or transfers of dwellings to persons who are not age-qualified for residency in such communities.

As amended May 10, 2007, the bill requires the purchaser or grantee by operation of law of a dwelling in a

subject community to certify, prior to resale or transfer of the unit, that a person whose age complies with the FHAA will occupy the dwelling. The certification would be recorded together with the deed. The law would not apply to the first-time transfer of an age-restricted dwelling from the developer.

Conclusion

Age-restricted housing has evolved and assumed a prominent role in the

development of housing throughout the state. It will undoubtedly remain an essential and successful component of the residential real estate landscape in the coming years. The successful operation and administration of these communities play a critical role in the quality of life of their residents, and in the strength of the municipalities advocating their development. As these communities age, there will be a growing need for authorities on the municipal and state level to

enforce the age restrictions, either through legislation or enforcement of the covenants in documents, and to impart on the governing associations the power to ensure the operational viability of their communities. ©

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