

LEGAL ISSUES IN AGE-RESTRICTED COMMUNITIES

*Pennsylvania and Delaware Valley Chapter
Community Associations Institute
2009 Trade Show
April 29, 2009*

*A. Christopher Florio, Esquire
Stark & Stark, P.C.
993 Lenox Drive
Larwenceville, NJ 08648
(609) 895-7335
cflorio@stark-stark.com*

LEGAL ISSUES IN AGE-RESTRICTED COMMUNITIES

- A. Fair Housing Act
 - An Overview
 - Housing Discrimination
- B. Housing for Older Persons Act (HOPA)
 - Allows For “Legal” Discrimination
 - Significance of 55 Year Old Threshold
 - HOPA Reconciled With Governing Documents That Are More Strict
- C. Governance Issues
 - Board vs. Committees
 - Provided Activities
 - Insurance Issues
 - For Profit vs. Enhanced Lifestyle Offering
 - Displaying the Flag
 - Transition Issues
 - Who Runs It?

The Housing for Older Persons 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 new requirements under HOPA are equivalent to the original provisions of the Fair Housing Act regarding age categories. HOPA also required that a facility or community seeking to claim the 55 and older exemption show the following two factors: (1) that the housing be intended and operated for persons 55 years of age or older; and (2) the housing facility or community publish and adhere to policies and procedures that demonstrate its intent to qualify for the exemption. The housing facility or community must also comply with rules issued by HUD for the verification of occupancy.

One major change made by HOPA was the elimination of “significant facilities and services” previously required by the Act to meet the 55 and older exemption. The Act originally required that housing designed for persons 55 years of age or older provide “significant facilities and services specifically designed to meet the physical or social needs of older persons.” This requirement has now been eliminated from the law.

HOPA also added the new requirement that a housing facility or community seeking the 55 and older exemption comply with HUD regulations on verification of occupancy. This should be performed through reliable survey, affidavit or other documentation of the individual’s choosing, a copy of which should be retained for recording keeping purposes, which confirms that the 80% threshold is being met. A self-certification of his or her age by an individual will be adequate to meet this standard. Copies of information gathered in support of the occupancy verification may be kept in a separate file with limited access, created for the sole purpose of complying with HOPA and should be reviewed and updated every 2 years.

In regards to the housing facility or community publishing and adhering to policies and procedures that demonstrate its intent to qualify for the 55 and older exemption, the regulations state that simply publishing that this is an “adult community” is not sufficient to meet this standard. Clear policies and procedures must be published and adhered to. When advertising, the guidelines state that the best practice is to refer to such housing as “Senior Housing” or “A 55 and older community” or “retirement community” and discourages the use of the term “adult housing” or similar language. While the use of adult housing or similar phrases standing alone do not destroy the intent requirement of HOPA, the regulations state that they send a clear message which is inconsistent with the intent to be housing for older persons. If a community or facility has clearly shown its intent in other ways, and clearly meets the 80% requirement, then the intent requirement has been met even if the phrase “adult” or similar terminology is occasionally used. However, a community that describes itself as “adult” leaves itself vulnerable to complaints about its eligibility for the exemption, which could result in an investigation or litigation to determine whether the community in fact qualifies for the exemption.

_____ CONDOMINIUM ASSOCIATION, INC.
CENSUS FORM

Directions: Complete and return to the Association with appropriate documentation attached no later than June 30, 2006.

1. Are you an owner of a Unit located within _____ Condominium Association, Inc.?
____ YES If YES, provide your Unit address _____.
____ NO If NO, do not continue. Give this form to the owner of your Unit.

2. Do you reside in the Unit?
____ YES If YES, provide your telephone number: _____.
____ NO If NO, provide
(a) your mailing address: _____.
(b) telephone number: _____.

3. Provide the name, birth date, and relationship to Unit Owner of all persons who reside in the Unit including yourself, if applicable. For tenants, write the relationship of each to the first designated tenant:

<u>NAME</u>	<u>BIRTH DATE</u> <u>MONTH / DAY / YEAR</u>	<u>RELATIONSHIP</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

(If you need more space, please attach separate paper.)

4. For each person listed in Paragraph 3 above, attach a clear photocopy of his/her photo identification showing name, address and birth date. Examples of acceptable identification are driver's license, military identification, passport. If you do not have a photo identification for any individual, please contact the Association for further information on acceptable documents.

