



Regional Housing Services Office

Serving Acton, Bedford, Burlington, Concord, Lexington, Sudbury, Wayland, and Weston

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Memorandum

Date: May 22, 2018
To: Regional Housing Service Office Community Members
From: Liz Valenta and Dan Gaulin, RHSO
Re: **Municipal Considerations for Planning for Age-Restricted Housing**

Introduction

Many RHSO member communities are acutely aware of the demographic shift to an increasingly older population and the impact that has on the housing needs in their community. As communities strive to take pro-active steps in planning to ensure that the housing needs of older people are met, it is important to consider how the decision to allow for age-restricted developments might be impacted by various laws. Detailed below is an overview of the historical precedent and laws that allow for age-restricted housing.

Many communities have developed housing production plans which specifically outline the various housing needs of a diverse population. These plans can be useful tools in determining how much age-restricted housing is needed as in the overall portfolio of housing in the community.

An added complexity to these planning and zoning decisions are the requirements of various regulatory bodies, including subsidizing agencies, with regard to the inclusion of affordable units within age restricted housing. The Massachusetts Department of Housing and Community Development (DHCD) together with the other subsidizing agencies have made it clear that for 55+ age-restricted communities, DHCD will not approve affordable housing for inclusion on the subsidized housing inventory (SHI) where the selection or occupancy policy for the affordable units would exclude persons 18 years of age or younger from occupying those affordable units. Persons 18 years of age or younger may be excluded from market-rate units.

Finally, the State's Attorney General recently issued a strong statement with regard to Towns' enacting zoning by-laws that have provisions limiting the number of bedrooms. While age-restricted developments can be allowable by law, the Attorney General has cautioned that zoning by-laws must not have the intention to discriminate against families with children in violation of the federal Fair Housing Act and the state's Chapter 151B (an excerpt from this letter is included in the memo).

History and Law

The earliest known age-restricted community was Youngtown, Arizona which started as a development built on former farmland outside of Phoenix in 1954. In 1960, it incorporated as a



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municipality and age restrictions were incorporated into the town by-laws. This was followed in 1960 by Del Webb's Sun City development south of Phoenix which has been replicated throughout the southern part of the US.

Discrimination based on family status i.e. households with children, became illegal in the 1988 Amendment to the Fair Housing Law. The law did, however, create three exemptions where a development could legally exclude individuals or households based on the age of household member(s) i.e. discriminate based on age:

- the housing was specifically designed for, and occupied by, elderly persons under a Federal, State or local government program (e.g. state elderly public housing or HUD Section 202 rental);
- the housing was occupied solely by persons who are 62 years of age or older; or
- the housing development has at least one person who was 55 years of age or older in at least 80 percent of the occupied units, and there were significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons.

Bonnie Heudorfer in a report entitled **Age Restricted Active Adult Housing in Massachusetts** published by CHAPA provides interesting historical background: "The Department of Housing and Urban Development (HUD) was charged with promulgating regulations that defined what qualified as "significant facilities and services," but the process was fraught with controversy. After various iterations of proposed regulations, and a series of lawsuits, the legal status of many properties remained in doubt. Before long Congress decided to step in and clarify the law with the passage of the Housing for Older Persons Act of 1995 (HOPA). This legislation passed with overwhelming bipartisan support (94-3 in the Senate and 424-5 in the House.) HOPA deleted the "significant facilities and services" part of the definition and replaced it with "The housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and (iii) The housing facility or community complies with rules issued by the Secretary [of HUD] for verification of occupancy, which shall— (I) Provide for verification by reliable surveys and affidavits; and (II) Include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification."

Demand for Age-restricted housing

According to RCLCO, a large real estate consulting practice, age-restricted communities appeal to roughly 20% of eligible homeowners nationwide. The largest age-restricted community is "The Villages" near Orlando, FL with a population over 100,000. In Massachusetts, the demand is likely to be less than 20%, as many Massachusetts residents purchase homes in 55+ developments in states with warmer climates.



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CHAPA's report (updated in 2008) indicated that 150 developments were either completed or in construction in Massachusetts containing a total of over 10,000 units and that an additional 14,000 units in 172 developments were in some stage of planning/permitting. In MetroWest, there continues to be significant activity with 41 units in two phases of Black Birch in Concord, 60 units permitted in Framingham and a 700 unit development at the site of the former Westborough State Hospital currently in the permitting stage.

In 2008, 70 communities had references in their zoning to age-restricted developments including the RHSO towns of Acton and Sudbury. Since then, Weston has added an age-restricted provision in the form of an Active Adult Residential Development ("AARD"). The Acton and Weston bylaws require 5-10% affordable units eligible for inclusion on the Subsidized Housing Inventory while the Sudbury bylaw has a maximum sales price limit on all units developed under the Incentive Senior Development Bylaw that is roughly 250% of the DHCD affordable price.

