

THE COUNCIL Communique

The New Jersey Senior Housing Council Newsletter

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DCA PLACES A NEW TWIST ON "55 OR OVER" EXEMPTION UNDER HOUSING FOR OLDER PERSONS ACT

Developers of active adult communities should be alerted to a new administrative policy being asserted by the New Jersey Department of Community Affairs ("DCA") with respect to active adult communities registered under the New Jersey Planned Real Estate Development Full Disclosure Act ("PREDFDA"), N.J.S.A. 45:22A-21 et seq. This policy is expected to be introduced as a proposed PREDFDA regulation and adopted in the near future.

By way of background, the Fair Housing Amendments Act of 1988 ("Fair Housing Act"), 42 U.S.C. 3607(b), and the Housing for Older Persons Act of 1995 ("HOPA"), 46 U.S.C. 3601 both contain a "housing for older persons" exemption from the "familial status" discrimination provisions for communities in which "at least 80 percent of the occupied units are permanently occupied by at least one person who is 55 years of age or older." For many years, the conventional wisdom among counsel representing developers or homeowners in active adult communities was that the permitted underage occupancy of the 20 percent of the homes was intended in Congress to provide a safe harbor for hardship situations such as the death of an age qualified parent or spouse, economic distress or other unforeseen circumstances. However, in 1999, HUD adopted and changed the previous general interpretation.

Specifically, this new HOPA regulation made it clear that, as there was literal good faith compliance with the 80 percent requirement on the date of an alleged violation of the "familial status" prohibitions against discrimination, no

sanctions would be imposed regardless of the reasons for occupancy of the other units by persons under 55 years of age.



By **Wendell A. Smith, Esq.**

While there are also other requirements to claim this exemption, such as (i) the demonstration of policies and procedures evidencing that the particular community was intended for occupancy by persons 55 years or over, and (ii) the periodic verification of occupancy at least once every two years, the 80 percent occupancy threshold is the principal criteria.

The New Jersey Division of Civil Rights has also adopted a regulation which recognizes the "80-20" exemption. See N.J.A.C. 15:15-1.5(c). Recently, however, DCA has taken a different position and has declined to register active adult communities under PREDFDA if the covenants and restrictions permit occupancy of more than 15 percent of the units by permanent residents under 55 years of age. In addition, they have required that no permanent occupants may be less than 50 years of age with the exception of adult children, caregivers and hardship cases. Clearly, DCA has elected to impose a policy that conflicts with both Federal and New Jersey civil rights laws by not permitting the full 20 percent window and by the imposition of a minimum age limit, which is not required by either of the forgoing civil rights laws nor by the New Jersey Retirement Community Full Disclosure Act. See N.J.S.A. 45:22A-2(b).

DCA's rationale for its position is not entirely clear. Apparently, *continued on page 3*

PRESIDENT'S MESSAGE



Ralph Orlando

We have all been deeply touched by the events of September 11th and for those of us that were at the Senior Housing Council Breakfast Meeting that same morning, the unfolding events of the day were most chilling and horrifying. I will

forever remember the moment that Bob Bolderman mentioned to me that a plane had hit the World Trade Center and Barry Rosengarten announced to the sixty attendees in the room the details of the terrorist attack. All of our lives have been truly changed, forever. May I take this opportunity to offer, on behalf of the Senior Housing Council, our sincere condolences and deepest sympathies to the families who lost their loved ones and a sincere debt of gratitude to each and every member of the gallant rescue teams – fire, police and emergency service units that worked tirelessly in the rescue effort. It is difficult to go forward with normal daily activities when over 6,000 families as well as millions of people directly associated with those families have been deeply saddened by the horrific event. As I read the listing of missing in the Asbury Park Press, I was stunned by the overwhelming number of individuals between the ages of 24 and 42 years old representing some of our current and potential future leaders. We who are here to mourn their loss can only wonder what greatness has been lost by their sudden departure. President Bush's message of September 20th to the Nation was a powerful and sincere speech that has inspired me as well as, I am sure, an entire Nation to come together and go forward with our lives. As Americans, we should be proud of our unified actions, and at this time of national mourning, we must all look within ourselves for the divine inspiration to go forward with the important role of rebuilding.