5. Does your Unit comply with the Association's age restrictions set forth in Declaration Section 22? ("Permanent residents must be single individuals 55 years of age and over; married couples at least one of whom is 55 years of age or over; or two closely related persons, e.g., sisters, brothers, brother and sister, aunt and niece, parent and child, etc., when both persons are 55 years of age or over; or two unrelated persons of the same sex when both are 55 years of age or older. One person over 19 years of age may reside in a dwelling unit with an elderly person or persons, as permitted, above, if the presence of such person is essential for the physical care or economic support of the elderly person or persons. Children 19 years of age or older may reside with a parent or parents.")

YES If YES, go to question number 7.

NO If NO, go to question number 6.

6. Are you requesting an exception to the Association's age restrictions?

YES If YES, describe why you need the exception: _____

_____ (If you need more space, attach separate paper.)

NO If NO, describe why not: _____

_____ (If you need more space, attach separate paper.)

7. I understand that the information provided on this form and the photo or other identification attached will be maintained by the Association and made available for inspection only by appropriate local, state, or federal investigators or as part of court proceedings to show compliance or non-compliance. I also understand that a summary of age-related data may be compiled for distribution to unit owners upon request but that this summary will not include names, ages, addresses, or other data which could identify any individual. INITIAL _____

8. I hereby certify that the above information is accurate, complete and true. I understand that I am obligated to update this information in the event it changes. I further understand that if any of the foregoing statements are wilfully false, I am subject to punishment.

Dated: _____

Print Name _____

Signature _____

CONDOMINIUM ASSOCIATION, INC.
ACKNOWLEDGMENT OF AGE RESTRICTIONS

I, _____, am purchasing a unit within _____ Condominium Association, even though I do not meet the age requirements and/or I have children who are under age 19. I acknowledge that I have read the Master Deed, By-Laws, and Rules and Regulations for _____ Condominium Association, Inc. including, but not limited to, Master Deed Section _____ regarding Age Restrictions. In particular, I acknowledge and agree with the following:

1. Until such time as I am 55 years of age or older, I cannot reside in my unit unless I share my unit with an age-qualified person (55 or older). This age-qualified person must be a permanent occupant of the unit and not a temporary or occasional visitor. This age-qualified person must be my spouse, parent, or companion.
2. If the age qualified person moves out of the unit, I will not reside in the unit and I will not allow other to reside in the unit unless another age qualified person occupies my unit.
3. If I was permitted to occupy and did permanently occupy the unit with an age qualified person, after the passing of the age-qualified person, I may continue to occupy the unit even though I may not yet be age 55 or over.
4. If I do not reside in the unit, I will ensure that the unit is occupied in compliance with the Association's governing documents.
5. Nobody under the age of 19 years old will reside in the unit. Permitted visitations by those who are under age 19 must not exceed 29 consecutive days nor more than a total of 60 days in a calendar year.
6. This summary of the age restrictions do not replace or modify those set forth in the Association's governing documents.

Signature

Unit Address _____

Name (Print)

Date _____

IMPORTANT NOTICE

Dear Unit Owner,

Enclosed is the Occupancy Age Restriction Resolution adopted by the Association on _____. Also enclosed is a census form which you must complete and return to the Association no later than June 30, 2006. Along with the census form you must provide a clear copy of a photo identification which shows name, address, and birth date for each person who resides in the unit.

The census form is required by law to validate the Association's age restricted status. Accordingly, the Association will be strictly monitoring the completion and return of these forms. If you fail to return a completed census form by _____, 20__, or any subsequent deadline, you will be subject to fines, administrative fees, and further legal action. Any census form returned which is incomplete in any way (no signature, missing documentation, etc.) shall be returned to you and you will be subject to fines, administrative fees, and further legal action. Fines are \$50.00 per day; each day after notice shall be deemed a new violation. An administrative fee of \$50.00 per incident will be imposed for having to remind a unit owner that the census form has not been returned by the deadline or for returning an incomplete census form.

The Association is not required to grant exceptions to current residents who do not meet the age restrictions. The Association will consider such requests but only upon receipt of the completed census form and submission of any additional information the Board may deem necessary.

Your cooperation and assistance is appreciated.

