

ENSURING COMPLIANCE WITH AGE RESTRICTIONS IN "55 AND OVER" COMMUNITIES

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'Fifty-five and over' communities are not a new phenomenon. These communities were originally created as part of the Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601-3619) which was most recently revised by the Federal Housing for Older Persons Act of 1995 ("HOPA"). HOPA is essentially an exemption from the Federal Fair Housing Act's prohibition against discrimination based on familial status. Specifically, HOPA exempts certain "housing for older persons" which includes housing "intended and operated for occupancy by persons 55 years of age or older."

HOPA defines a community "intended and operated for occupancy by persons 55 years of age or older" as: (i) having at least 80% of the occupied units occupied by at least one person who is 55 years of age or older; (ii) having and adhering to policies and procedures that demonstrate the intent to provide housing for occupancy by persons 55 years of age or older; and (iii) complying with the rules issued by the Department of Housing and Urban Development ("HUD") for verification of occupancy which require verification by reliable surveys and affidavits.

1) Proper Governing Documents—The first requirement is to have the community's governing documents properly drafted by the developer's attorney so as to accurately impose the requirements of HOPA, as well as any requirements of the

state, county and municipality in which the community is located. Paying close attention to state, county and municipal requirements is of utmost importance since HOPA is a floor, but not a ceiling, on the regulation of these communities. This means that HOPA allows other regulations, such as municipal zoning ordinances, to be more restrictive. Hence, compliance with HOPA does not necessarily mean that a community is in compliance with other age-related requirements. For example, it is not unusual for a municipal ordinance to require that 100% of the occupied units in such a community be occupied by persons over the age of 55. Such ordinances fail to recognize HOPA's leniency in requiring: (i) that only 80% of the units be occupied by an age qualified individual; and (ii) that those units need only be occupied by at least one person over the requisite age. Without a municipal ordinance's recognition of the less stringent HOPA requirements set forth immediately above, underage surviving spouses and, other occupants that may have properly occupied a unit with an otherwise age qualified occupant under HOPA, may not be allowed to continue to occupy a unit after the age qualified occupant no longer resides there. It is imperative that any applicable municipal ordinances be consulted before the governing documents are drafted. All too often, a community's governing documents will only include the less stringent HOPA requirements, thereby resulting in a violation of the municipality's ordinance. Additionally, the State of New Jersey Department of Community



Xanadu in Wall Township, Monmouth County

Affairs has additional policies that impact these types of communities that should be taken into consideration.

2) Intention to Comply—The second requirement is that age restricted communities publish and adhere to policies and procedures to demonstrate an intent to operate as a “55 and over” community. HUD indicates there are several factors that are considered in determining whether an age restricted community has complied with this requirement. These include the manner in which the community is described to prospective residents, lease provisions, written rules, regulations and deed restrictions, the maintenance and consistent application of relevant procedures, actual practices and signage within the community describing the community as housing for “persons 55 years of age or over.”

Just as it is important that a developer’s attorney properly set up the governing documents of such a community from the outset, it is equally important that these documents provide for the restrictions to evolve as laws and regulations change. This will enable a developer to not only maintain a community’s compliance, but also take advantage of any changes in the laws and regulations that pertain to such a community which may increase the universe of potential occupants.

3) Verification of Occupancy Requirements—The third requirement is the actual verification that a community

meets the occupancy requirements. It is imperative that developers, and subsequently property owners’ associations that manage such communities, ensure continued compliance with the requirements of the governing documents and all applicable laws and regulations. In the event that a community’s compliance is called into question, the community must be able to produce verification of compliance through reliable surveys and affidavits. While a developer must verify the ages of occupants (such as through driver’s licenses, birth certificates, passports, immigration cards, or other reliable documents, certifications, affidavits or documents signed by occupants of the household), such information must be periodically updated (at least once every two years) which means that property owners’ associations must become involved with this issue.

While the requirements of HOPA seem simple on their face, extreme care must be taken by developers and property owners’ associations of such communities to ensure compliance and to avoid a host of pitfalls.

For more information regarding ensuring compliance with the above requirements and other related topics, please contact J. Scott Anderson, Esq. (sanderson@ghclaw.com) or Monica J. Ceres, Esq. (mceres@ghclaw.com) of Giordano, Halleran & Ciesla, P.C.’s Planned Real Estate Development Department at 732-741-3900.