

## HOUSING FOR OLDER PERSONS EXEMPTION THE 80% RULE REVISITED

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Ten years ago, the Fair Housing Amendments Act of 1988 ("FHAA") was enacted to add "familial status" and "handicapped" to the classes protected against discrimination in housing. The FHAA included an exemption for "housing for older persons." In addition to senior housing projects sponsored by the Federal Government and those requiring all residents to be at least 62 years of age or older, a third category was established to exempt active adult communities from the familial status provisions. To be eligible such housing had to be intended and operated for occupancy by at least one person 55 years of age or older. Moreover, at least 80 percent of the occupied homes had to have at least one permanent resident who was 55 or over. In addition, the FHAA and appurtenant regulations required a smorgasbord of facilities and services designed for persons 55 years of age or older in order to qualify for the exemption.

Perhaps the issue provoking the most discussion beyond the "facilities and services" requirements was the scope of the 80 percent occupancy requirement. The specific concerns focused on the intent of the legislation and the HUD regulations that were subsequently promulgated and whether the occupancy of up to 20 percent of the homes by persons under 55 years of age was restricted to hardship cases or transitional circumstances such as the death of age-qualified occupants or where economic distress makes it necessary for temporarily lowering the residency requirement to permit all residents of a home to be under 55 years of age; or, on the other hand, did the FHAA also permit the units to be marketed, either actively or passively, to persons under the age of 55 if at least one permanent occupant in 80

percent of the homes was at least 55 years of age?

Initially, the conventional wisdom, based upon somewhat ambiguous interpretations by HUD officials, was that the 20 percent leeway under the Act was to permit extraordinary situations such as those cited above. Moreover, the common view was that neither active nor casual sales of housing to underage occupants was permitted if the community was to qualify for the 55 or older exemption. However, seven years later, Congress enacted The Housing For Older Persons Act of 1995 ("HOPA") which not only eliminated the necessity to provide significant services and facilities in order to qualify for the "55 or older" exemption, but also restated the qualifications for such exemption to require:

"(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

"(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

"(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall -

"(I) provide for verification by reliable surveys and affidavits; and

"(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification."

In addition, section 807 (b) of the FHAA was supplemented to broaden the scope of the exemption. In essence, if interpreted literally, it would establish a

## President's Message

As your new president, my goal for the coming year is to continue to focus on the council's mission to serve our membership as a forum for educational and legislative issues regarding senior housing, to continue to provide networking opportunities and to



act as an informational resource for the membership. Additionally, we will keep our members aware of the Resolution Committee's

recommendation as it relates to the water/sewer flow research being conducted.

The New Jersey Senior Housing Council is the largest state council in the country. Take advantage of the innumerable resources available through the council. Many of our members also serve on the Board of Directors of the National Council on Seniors Housing (NCOSH) as well as other state and local committees. They are a great resource for answers to all types of questions and issues regarding every kind of senior housing.

I encourage you to support your association by attending the informative NJSHC breakfast meetings and the annual programs and seminars at the Atlantic Builders Convention in April. Help us make our council even stronger by encouraging associates and builders who are not members to join, because there is strength in membership.

Remember, it's good business to do business with a member! See you at our next meeting.

Joe Guidice  
President, NJSHC

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## ***Housing for Older Persons (cont.)***

defense to any "familial status" discrimination claim for monetary damages if the defendant could demonstrate reasonable good faith reliance that there was compliance with the 80 percent requirement at the time of the alleged violation. However, the reasons for occupancy of up to 20 percent of the homes by underage residents is not addressed in HOPA.

Although HOPA regulations were first proposed in January of 1977, they have yet to be promulgated by HUD, despite the fact that there have been repeated assurances during that period that the final version is only 60 to 90 days away. Nevertheless, the director of the Office of Enforcement for HUD has issued a letter which supports a more liberal interpretation of the exemption. It states in pertinent part:

"...as long as 80 percent of the occupied units are occupied by at least one person 55 years of age or older, the remaining 20 percent may be resold or marketed to persons of any age, and the housing provider may still qualify for the exemption."