Sincerely,

Board of Trustees

IMPORTANT NOTICE
TO ALL UNIT OWNERS

On _____, the Association adopted rules to help with enforcement of the age-restricted status of the community. A copy of the Occupancy Age Restrictions Resolution and a census form has been mailed to all unit owners.

Census forms must be completed and returned to the Association no later than _____, 20___. Along with the census form you must provide a clear copy of a photo identification which shows name, address, and birth date for each person who resides in the unit.

The census form is required by law to validate the Association's age restricted status. Accordingly, the Association will be strictly monitoring the completion and return of these forms. If you fail to return a completed census form by _____, 20___, you will be subject to fines, administrative fees, and further legal action. Any census form returned which is incomplete in any way (no signature, missing documentation, etc.) shall be returned to you and you will be subject to fines, administrative fees, and further legal action. Fines are \$50.00 per day; each day after notice shall be deemed a new violation. An administrative fee of \$50.00 per incident is imposed for having to remind a unit owner that the census form has not been returned by the deadline or for returning an incomplete census form.

The Association is not required to grant exceptions to current residents who do not meet the age restrictions. The Association will consider such requests but only upon receipt of the completed census form and submission of any additional information the Board may deem necessary.

Your cooperation and assistance is appreciated.

FAIR HOUSING ACT

THE FAIR HOUSING ACT - HANDICAPPED ISSUES

What is the FHA? Federal law prohibits housing discrimination based on criteria such as race, color, religion, sex, familial status, and national origin. It also prohibits discrimination against persons who are handicapped. New Jersey has a similar law called the Law Against Discrimination (“LAD”); the LAD has broader application.

What is a Handicap? Federal law defines a handicap as a physical or mental impairment that substantially limits one or more major life activities (walking, talking, etc.) NJ state law is more specific and includes physical and nonphysical categories.

Reasonable Accommodation. It is illegal for an association to refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations are necessary to allow a handicapped person equal opportunity to use and enjoy a unit. Example: Even though an association’s master deed prohibits assigned parking spaces, the law would require that restriction to be disregarded to allow a handicapped person a reserved parking space.

Example: Even though an association’s master deed prohibits dogs, the law would require that restriction to be disregarded to allow a blind person a seeing-eye dog. Service animals in general.

Reasonable Modifications. It is also illegal for an association to refuse to permit reasonable modifications of existing premises if necessary to allow a handicapped person equal opportunity to use and enjoy a unit. All such modifications are at the handicapped person’s expense. Example: A wheel-chair bound person may, at her expense and with certain guidelines, install a ramp over the stairs leading to her unit.

THE FAIR HOUSING ACT - HANDICAPPED ISSUES

IMPORTANT POINTS TO REMEMBER

1. Reasonable accommodations only. (Elevator vs. ramp.) (How does it affect the program and services at large?)
2. Necessary to allow equal use and enjoyment. (Does a hearing-impaired person need a reserved parking space?)
3. Handicapped person pays for installation and remediation. (Exception)
4. Not just within the unit; applies to common area. (Ramps, signs)
5. Not all handicaps are visible.
6. If in doubt, ask for documentation—do not ignore request.
7. Service animals

HOUSING FOR OLDER PERSONS ACT (“HOPA”)

What is HOPA? It is illegal for a community association to discriminate against families with children. (Examples of discrimination based on familial status: prohibiting children from living in the community, prohibiting children from using the tennis courts, adult swim time.) The law exempts 55 and older communities from this requirement. In other words, 55 and older communities may legally discriminate against families with children. In order to qualify for the exemption, a community must be able to demonstrate that:

- (1) it is intended for occupancy by persons aged 55 and older,

(2) it has published policies and procedures that demonstrate its intent to qualify for the exemption, and

(3) at least 80% of the units are occupied by a person who is aged 55 or older.

Data Collection Requirements. (How do you demonstrate a community is intended for occupancy by persons aged 55 and older and that it has published policies and procedures showing it intends to qualify for the exemption?) Many types of documentation will satisfy these requirements, including written rules, regulations, covenants, master deed or other restrictions that include “55 or older” language. Compliance with one factor, such as appropriate language in the Association’s governing documents, may satisfy the requirement as long as there are no practices inconsistent with the “55 and older” restriction (e.g., advertising targeted to younger age groups, inconsistent rule application). However, compliance with more than one factor can only help clarify an association’s intent, if questioned.

