

Connecticut Law Tribune

APRIL 11, 2011
VOL. 37 • NO. 15

An ALM Publication

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Removing Age-Restrictions On Residential Developments

MARKET CHALLENGES PROMPT DEVELOPERS TO APPROACH LAND USE AGENCIES

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In December 2010, the *Hartford Courant* reported that the age-restricted housing market in Connecticut had "hit a wall" — builders were unable to sell units, residents of existing developments were unable to re-sell, and developers and residents of approved and partially occupied developments were petitioning local officials for relief from the restrictions.

Whether the problems of selling or reselling age-restricted units are the result of the overall challenges in the housing market, over-saturation of the age-restricted market, or both, with some 200 age-restricted developments across Connecticut and the oldest Baby Boomers turning 65 this year, the critical issue arises: Can a land use board's approval of age-restricted housing be revised or undone?

Applicable Law

The most important legal aspect of age-restricted housing is that such developments are an *exemption* from the federal Fair Housing Act's prohibition on discrimination against families with children, known as "familial status" protection. See 42 U.S.C. §§ 3601, 3607. It is illegal to deny housing to a family because of the presence of one or more children under age 18. Age-restricted housing is legal only because in the 1990s Congress recognized seniors' desire to live in age-restricted environments and created a strict set of criteria to ensure that housing developments that exclude families with children are bona fide com-

munities for older adults, such that otherwise discriminatory practices may be carried out.

The Fair Housing Act allows three types of age-restrictions: (1) housing is under federal or state programs designed and operated to assist elderly people needing some form of care; (2) housing is intended for and solely occupied by persons 62 or older; (3) housing where 80 percent of the *occupied* units are populated by at least one person above age 55, and the development verifies compliance with this percentage once every two years.

For 55-and-over housing, the non-restricted 20 percent serves as a safe harbor for transitional situations, such as an under-55 resident becoming the sole occupant through divorce or death of an over-55 resident. If a development does not maintain the 80 percent requirement, the exemption can be lost; to regain exempt status, the developer or unit owners' association must market to all populations. In other words, falling below 80 percent through inattention to the age restriction does not become a valid reason to begin discriminating based on familial status.

Connecticut's fair housing law, General Statutes § 46a-64c, tracks the federal law. Thus, if a development satisfies federal re-



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quirements, it also satisfies state law.

For a 55-and-over development to meet the 80 percent rule, it must be considered a separate community. If it exists on the same parcel with a non-age-restricted building, certain distinctions must be maintained. In *Deer Hill Arms II Limited Partnership v. Planning Commission*, 239 Conn. 617 (1996), a developer tried to sell units that were originally age-restricted by arguing that compliance with the 80-percent rule was not possible because the development contained a second, unrestricted building. Other than common title and a common driveway, the two buildings were operated as separate entities, with separate owners' associations, common areas, and common charges. Based on these factors, the court

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found that the buildings were separate communities and that their physical co-existence did not violate the Fair Housing Act.

Economic, Practical Impacts

Age-restrictions are imposed through a zoning or subdivision regulation, a subdivision, special permit, or site-plan approval condition. If the development is a common-interest ownership community, the restriction is further articulated in the association documents. Theoretically, what can be legally imposed can be legally modified or removed. The issues in removal or modification of an age restriction become economic motivation, practicality, and vested rights. The process for removal will vary depending on who the players are and the status of construction, occupancy, and ownership.

The first level of analysis is who will participate in the removal/modification decision. The developer and land use board will be the primary movers, and the central claim will be economic hardship resulting from the age restriction. However, the process may also be influenced by whether there are existing residents who purchased or are

renting relying on the age restriction, and by a lender with a stake in the value of the property. For developments that have been approved but not yet built, occupant rights will not be an issue, but the developer will have a harder time convincing the local land use agency that economic hardship justifies removal of the age restriction.

If there are existing residents with vested rights, in order to continue the age restriction the issue most likely becomes one of economic alignment: Are the residents willing to give up the age-restriction to improve their re-sale potential? In many cases, the answer is yes, but this is not assured.

In approaching land use commissions, the consent of existing occupants will be essential. Even then, the agency will need convincing to remove a condition that was likely an integral part of the original approval. Fiscal impacts on the town from removing the restriction —though legally irrelevant to land use decisions — are a likely factor in the discussion.

Connecticut's affordable housing statute, General Statutes § 8-30g, may provide a means to remove age-restrictions. Provided

the applicant is willing to accept price or rent restrictions on 30 percent of units, and no residents have vested rights, an application to remove an age restriction will be difficult for a local zoning agency to deny under §8-30g's burden-shifting standards.

A final factor is the nature of the proposed change. If the development is all-residents-over-62, a change to 80 percent over 55 may be an interim step. Otherwise, the local commission will want to know if only the age restriction is being revised, or also the site plan – density, bedrooms, amenities, etc. Modification or removal of age-restrictions also may be an opportunity for developers to re-envision developments with respect to market demands, such as affordability, accessibility, green building, additional amenities, walkable communities, and universal design.

Connecticut has one of the nation's oldest populations, thereby increasing the number of residents eligible for age-restricted housing. Given the problems and issues noted here, whether new age-restricted developments or removal of restrictions keeps pace with our aging population is a complex question of law, economics, and practicality. ■