

The ASSOCIATION ADVISOR

A newsletter for HOA & COA leaders and representatives

55+ Communities and the Fair Housing Act

by Anthony L. Rafel and David C. Martin

It is important for 55+ communities to comply with the Fair Housing Act and analogous state statutes to ensure



that they do not inadvertently lose their ability to lawfully discriminate against people living with children. The following summary of the law is intended to help 55+ communities maintain their status as housing for older persons.

The Fair Housing Act was passed to prohibit discrimination in the housing market on the basis of race and certain other characteristics. In 1988, Congress amended the Act to also prohibit discrimination on the basis of "familial status." 42 U.S.C. 3604. Familial status is defined as one or more persons under the age of 18 years old who are domiciled with a parent or legal guardian. In other words, the 1988 amendment prohibited discrimination in housing against people living with children. Similarly, Oregon and Washington law also prohibit

discrimination based on familial status. See ORS 659A.421; RCW 49.60.222(1).

However, both the Fair Housing Act and the state statutes exempt certain types of housing from that prohibition, including "housing for older persons." 42 U.S.C. 3607; ORS 659A.421(7)(a); RCW 49.60.222(6). Housing for older persons means (among other things) housing intended and operated for occupancy by persons 55 years of age or older, where at least 80 percent of the units are occupied by at least one person who is 55 years of age or older. To qualify as housing for older persons, a community must publish and adhere to policies and procedures that demonstrate the intent to operate as housing for older persons. 24 CFR 100.306(a); ORS 659A.421(7)(b)(C)(ii); RCW 49.60.222(6).

Under federal regulations, the following factors are relevant in determining whether the community has demonstrated its intent to operate as housing for older persons: the manner in which the community is described to prospective residents; any advertising materials; lease provisions; written rules, regulations and covenants; the maintenance

Rafel Law Group is pleased to announce that Robert Hyde has been promoted to Principal.

Bob graduated from Duke Law School and was Editor-in-Chief of the Duke Law and Technology Review. Before entering private practice, Bob spent



two years clerking for the United States District Court for the Central District of California and served as an aide to United States Senator Pete V. Domenici of New Mexico.

At Rafel Law Group, Bob represents community associations in insurance bad faith and construction defect matters. He is Chair of the King County Bar Association YLD Board of Trustees and has been named a Rising Star® by Washington Law & Politics magazine in 2007, 2008 and 2009. In 2009, he was one of only eleven Washington lawyers named a Rising Star for his work in the Insurance Coverage practice area.

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and consistent application of relevant procedures; actual practices of the community; and public posting in common areas of statements describing the community as housing for persons 55 years of age or older.

Note that “phrases such as ‘adult living,’ ‘adult community,’ or similar statements in any written advertisement or prospectus are not consistent with the intent that the housing facility or community intends to operate as housing for persons 55 or older.” 24 CFR 100.306(b).

To comply with these regulations, it is helpful to have covenants or bylaws that clearly demonstrate the intent to operate as a 55+ community. If a community’s actual practice matches its published policy to operate as housing for persons 55 or older, then it is likely to qualify for the exemption that permits it to lawfully practice “familial status” discrimination. The federal regulations even provide that “a person shall not be held personally liable” for monetary damages in a civil suit for discriminating on the basis of familial status “if the person acted with the good faith belief that the housing facility or community qualified for an ... older persons exemption.” 24 CFR 100.308(a). However, the Oregon statute does not contain this good faith exemption, so Oregon associations should be careful to comply with state law. In con-

trast, the Washington statute expressly states that its requirements are no different than the federal requirements. RCW 49.60.222(6).

As long as 80% of the units are occupied by at least one person who is 55 or older, then the community can (without violating the Fair Housing Act or Oregon law) make its own rules as to an age restriction on the remaining 20% of occupied units. 24 CFR 100.305(h); ORS 659A.421(7). Similarly, a 55+ community may choose to allow children without losing its status as housing for older persons, so long as at least 80% of the units remain occupied by at least one person who is 55 or older. 24 CFR 100.306(d). To demonstrate that it meets the 80% requirement, the community must compile a list of its occupants and verify their ages through reliable surveys and affidavits. 24 CFR 100.307(a). The community’s age verification information must be updated at least once every two years. 24 CFR 100.307(c).

Finally, it is worth noting that the Fair Housing Act does not apply to “the sale or rental of any single family house by an owner,” provided certain requirements are met. 24 CFR 100.10(c). In other words, if a unit owner is selling his or her unit, the Fair Housing Act typically does not apply to that transaction; the association, however, is still prohibited from engaging in any unlawful discrimination.