However, it can still be argued that active marketing to underage residents of up to 20 percent of the homes in a "55 or older" active adult community might invalidate the exemption. Specifically, HOPA requires that the community be intended and operated for occupancy by residents who are 55 years of age or older and a good argument could be made that this requirement is not met if there is active marketing to underage occupants. Importantly, the HUD letter contains an express admonishment in this regard and states:

"Additional care should be exercised to avoid creating an intent that the housing community or facility is not intended and operated for occupancy by persons 55 years of age or older."

On the other hand, casual sales to underage persons together with a clearly stated policy and procedures reflecting that the community is intended for occupancy by persons 55 or over would seem appropriate under HOPA as interpreted by

the HUD letter.

Unfortunately, the foregoing HUD interpretation is not legally binding and HUD continues to state that the promulgation of regulations is still 60 to 90 days away. Significantly, however, we do not have a clear statement by the HUD enforcement arm indicating that the exemption will be valid if there is good faith literal compliance with the 80 percent threshold on the date of an alleged discriminatory act based upon familial status. In HUD's view, distinction between transitional and permanent underage occupancy apparently does not exist under HOPA. However, there are two primary caveats. First, under 55 occupancy should not be actively promoted as this could be interpreted as being inconsistent with the requirement that the community is intended for persons 55 or older and void any exemption. Secondly, there must be good record keeping of the ages of the permanent residents of an active adult community, through surveys and affidavits as required by HOPA, in order to carry the burden of proof that there is a valid exemption.

Finally, it should be kept in mind that failure to qualify for the exemption will subject a housing provider to serious sanctions for familial status discrimination under the FHAA. These include civil penalties starting at maximums of \$10,000 for first time offenders and ranging up to \$100,000 per violation for repeated offenses, together with punitive damages and legal fees.

Although there may not be active enforcement by HUD, developers should not be lulled into a false sense of security. All that it takes is one whistle blower such as a public interest group seeking publicity and legal fees or an anonymous call from unfriendly competition to trigger a HUD investigation. It is important to remember that there must also be compliance with local zoning ordinances and restrictive covenants which contain more limited age restrictions than the HOPA "55 or older" exemption, which is not pre-emptive.

## **NEW REGULATIONS FOR REAL ESTATE ADVERTISING TERMINOLOGY**

It has recently come to the attention of the Public Affairs Committee of the Builders League of South Jersey that the Pennsylvania Human Relations Commission has issued new regulations pertaining to what we have been calling "adult communities" or "seniors' housing."

What have Pennsylvania's rules got to do with you? If you advertise in the Philadelphia Inquirer, read on.

Under new guidelines of the Commission, advertisers can no longer use the words "adult," "retirement," or "seniors" to describe housing. This means that the following ad or advertorial copy phrases cannot be used:

***Adult Building, Adult Living, Adults Only, Retirees' Community, Retirement Community, Retirement Village, Senior Community, Senior Housing, Senior Living, Seniors Only.***

If housing meets specific criteria advertisers may use the following terminology:

***Are you 55 or older? Are you 62 or older? Housing for older persons, Housing for older persons 55 and up, Housing for older persons 62 and up, Housing for persons 55 and older, Housing for persons 62 and older.***

To meet criteria for the definition of "housing for older persons," housing must:

***Be intended for and solely occupied by people over the age of 62, or 80% of the units are occupied by at least one person who is 55 years of age or older, and the property also meets criteria contained in federal funding regulations.***

NJSHC member advertisers who plan to advertise housing that falls under the above definitions should be aware that the Philadelphia Inquirer will apply these rules to all advertisements for housing for older persons, even if the housing is not located in Pennsylvania. The Inquirer will not accept or run advertising that does not comply with the new terminology regulations.

If you plan to run advertising for this type of property, consult with your advertising representative for further information before creating new materials or submitting standing material that does not meet the regulations.

In the meantime, the BLSJ Public Affairs Committee is investigating for recourse in the matter of restrictive advertising terminology.