How do you prove 80% of the units are occupied by a person 55 or older?

The Association must at all times be able to verify that at least 80% of its units are occupied by at least one person who is age 55 or older. This means the Association must collect for each unit a reliable document (driver’s license, birth certificate, etc.) showing that at least one occupant is age 55 or older. The age-qualified occupant need not be the unit owner; it could be a spouse, grandparent, tenant, etc. This information must be reverified every two years. The information collected must be retained by the Association and made available for inspection by HUD upon request. It is unlikely the information will ever be inspected by HUD, however, if the Association is involved in a discrimination lawsuit, the documentation may and can be used in any court or administrative proceeding to show compliance (or noncompliance) with the HUD regulations. Supporting documentation should otherwise be kept confidential. You must also prepare a summary of the age compliance data (without identifying information); this can be provided to members upon request.

THE 80/20 Split. If only 80% of the units have to be occupied by persons age 55 or older, what happens to the other 20% of the units? This depends on the Association’s governing documents. The governing documents may require all units to be occupied by an age-qualified person except in certain exceptions. These exceptions are designed so that young spouses are not forced to leave the family home after the death of an older (age qualifying) spouse. However, the law allows up to 20% of the units to be occupied by non-qualifying person for any reason. If more than 20% of the units are occupied by non-qualifying persons (“good” reasons do not matter) the Association may lose its exemption and could find itself sued on the basis of discrimination against families.

HOUSING FOR OLDER PERSONS ACT (“HOPA”)

IMPORTANT POINTS TO REMEMBER

Consistently convey the “55 and older” message.

New member interviews.

Verify eligibility every two years.

Keep verifying documents confidential.

Information summary.

80/20 split should not be misused.

**COMMON ISSUES WITH OLDER POPULATIONS -
BUT NOT EXCLUSIVE TO THEM**

Firing the Lifeguard State law permits community associations to operate a pool without a lifeguard. Because there are fewer children in 55+ communities, many try to do without the lifeguard. Certain signage is required, a manager must be on duty when the pool is open, water quality must be monitored every two hours. Association's insurance must be consulted.

Tort Immunity. A way for an association to avoid liability for slip and falls and other personal injury on the premises. Unit owners waive their right to sue the association (tenants, visitors, others, still have the right). Requires an amendment to the by-laws approved by 2/3 of the unit owners. If association is willful, wanton, or grossly negligent, unit owner can still sue. May reduce insurance premiums.

Displaying the Flag. There are both state and federal laws which give homeowners in community associations the right to display the flag. NJ state law also permits the display of yellow ribbons and signs supporting the troops. Association rules can require safe installation, removal for maintenance, that it not interfere with another's property rights, and that flags be displayed in accordance with the federal flag code (sunrise-sunset or 24/7 if illuminated, not in inclement weather unless it's an all weather flag, position/poles, etc.)

ALTERNATE DISPUTE RESOLUTION ("ADR")

When to Use It. Housing related disputes. Not delinquencies. Not clear restrictions in the documents (Croasdale). For condos, before trying to collect fines.

How it Works. NJ state law only requires that an association provide a fair and efficient procedure for resolving housing related disputes. (Governing documents may require more specific procedures.) At the minimum this means you give notice of the problem, and you provide an unbiased person(s) to listen and help resolve the issue. You can have a complicated procedure or a simple one.

Notice. Tell the offending unit owner what rule he violated, when he did it, and what will happen next.

Freedom to Display the American Flag Act of 2005 (Enrolled as Agreed to or Passed by Both House and Senate)

--H.R.42--

H.R.42

**One Hundred Ninth Congress
of the
United States of America
AT THE SECOND SESSION**

Begun and held at the City of Washington on Tuesday,
the third day of January, two thousand and six

An Act

To ensure that the right of an individual to display the flag of the United States on residential property not be abridged.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Freedom to Display the American Flag Act of 2005'.

SEC. 2. DEFINITIONS.