The Transition from Declarant Control in Washington

by David C. Martin

Condominium declarations and other residential community declarations typically provide for a period of declarant control that permits the declarant/developer to appoint or remove the association’s board of directors and officers and authorizes the declarant to approve or veto the board or association’s actions. At a certain point, the declarant must turn over control of the board and the association to the unit owners. The timing of this transition may vary, but the Washington Condominium Act requires the declarant to transfer control of the association no later than sixty days after seventy-five percent of the units have been conveyed to someone other than the declarant. See RCW 64.34.308(4)(b). The Washington Homeowners’ Associations Act (RCW 64.38) does not contain a similar requirement, which means homeowners’ associations should look to their governing documents to determine when and how turnover should occur. The turnover of most homeowners’ associations does not occur until 100% of the homes are sold. However, the declaration sometimes provides for minority representation on the board by homeowners after certain milestones are reached, such as when 25%, 50% or 75% of the homes are conveyed to someone other than the declarant.

The termination of declarant control raises a variety of legal issues for an association. First and foremost, the unit owners must elect a board of directors of at least three members. This election must occur within thirty days after declarant control has been terminated. See RCW 64.34.308(6). The board of directors then appoints the officers of the association.

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The Transition from Declarant Control in Washington

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The newly elected board should take time to familiarize itself with the association's rights upon turnover. One of these rights is the right to have the declarant deliver to the association all of the association's property that is held or controlled by the declarant. This includes a copy of the recorded declaration and any amendments thereto, the certificate of incorporation, the articles of incorporation, the association's bylaws, any rules and regulations that have been adopted, the minute books, the association's financial records, all association funds, all tangible property of the association, a copy of the declarant's plans and specifications used in the construction of the condominium, the association's insurance policies, certificates of occupancy, permits issued for the condominium, any written warranties that are still in effect, any qualified warranty issued to the association, a roster of the unit owners and eligible mortgagees, and any leases or contracts that the association is a party to. The declarant must deliver these items to the association within sixty days after the termination of declarant control. Further details on these turnover requirements can be found in RCW 64.34.312(1).

The newly elected board also takes over a variety of responsibilities and obligations. These responsibilities include preparing and approving budgets, levying and collecting assessments, maintaining proper insurance coverage, enforcing the governing documents, enforcing use and occupancy restrictions, maintaining and repairing areas of common responsibility, entering into agreements on behalf of the association, assuring compliance with the law, initiating and managing litigation,

and contracting for services and facilities. Condominium associations also must conduct a reserve study and update it annually in accordance with the association's governing documents and RCW 64.34.382.

In addition, RCW 64.34.312(2) requires that the records of a condominium association be audited as of the date of termination of declarant control. This audit can be waived by a two-thirds vote of the unit owners, but this is not recommended. The audit must be performed by an independent certified public accountant in accordance with generally accepted auditing standards. The audit must examine the association's records and documents, including cash disbursements and paid invoices, to ascertain whether the declarant's expenditures were for association purposes and whether the declarant paid the proper assessments owed to the association. The cost of the audit is a common expense unless the declaration states otherwise.

After transition, the board should examine the association's governing documents to determine whether they need to be amended. This can be particularly necessary if the governing documents contain language favorable to the declarant that does not serve the best interests of the association or is contrary to applicable laws.

The board should also examine the condition of the condominium to determine whether the association needs to assert its warranty rights. This usually includes hiring a professional to conduct an inspection of the condominium. Condominiums have implied warranties of quality pursuant to RCW

64.34.445 which warrant "that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type." The declarant also impliedly warrants that the condominium will be: (1) free from defective materials; (2) constructed in accordance with sound engineering and construction standards; (3) constructed in a workmanlike manner; and (4) constructed in compliance with all laws then applicable to such improvements. An express warranty from the declarant cannot reduce these statutory warranty rights. See RCW 64.34.450(3). The implied warranties of quality expire four years after the association's cause of action accrues. The cause of action accrues on the date of sale of the first unit to a bona fide purchaser, the date of completion of a common element, or one year after the period of declarant control ends, whichever occurs latest. See RCW 64.34.452(2). Because these warranties may expire within a year after the termination of declarant control, the board should act diligently to ensure that the association's warranty rights are preserved. If warranty rights are not timely asserted, the cost of necessary repairs falls to the owners rather than the declarant.

Although the transition process can be complicated, with careful planning and careful attention paid to the requirements of both the relevant statutes and the association's governing documents, the newly elected board can ensure that the transition goes smoothly and the association's rights are fully protected.

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