



Maintaining An Age 55 & Over Senior Exemption In A Challenging Housing Market

BY ROBERT G. WILLIAMSON, JR.

Brief Fair Housing Background

The federal Fair Housing Act (FHA) which prohibits, among other things, discrimination in the rental or sale of manufactured housing on the basis of race, color, religion, sex, or national origin is well known.¹ Equally well known is that in 1988, Congress enacted the Fair Housing Amendments Act (FHAA), which amended FHA to prohibit discrimination on the basis of familial status. It also created an exemption to this prohibition in favor of “housing for older persons.”² This permitted communities imposing residency age restrictions to remain age restricted as “housing for older persons” provided FHAA requirements were satisfied.

But, manufactured housing community and mobile home park owners initially struggled, in many instances through litigation, with interpreting and implementing the FHAA requirements in attempts to satisfy the senior exemption. The FHAA requirement that exempted housing for persons age 55 or older had to provide “significant facilities and services specifically designed to meet the physical or social needs of older persons” was the main offender. Congress responded.

In 1995 Congress enacted the Housing for Older Persons Act (HOPA) that amended FHAA.³ HOPA’s purpose and goal was to clarify the law “making it more workable” and easier to determine whether a community qualified for the exemption by, among other things, eliminating the “services and facilities” requirement.⁴ As the Secretary for the Department of Housing and Urban Develop-

ment (HUD) in HUD’s final rule implementing its HOPA regulations put it, “In short, HOPA was passed in order to protect senior housing.”⁵

HOPA requires that a manufactured housing or mobile home community claiming the 55 and older senior exemption show three factors: (1) That the housing be intended and operated for persons 55 years of age or older; (2) that at least 80 percent of the occupied units be occupied by at least one person who is 55 years of age or older; and (3) community or park publish and adhere to policies and procedures that demonstrate its intent to qualify for the exemption. The community or park must also

owners thus desire to take advantage of HOPA’s “20% flexibility” discretionary element in order to fill their community. In considering this approach, however, there are practical issues and potential pitfalls implementing this apparent emerging market driven strategy which must be carefully considered and closely reviewed based on the dynamics of the particular community.

Applying the 20% Flexibility Element

HOPA’s exemption from the prohibition against discrimination based on familial status requires that “at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older.”⁷ The issue is: What about the remaining 20% of the occupied units, often referred to as the 80/20 split?

Under FHAA, HUD recognized the original examples cited by Congress for justification of the 20% element or “split” were circumstances where a person under the age of 55 inherits a unit or where a surviving spouse of a qualified resident was under age 55. However, under its final rule implementing HOPA, HUD made clear that it, “does not consider these to be the only appropriate uses of the flexibility provided by the up to 20% allowed by the exemption....”⁸ Rather, HUD issued its policy statements that, “the appropriate use of the 20% is at the discretion of the community... and [HUD] does not intend to impose more specific requirements in this area” provided that the “80%” requirement is satisfied and the discretionary 20% “requirements are not inconsistent with the overall intent to be housing for older persons.”⁹

While occupancy/age verification compliance is an important factor, this article focuses on maintaining 80% occupancy by persons age 55 or over. The obvious solution to maintaining 80% senior occupancy is, of course, drafting your community’s residency documents to expressly limit residency to persons age 55 or older.

comply with age verification rules of occupancy issued by HUD.⁶

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In a difficult housing market, however, where economic pressures have increased both vacancy rates and prospective purchasers and renters under age 55, there is the temptation to allow, or continue to allow, persons under the age 55 to rent and own in your senior community. Many community

However, despite this apparent grant of broad discretion it is critical community and park owners recognize that the 80/20 ratio is a *minimum* inflexible requirement. Indeed, falling below this ratio could result in disqualification under HOPA and loss of a community's senior exemption. Thus, in today's housing market a potential pitfall arises in applying the "20% flexibility" element "aggressively" to mitigate current economic pressures, to wit: inadvertently jeopardizing the exemption when existing residents' life changes or other hardships develop.

For example, if a community is at the "80/20" ratio from allowing homeowners under age 55 years, and even families, to buy or rent in the community, and the qualified resident passes away, leaving an under age 55 widow or widower, then the community owner faces a difficult choice each with its own potentially costly consequences. Lose perhaps a long time resident under stressful circumstances or lose the exemption under HOPA. There should be enough "flexibility" in the 20% element to absorb these types of circumstances.

There are other circumstances, to be sure, that militate against over aggressive use of the "20% flexibility" element to achieve purely economic goals, such as alleged discrimination on other

grounds when prospective occupants under age 55 who are of a protected class are denied residency. The point is that while there is seemingly unfettered discretion under the 20% flexibility rule, exercising it without careful and adequate consideration of all community demographic factors can bring costly unintended consequences. Accordingly, you should consult with your community's attorney to ensure adequate compliance with HOPA elements and in the planning and implementation of the "20% flexibility" element of HOPA.



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- 1 42 U. S. C. § 3604(a) (1968).
- 2 42 U. S. C. § 3604; "Familial status" is defined as children younger than

- eighteen living with a parent or legal custodian. 4 U. S. C. § 3602(k); 42 U. S. C. § 3607(b) (1).
- 3 Pub. L. No. 104-76, 109 Stat. 787 (1995) (codified at 42 U. S. C. § 3607)
- 4 64 Fed. Reg. 16324 - 16326 (Apr. 2, 1999)
- 5 Ibid. See, e. g., *Putnam Family P' ship v. City of Yucaipa*, 673 F.3d 920, 923 (9th Cir. Cal. 2012) [city zoning ordinance prohibiting any mobile home park currently operating as senior housing from converting to all-age housing.] and *Balvage v. Ryderwood Improvement & Serv. Ass'n, Inc.*, 642 F.3d 765, 768-769 (9th Cir. Wash. 2011) [exemption allowed even if age verification compliance first achieved at the time of alleged violation.]
- 6 Ibid; 42 U. S. C. § 3607(b) (2) (C) (iii); 24 C. F. R. § 100.307.
- 7 42 U. S. C § 3607(b) (2) (C) (i).
- 8 64 Fed. Reg. 16327 (Apr. 2, 1999).
- 9 Ibid.

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