Questions&Answers

Regarding *Age Restricted Communities*

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What are the requirements at present for a community to be senior?

For "stick built" housing (traditional, non-mobilehome housing) the community must satisfy both state and federal law on senior housing. Federal law requires three things: (1) that at least 80% of the occupied units be occupied by at least one person 55 years of age or older, (2) that the community publish and adhere to policies and procedures designed to effectuate the intent to provide housing for seniors, and (3) that the community verify the ages of its occupants in accordance with regulations published by the Department of Housing and Urban Development (HUD). State law requires the community satisfy both a design element and a resident profile. The design element specifies the community must have a certain minimum number of units (depending on where the community is located), and that the development has been developed for, or substantially rehabilitated or renovated for senior use. The resident profile requires that residents be either seniors (55 or older), "qualified permanent residents," permitted health care providers, or persons who were lawfully in residence on January 1, 1985. These requirements are slightly milder for communities located in Riverside County, and mobilehome communities of any description, wherever located in California, need only satisfy federal law.

Our CC&Rs say residents must be "45 or older" and that persons under 18 may only visit for a limited period of time. Are these documents satisfactory?

These documents are not satisfactory. The CC8Rs must be amended to specify that all residents must be either 55, or qualified permanent residents, permitted health care providers, or those lawfully in residence on January 1, 1985. Sometimes it is extremely difficult to obtain the votes necessary to procure this type of amendment; HUD regulations indicate that the government, in investigating claims of familial status discrimination, will take into account any unsuccessful attempts to amend the governing documents, but some type of attempt must have been made. If the community simply enforces the existing documents to the extent permitted by state law, it would not satisfy federal law. The documents must be changed. Sometimes older communities have the habit of referring to themselves as "adult" communities. This practice must be discouraged, because federal regulations indicate that an "adult" community is not a senior community. It is appropriate to refer to the community as "senior," "55+," or "housing for older persons," for example, but it is not appropriate to identify the community as "adult" in either the governing documents or signage.

One of our residents refuses to provide age verification. We are fairly sure she is over 55, but she won't provide us with a copy of any document and she won't sign anything attesting to her age. What can we do?

Federal regulations currently require age verification every two years. Residents should be required to provide copies of some proof of age, such as a driver's license, birth certificate, passport, immigration documents, and so on. If a resident refuses to provide such proof, a member of the household over the age of 18 may certify on behalf of the resident who refuses, or in the alternative, another member of the community who has knowledge of the age of the resident may provide the proof. If none of these alternatives is possible, the association may have to resort to fining the resident in order to secure the proof.

Once the proof is obtained, the association need not force the applicant to produce the same proof thereafter (although incoming residents must provide proof). The evidence of residents' ages may be kept in confidence, and is required to be produced only when HUD or a qualified fair housing organization undertakes an investigation of alleged discrimination.

Recently a family with children under 18 moved into our senior community. We approached them and told them about our CC&Rs and they moved out. Their attorney told us we had violated their civil rights and that they could have sued. What can we do to protect ourselves in the future?

The most important protection is to assure that the community does indeed qualify for the senior housing exemptions provided in state and federal law. If so, the community would be insulated from liability for age or familial status discrimination. However, even if the community actually is entitled to enforce its age restrictions, that is no guarantee that the Association and its Board will not be sued in a misguided attempt to prove the Association was wrong. In a case such as this, the best protection is full and adequate insurance coverage. You should check your "directors and officers liability" insurance policy to make sure it will provide a defense if the Association and/or its directors are accused of age/familial status discrimination. Also, the federal law provides a "good faith" defense for individuals who seek to enforce a senior community's age restrictions. In order to qualify for the defense, the Association's Board needs to execute a statement under oath that the community qualifies for the defense, and the individual must be aware that the Board has done so.

A family with children wants to move into our senior community. They claim that senior communities must "set aside" the 20% of the units which do not need to be occupied by seniors under federal law, for families with children. Are they right?

They are not right. First, the 20% is a "safe harbor": under federal law, a senior community can have up to 20% of its units occupied by non-seniors and still not lose the federal exemption. But, to set aside 20% of the units for non-seniors would not demonstrate the intent to provide housing for seniors. Thus according to federal regulations, the 20% may not be set aside for family housing. Furthermore, if the housing in question is also subject to state law (as is all senior housing except for mobilehomes), then 100% of its residents must satisfy the resident profile contained in the senior exemption.

One of our senior residents has a disabled child who is not yet 55. Our CC&Rs require non-senior residents to be 45 or a spouse or cohabitant of a senior, or to provide primary economic or physical support to a senior resident. This child doesn't satisfy any of these requirements. Is the child entitled to stay?

The short answer is "yes." Your CC&Rs reflect California law prior to 2001. In that year, the law was changed to provide that the disabled child or grandchild of a senior or other qualified permanent resident, who needs to reside with the senior or qualified permanent resident because of the disabling condition, illness or injury, is also a qualified permanent resident. If the disabling condition or illness ends, the senior community may force the removal of the child or grandchild on six months' notice (provided the child/grandchild has not become 45 or otherwise qualified as a permanent resident in the interim.)

We used to be senior, but we sort of abandoned our senior status when the laws changed. However, we believe we are still about 80% senior occupied. Can we convert back to senior?

This is a very difficult question. The 1999 federal regulations specifically permitted Associations to discriminate until May, 2000 to obtain the correct percentage of 55+ occupied homes; until May, 2000 that date, communities desiring to be senior could require that incoming residents be senior households. If by that date, however, the community had not achieved the requisite 80%, the community was required thereafter to abandon its attempts to become senior.

The problem is complicated by the state law. Under state law, which applies to housing other than mobilehomes, and for counties other than Riverside County, there is no method by which a non-senior community can enforce age restrictions to force incoming residents to be senior. Riverside County does have a "transition" provision, but it is limited to formerly senior communities which lost their senior status in response to a claim of discrimination.

Mobilehomes, as noted above, are subject only to federal law, and thus could, theoretically, transition to senior status, provided they achieved the 80% figure by May, 2000. Mobilehome communities might also be able to convert after the May 2000 figure, if they were able to achieve the 80% figure without discriminating against families with children, and if they also satisfied the other two requirements of federal law, viz ., having CC&Rs which correctly reflect senior housing laws, and verifying the ages of occupants as prescribed by HUD. The problem is simply this: it is extremely unlikely that all three elements of the federal law could be satisfied without discriminating against families with children at some point.

If you are considering the possibility of a transition to senior status, contact your attorney, since the circumstances permitting transition are specific to the location and history of the community.