For purposes of this Act--

- (1) the term 'flag of the United States' has the meaning given the term 'flag, standard, colors, or ensign' under section 3 of title 4, United States Code;
- (2) the terms 'condominium association' and 'cooperative association' have the meanings given such terms under section 604 of Public Law 96-399 (15 U.S.C. 3603);
- (3) the term 'residential real estate management association' has the meaning given such term under section 528 of the Internal Revenue Code of 1986 (26 U.S.C. 528); and
- (4) the term 'member'--
 - (A) as used with respect to a condominium association, means an owner of a condominium unit (as defined under section 604 of Public Law 96-399 (15 U.S.C. 3603)) within such association;
 - (B) as used with respect to a cooperative association, means a cooperative unit owner (as defined under section 604 of Public Law 96-399 (15 U.S.C. 3603)) within such association; and
 - (C) as used with respect to a residential real estate management association, means an owner of a residential property within a subdivision, development, or similar

area subject to any policy or restriction adopted by such association.

SEC. 3. RIGHT TO DISPLAY THE FLAG OF THE UNITED STATES.

A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.

SEC. 4. LIMITATIONS.

Nothing in this Act shall be considered to permit any display or use that is inconsistent with--

- (1) any provision of chapter 1 of title 4, United States Code, or any rule or custom pertaining to the proper display or use of the flag of the United States (as established pursuant to such chapter or any otherwise applicable provision of law); or
- (2) any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.



Media contact:
Frank Rathbun
(703) 797-6261
FRathbun@caionline.org

National Flag Law Mirrors CAI Public Policy

ALEXANDRIA, VA, JULY 24, 2006—Community Associations Institute (CAI) today applauded the enactment of legislation that gives residents in community associations the right to fly the American flag. While many homeowner associations already allow the display of American flags, some restrict the practice to prevent the proliferation of flags, banners and emblems.

First introduced in January 2005, the Freedom to Display the American Flag Act of 2005 (H.R. 42), was signed by President Bush today and is effective immediately.

Sponsored in the House of Representatives by Rep. Roscoe Bartlett (R-MD), the legislation is based largely on CAI's own public policy on the display of the American flag in community associations. That long-standing policy recommends the "elimination of community association restrictions that prohibit the display of a reasonably sized, removable American flag from a resident's exclusive use or limited common element areas, so long as the flag is displayed in accordance with the Federal Flag Code...."

At the same time—and consistent with provisions in H.R. 42—CAI believes that community associations, and not state laws, are best suited to determine the appropriate size, placement and installation of flags and flagpoles.

"I'm gratified the President signed this important measure," said Bartlett, who drafted H.R. 42 after reviewing state statutes and public policy guidelines developed by CAI. "This is a reasonable and thoughtful approach that gives residents the right to fly our colors, even as it gives community associations the right to establish appropriate limitations on the size and locations of flags displayed in their communities. This is a perfect compromise between the rights of individuals and the important obligations of community association leaders."

"Displaying the American flag is the patriotic right of all Americans and H.R. 42 helps protect it," said Senate Majority Leader Bill Frist (R-TN) after the Senate passed the measure July 17 by unanimous consent. "This legislation strikes the appropriate balance between reasonable community regulations and an essential American liberty."

According to CAI, more than 57 million Americans live in an estimated 286,000 homeowner and condominium associations, up from just two million residents in 10,000 communities in 1970.

Flags—and flag poles—have become an occasional source of conflict when residents want to fly flags or install flagpoles in violation of established community association guidelines. Such restrictions, as well

as others pertaining to architectural guidelines and lawn-care standards, are designed to preserve the appearance of communities and protect property values.

These occasional conflicts notwithstanding, recent national research conducted by Zogby International indicates that more than 7 in 10 Americans who live in homeowner and condominium associations are pleased with their communities, with just 10 percent expressing some level of dissatisfaction. Zogby found that 78 percent believe community association rules "protect and enhance" property values. Only 1 percent said rules harm property values, while about 20 percent see no difference. The research was conducted by the Foundation for Community Association Research.

"We commend Mr. Bartlett and his colleagues for taking a logical and balanced approach to what can be a contentious issue," said CAI Chief Executive Officer Thomas M. Skiba. "This legislation codifies the right of residents to fly the flag, but also affirms the right of community associations to establish fair and reasonable limitations on how the flag is displayed."

CAI is a national membership association that provides information, tools and resources to homeowners and professionals who govern and manage homeowner and condominium associations. CAI members include community managers, volunteer homeowner leaders and businesses and professionals who support common-interest communities. CAI member services include conferences and seminars, education courses, public policy and media advocacy, periodicals, books, professional service directories and professional designations.

CAI's public policies can be assessed at <http://www.caionline.org/govt/position.cfm>.

###