

Senior Housing & Care

Legal considerations for age-restricted housing

This article is Part 2 of a series of articles discussing real estate issues that are unique to senior housing transactions.

As the members of our communities age and seniors make up a larger segment of the population in Colorado and nationwide, increased consideration has been given to housing for the aging. As discussed in our first article in this series, senior housing can encompass several different types of facilities and levels of care, including independent living, assisted living, memory care and skilled-nursing facilities. As real estate developers and consumers consider different options for housing that is appealing to older generations, one product – age-restricted housing – is gaining popularity.

Age-restricted communities are independent living developments that do not offer medical care or services but restrict the housing to residents above a certain age. They can be offered as apartments, condominiums, mobile home parks or single-family home subdivisions. They are attractive to some residents because they offer an opportunity to live in a built-in community with others in the same phase of life who may share similar interests and life experiences. Larger communities may provide resort-type amenities such as golf courses, clubhouses, pools, spas and fitness centers. Some also offer certain amenities typically found in senior living facilities, such as coordination of social activities, and cleaning and laundry services. For



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Although age-restricted, independent living communities in Colorado do not require licensing or regulatory oversight, developers and operators should be aware of the legal framework that governs their creation and operation. Under the federal Fair Housing Act, it is illegal to deny housing based on familial status, in particular to families with children under the age of 18. However, in recognition of the popularity of and the need for senior housing communities, the FHA provides an exemption for “housing for older persons” – the Housing for Older Persons Act of 1995.

HOPA provides two categories of exemptions from the FHA: (1) “62 and older” housing, where 100 percent of units must be occupied by persons 62 years of age or older and (2) “55 and older” housing where 80 percent of the units must be occupied by at least one person aged 55 years or older. If providing housing under the 55 and older designation, the community must (a) demonstrate that the housing is intended

developers, these may be attractive opportunities because they are able to market to the senior community without the additional layer of licensing and regulatory requirements involved in developing facilities with assisted living and skilled-nursing services.



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for and operated for persons 55 years of age or older (which must be considered in advertising and marketing for the community); and (b) publish and adhere to policies and procedures that demonstrate the intent to have the units occupied solely by those 55 or older. The community also must comply with U.S. Department of Housing and Urban Development regulations for verifying that the 80 percent requirement is being met. To demonstrate that the housing meets the 55 and older exemption test, the community should obtain documentation of an occupant’s age when he joins the community, and maintain current files documenting compliance with the occupancy requirements.

In a for-sale community, age restrictions should be imposed by declaration of restrictive covenants recorded in the real property records, and the age restrictions monitored, documented and enforced by an association created pursuant to the declaration (and if the community is subject to the Colorado Common Interest Ownership Act, the declaration will need to comply with the terms of CCIOA). The association should be diligent in enforcing the provisions of the declaration or it could risk losing its exemption under the FHA and the

possibility of a lawsuit for discrimination.

In a for-rent community, age restrictions can be managed and enforced by the operator or property manager. Additionally, as a for-rent product, age-restricted housing will be subject to applicable landlord and tenant laws. If collecting a deposit, landlords should be certain to comply with the rules applicable to tenant security deposits, and, if using a month-to-month lease, landlords must comply with the notice requirements for termination (21 days’ notice to terminate a month-to-month tenancy where a resident has been in occupancy for less than six months, 28 days’ notice if the tenant has been in place between six months and one year, and 91 days’ notice if the resident has been in occupancy for more than one year). Additionally, if the landlord engages a third-party operator to manage the property, the management company must be properly licensed through the Colorado Division of Real Estate to perform these property management services.

By 2050, people over age 60 are expected to account for 25 to 29 percent of the U.S. population, and Colorado likely will see a similar trend. Given the projected demographic shifts, we will continue to see a need for different types of senior housing products, and age-restricted housing will continue to be a popular and important component of that mix. With proper consideration of the legal requirements, age-restricted housing communities can be a prime area for future development opportunities.▲

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