

## 55+ Communities and the Fair Housing Act

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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 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 contrast, 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.

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