

Conversion to Housing for Older Persons Under the Fair Housing Act

The Fair Housing Act exempts “housing for older persons” from the Act’s prohibition of discrimination against families with children in two categories: 100% of the occupants must be 62 years of age or older or 80% of the occupied units must be occupied by at least one person who is 55 or older. The Fair Housing Council occasionally receives questions from housing providers concerning whether it is legal to convert an existing community to housing for older persons under the Fair Housing Act. Recently, the U. S. Department of Housing and Urban Development (HUD) issued a memo clarifying this issue. According to the memo:

The Fair Housing Act (the Act) and the Housing for Older Persons Act of 1995 (HOPA) amending it, excludes from the Act’s prohibitions against familial status discrimination communities and facilities that have met certain conditions demonstrating an affirmative intent to provide housing for older persons.

A question has arisen regarding whether an existing community or facility can become housing for older persons after May 3, 2000, the expiration date of the transition period provided for in HUD’S HOPA regulations, 24 CFR § 100.305(e).

The Department’s HOPA regulations established a transition period to provide a mechanism for communities or facilities to become housing for older persons, if they had abandoned or did not achieve such status before HOPA. The transition period allowed a community or facility that did not yet meet all of the HOPA requirements to deny housing to families with children in order to get 80 percent of its units filled by at least one person 55 or older. During the transition period, if a housing facility or community demonstrated an intent to be housing for older persons and adopted age verification procedures, it could reserve all unoccupied units for occupancy by at least one person 55 or older. If an eligible family with children wanted to occupy a vacant unit during the transition period, a community or facility that had not yet met the 80 percent threshold could have legally refused to admit the family. However, at the end of the transition period, any community that failed to have 80 percent of its units occupied by at least one person at least 55 years of age had to cease reserving unoccupied units for persons over 55 years of age and could no longer discriminate against families with children.

This memorandum provides clarification on how communities that did not convert to “housing for older persons” by May 3, 2000, can become housing for older persons. There are two ways to establish housing for older persons after the transition period: conversion and new construction.

First, an existing community or facility can convert to “housing for older persons” if 80 percent of its occupied units become occupied by at least one person 55 years of age or older. Unlike during the transition period, housing providers cannot discriminate against families with children in order to achieve 80 percent occupancy by persons 55 or older. In other words, a community or facility cannot reserve unoccupied units for persons 55 or older, advertise itself as housing for older persons, or evict families with children in order to reach the 80 percent threshold. If a family with children seeks to occupy a vacant unit in an existing facility before it has met all of the requirements necessary to become housing for older persons, the community or facility must permit the family to live there. Additionally, the facility may not make existing families with

children feel unwelcome or otherwise encourage those families to move. While the facility or community may not take any measures deliberately designed to discourage families with children from continuing to reside in the community, nothing prevents the offering of positive incentives that might lead some families to seek housing elsewhere. If the community or facility achieves the 80 percent threshold, without discriminating against families with children, it may then publish and adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 years or older and comply with verification of occupancy rules. The facility or community cannot publish such policies or procedures in advance of meeting the 80 percent threshold (without discrimination) as such policies and procedures would have a chilling impact upon potential applicants or current occupants who are families with children.

A second way to establish housing for older persons is to construct a new housing community or facility and meet the three requirements set forth in HOPA: (1) 80 percent of the occupied units are occupied by at least one person 55 years of age or older; (2) the housing community or facility publishes and adheres to policies and procedures that demonstrate an intent to provide housing for persons 55 years or older; and (3) the community or facility complies with rules issued by the Secretary for verification of occupancy through reliable surveys and affidavits. Newly-constructed housing includes a facility or community that has been entirely unoccupied for at least 90 days prior to re-occupancy, due to renovation or