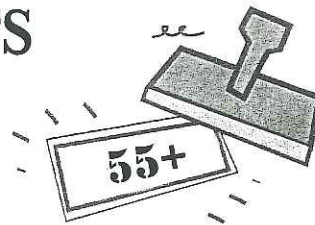


COUNSEL'S COMMENTS

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THE AGE RESTRICTION MAZE REVISITED

As active adult communities for persons 55 years of age or over continue to proliferate in New Jersey and elsewhere due to the "baby boomers" reaching that threshold, confusion has resurfaced about the applicability and interpretation of age restrictions among residents, developers and governmental officials concerned with senior housing. Most recently, litigation was commenced in the U.S. District Court for New Jersey by two developers against Monroe Township in Middlesex County because of conflicting interpretations of the minimum age requirements imposed by the local zoning ordinance for planned retirement communities. The case was further complicated by the fact that a less restrictive interpretation was reflected in the restrictive covenants of many of the adult communities in Monroe Township that had been completed in recent years or that were currently under development. To further exacerbate matters, the New Jersey Department of Community Affairs ("DCA") also weighed in on the side of the Township and issued Notices of Violation to several developers in the Township, which resulted in substantial fines.

In view of the foregoing and similar confusion which I have observed in numerous other instances, it seems appropriate to revisit some age restriction basics for the benefit of residents, attorneys, developers and public officials involved with adult communities. Accordingly, in order to help minimize future misunderstandings, I would list the following specific points of information:

New Jersey case law has validated age restricted communities since the early 1970's. See *Weymouth Township and Woodland Township* cases. In addition, the Municipal Land Use Act has also recognized for many years that "senior citizen community housing construction" is an appropriate purpose of zoning.

Until the federal Fair Housing Amendments Act of 1988 ("FHAA") was enacted, there were no legislative guidelines for the minimum age requirements to be applied to adult communities in New Jersey or elsewhere. Indeed it was commonplace to see 46 and 48 year age thresholds in many zoning ordinances or restrictive covenants for adult communities.

The FHAA added "familial status" and "hand-

icap" to the classes protected against discrimination in housing. Under the FHAA there are three "housing for older persons" exemptions from the familial status discrimination provisions. The principal exemption and the one that applies to active adult communities requires that the housing has to be **intended and operated** for occupancy by at least one person 55 years of age or older. However, only 80% of the occupied homes need to have at least one permanent resident who is 55 or over in order to qualify for the exemption. Seven years later, Congress enacted the Housing for Older Persons Act of 1995 ("HOPA") which maintained the same age criteria for the "55 or over" exemption but eliminated some of the FHAA requirements for the provision of certain facilities and services designed and intended for persons 55 years of age or over.

One of the most common misconceptions about FHAA and HOPA is that because the age guidelines are part of the federal law, they preempt state and local age requirements. This is not the case as these [Continues

federal age standards are **exemptions** from the familial status discrimination provisions of FHAA and HOPA and **not preemptions** of conflicting laws at the state and local levels. Therefore, state legislation, zoning ordinances and restrictive covenants imposing age restrictions for adult communities may differ from federal guidelines and/or each other so long as they meet the federal exemption requirement under FHAA and HOPA that at least 80% of the residences in the adult community be occupied by at least one person 55 or over. Indeed, Monroe Township interpreted its zoning ordinance to require that 100% of all residents be 55 or over with no exceptions for underage spouses, companions, caregivers or adult children over 18. On the other hand, the restrictive covenants that were imposed by the developers in various Monroe Township adult communities excepted spouses, companions and caregivers of age qualified occupants and also permitted 20% of the homes to be permanently occupied by persons under the age of 55 as allowed under FHAA and HOPA. Both the municipal and the restrictive covenant criteria qualified for the "55 or older" exemption under the federal law.

Where there are conflicting provisions between the local zoning ordinance and the restrictive covenants contained in the governing documents for adult communities, the **more restrictive provisions will govern**. Therefore, it is important for all parties involved to examine and understand any discrepancies between local ordinances and the restrictive age covenants. Accordingly, the developer and the attorney drafting the governing documents should ensure that the age requirements conform to all applicable standards. However, this may be problematical where the ordinance is not specific and defines an adult community in general terms - i.e. "a community intended to be permanently occupied by persons 55 or over in accordance with FHAA and HOPA".

Finally, there is often general misconception that **ownership** of dwellings in adult communities is subject to the applicable age restrictions. To the contrary, only **occupancy** is restricted, not ownership. Indeed, it is not uncommon for children to purchase homes in the adult communities for their parents to enjoy.

In summary, the drafting, interpretation and enforcement of age restrictions can be a legal maze. Therefore, it is important to analyze and reconcile all of the competing legal guidelines when addressing particular age restriction issues. Hopefully, the foregoing discussion will be somewhat helpful in this regard. ■

Taxpayers Ass'n of Weymouth Tp., Inc. v. Weymouth Tp., 125 N.J. Super. 376 (App. Div. 1973), A.2d 1987.

Shepard v. Woodland Tp. Communities and Planning Bd., 71 N.J. 230 (1976), 364 A.2d 1005.

N.J.S.A. 40:5D-21

42 U.S.C. 3601

Ironically, for many years prior to 1988, the minimum age requirement in Monroe Township was 48 years for all occupants.

Paraphrasing, in recent years for reasons unrelated to this discussion, the New Jersey Department of Community Affairs has not permitted registrations of adult communities with more than 15% of the homes to be occupied by persons less than 55 years of age during the period of developer sales and has imposed a 50 year minimum age requirement, all as a matter of DCA policy without any legislative or regulatory authority.