This is not a time to be complacent, but rather a time to muster all of our resources at hand and use our talents to bring forth the best product

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“55 OR OVER” EXEMPTION

continued from page 1 it is concerned that if the minimum age requirement is below 50 it would somehow constitute a misrepresentation to state that an active adult community is intended for occupancy by persons 55 years of age or older, regardless of the extent that the exceptions to the 55 year age threshold may be permitted under the law or disclosed in the Public Offering Statement or governing documents. Also, DCA seemingly wants to ensure that there is still a safe harbor for the Association to claim an exemption under HOPA after the developer has completed its sales program. Accordingly, DCA has mandated that only 15 percent of the units be permitted to be permanently occupied by households where all persons are between 50 and 54 years of age. In addition, it would seem that the limitation of active marketing of active adult communities to persons under 55 years old, is another concern of DCA.

It is too early to predict the impact of DCA’s new guidelines upon the adult community marketplace other than to note that because of the 50 year minimum age requirement, spouses under the age of 50 would be prohibited. This could lead to the absurd result that an adult child in his late teens or early 20’s could reside with a parent over 50 and the other parent who was in his or her 40’s would be restricted from living in the same household. Perhaps as even more bizarre result is that no spouse, companion or sibling who is under 50 years of age would be able to reside in the same household with an age qualified member of the family unless there was a caregiver relationship. Never the less, it is not unusual for minimum age thresholds between 45 and 50 for other family members to be found in the governing documents for age restricted communities.

As of the date of this article, no formal rule has been introduced or adopted by DCA to implement the foregoing guidelines. However, the policy is being enforced informally as part of the PREDFDA registration process. Therefore, developers of active adult communities should become aware of this new development and express their concern to their elected representatives and to DCA officials to eliminate the confusion that has been created and to urge a policy that conforms to federal and state law.

Mr. Smith is a senior partner of the law firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP located in Woodbridge. The firm is a long time associate member and Master Sponsor of NJBA. Mr. Smith serves on the Board of the NJ Senior Housing Council and Has extensive experience with the approval process and structuring for active adult communities and has an in depth knowledge of the governmental regulations applicable to age restrictions.

Facts & Figures

MOVING WHERE?

- 59.3% of those moving stayed in the same county
- 19.8% moved between counties in the same state
- 17.6% moved to a different state
- 3.4% moved to the U.S. from abroad
- 11.2% of those who moved were age of 55+

Source: The U.S. Department of Commerce, Economics and Statistics Administration: March 1999

NJSHC Hosted “NJ Energy Star Homes” at September Breakfast Seminar

The September breakfast meeting of the New Jersey Senior Housing Council (NJSHC) hosted a seminar on the New Jersey Energy Star Homes program. (See article on next page) Keynote speakers were Rick Marx, Senior Energy Consultant for GPU Energy, and David Cohen, President of K. Hovnanian’s Private Home Portfolio – a Build on Your Lot program.



Mr. Marx and Mr. Cohen outlined the benefits of the program to an audience of over sixty builders, developers and representatives from companies that provide goods and services to the building industry

The NJSHC’s breakfast meetings are an on-going series of educational seminars held throughout the year at Forsgate Country Club in Jamesburg, New Jersey. For more information on upcoming meetings, call Iris Cooper at the New Jersey Builders Association - (609) 275-8888.



PRESIDENT’S MESSAGE

continued from page 1 that we can for our State and Nation. With our national economy faltering, the mission of the Senior Housing Council becomes even clearer and more important. The Council is resolved to bring forth to the senior building community and to each and every developer the vital information needed to improve their product and maintain development in our State. The Council will continue to work and expand our role as educators in the Senior Housing Industry. The Council has evolved a series of exceptional educational programs for our 2001-2002 year. Our November 6th breakfast meeting at Forsgate featured Jim Hughes, Dean of Edward J. Bloustein School of Planning and Public Policy from Rutgers, addressing the “Demographics of the Current Economy” and the discussion consisted of how the demographic forces shape housing demand in the new millennium and what impact the tragedy of September 11th will have on the economy for the long term. A timely topic in light of the current economic situation and one, which will give us the long range forecasting needed to plan and strategize for development and re-development in the State.

I ask each of you to become active participants and share in our knowledge so that we can all obtain the resolve and acquire the fortitude needed to rebuild in the wake of this immense tragedy.

Ralph Orlando

President

MESSAGE of the DAY: By maintaining our focus, we will maintain balance in our life.