

THE COUNCIL Communiqué

The New Jersey Senior Housing Council Newsletter

Spring 2003

MODIFICATION OF DCA GUIDELINES FOR "55 OR OVER" EXEMPTION FOR ACTIVE ADULT COMMUNITIES

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Most developers of active adult communities are familiar with the "55 or over" exemption under the Housing for Older Persons Act of 1995 ("HOPA"), 46 U.S.C. 3601, which requires at least 80% of the units to be permanently occupied by at least one person who is 55 years of age or older in order to be exempt from the "familial status" discrimination provisions of HOPA. Moreover, approximately 18 months ago, an unwritten policy of the New Jersey Department of Community Affairs ("DCA") was established whereby DCA would not permit registration of adult communities under the New Jersey Real Estate Development Disclosure Act ("PREDFDA"), N.J.S. 45:22A-21 et seq., unless at least 85% of the units were permanently occupied by one person at least 55 years of age or over. The DCA at that time also required that, with the exception of adult children in the household over 19 and caregivers, no person under 50 years of age would be permitted to permanently reside in an active adult community. Although it was con-

templated that a regulation would be promulgated to implement all of the foregoing DCA guidelines, this has not occurred.

During the interim, DCA has still insisted that when an active adult community is under development, only 15% of the units can be occupied by households where there were no 55 or over age qualified members, as opposed to 20% under HOPA. However, at the same time, DCA has also apparently recognized that the rigid imposition of a minimum age requirement would preclude spouses, live-in companions, and adult siblings from residing in the same household with an age qualified member of the family unless there was a caregiver relationship. Clearly, as I pointed out in a prior "Communiqué" article, such a policy could lead to the bizarre result that would preclude an underage spouse from residing in the same household with his or her age qualified spouse and adult children. Therefore, DCA has modified its position and has permitted registration of active adult communities under PREDFDA to exempt underage spouses from the minimum 50 year age threshold. Presumably, underage adult siblings or live-in companions would also

now be excepted from the minimum 50 year age requirement, but this has yet to be expressly acknowledged by DCA.

Finally, there has been some indication by DCA that there may be some circumstances where the 50 year minimum age threshold might be permitted to be lowered on an ad hoc basis. Certainly, since HOPA does not have a minimum age requirement for 55 or over communities if the 80% test is met, a good argument can be made for reducing or eliminating the minimum age threshold for all occupants other than the 55 or over age qualified residents necessary to meet the 80% HOPA exemption.

For those seeking further information regarding the Housing for Older Persons exemption under the Federal Fair Housing Law and in New Jersey, prior articles can be obtained by visiting wsmith@greenbaumlaw.com.

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