Policy Considerations

CHAPA concluded that 55+ communities are "an important and legitimate component of a balanced housing policy." The developments meet a demand for single floor living with lower maintenance requirements. CHAPA cautioned that although the units are typically modest sized at 1,400-2,400 sf, the market units are not necessarily affordable e.g. market units at Quail Ridge in Acton sold for more than \$600,000 in 2014 (there is currently a unit listed for sale for \$680,000). In addition, CHAPA noted that communities that embrace 55+ communities under the assumption that the developments are not a strain on local budgets can be surprised as most growth in school populations comes from generational turnover of the existing housing stock rather than new construction. To the extent a development is successful in attracting empty-nesters, the houses previously occupied by an empty nester will often be sold to a family with school-aged children.

Although developers will often refer to these developments as "adult housing" or "adult community" or "active adult," the Department of Housing and Urban Development (HUD) specifically discourages the use of those terms. In its Housing for Older Persons Act (HOPA) implementing regulations, HUD states that the best practice is to refer to such housing as "senior housing" or "a 55 and older" or "retirement" community.

If a development meets existing zoning regulations and it meets the criteria in HOPA, it can label itself a 55+ community. In other words, the town doesn't have to specifically zone for an age-restricted development in order for one to exist. Age-restricted developments can be permitted as of right or under Chapter 40-B, a Special Permit or a Planned Residential Development bylaw.

Most age-restricted developments in Massachusetts (over 90%) are ownership, but there are some rental developments. DHCD will typically award Low Income Housing Tax Credits to an affordable 55+ development every few years. These tend to be large: the Coolidge on Route 20 in Sudbury is 64 units, there is a 96 unit development in Marshfield (Ocean Shores), a 38



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unit development in Lenox (Lenox Schoolhouse) and a 58 unit development in Bourne (Coady School). DHCD has also made awards to 62+ developments – Mystic Water Works in Somerville has 25 units and Weinberg House in Brighton will have 61 units.

In the initial boom of age-restricted ownership developments in the early 2000's, a few ran into difficulty when the 2008 financial crisis hit. Some petitioned the municipality to amend their permits so that they could sell to all ages. Some towns allowed the change (as happened in Wayland) and some denied the change.

If a town wants to specifically zone for an adult community or create a bylaw to encourage adult communities, it may require more stringent occupancy rules than the federal government. For example, instead of a minimum of 80% of the units occupied by at least one person over 55, it can require 90% or 100% of the units have at least one person over 55, or it can require that all persons in the household be 55+, or it can require one or all persons to be 60+. However, requiring more stringent occupancy rules puts the burden to enforce those rules on the Town. Marshfield's Age-Restricted zoning bylaw requires every occupant to be 55+. A development fell out of compliance with zoning when it allowed an owner to have their disabled adult child move in. In order to bring the development back in compliance with zoning, the zoning bylaw was changed at Town Meeting. Another consideration is that requirements in excess of federal law limit the potential market for a development which makes such requirements unpopular with the development community.

Recent Developments

Attorney General's letter regarding amendment to zoning bylaw prohibiting 3+ bedrooms in the Route 20 Overlay mixed-use zone in Shrewsbury

The Massachusetts Attorney General approved a Shrewsbury Town Meeting article that contained a limitation on unit sizes to 1-BR and 2-BR only; however, the letter contained a warning that the zoning revision *may* be in violation of federal and state fair housing law and the words of town officials (i.e. transcripts from meetings of the Board of Selectmen and Finance Committee) could be interpreted to indicate an illegal intent to discriminate against children. The concluding paragraph is quoted in its entirety:

“During the course of our review we received a copy of a transcript from a March 28, 2017 Board of Selectmen meeting and an April 20, 2017 Finance Committee meeting. These transcripts include statements that allegedly evidence an intent to discriminate against families with children in violation of the FHA and Chapter 151B. Such evidence, if it exists, could very well support a claim for violation of the FHA and Chapter 151B. However, the Attorney General's review of town by-laws is limited to the material submitted by the Town Clerk and does not include a review of transcripts from local meetings and hearings. Moreover, the issue whether any such statements prove an intent to discriminate against families with children in violation of the FHA is a matter for a fact-finder in the context of any potential court challenge. Such proof would require analysis of a full factual record beyond the documents submitted to the Attorney General for review under



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G.L. c. 40, § 32. Thus, based on our limited standard of review, we cannot conclude that the by-law's bedroom limitation necessarily violates the FHA or G.L. c. 151B. However, we strongly suggest that the Town discuss the by-law text with Town Counsel. Specifically, the Town should discuss with Town Counsel whether the by-law text needs further amendments and whether it should be enforced in light of the prohibitions in the FHA and G.L. c. 151B."

The Article passed Town Meeting.

DHCD issued letter reiterating its policy regarding children in affordable units in over 55+ developments.

Although the Housing for Older Persons Act allows a development that meets the criteria of a 55+ to exclude children, DHCD reiterated its policy that it will not approve affordable units under the LIP program if children are prohibited from residing in the units. DHCD indicated that it will carefully review all zoning, regulatory, marketing, and condo documents carefully to insure that children are allowed to reside in the affordable units. DHCD does not comment on the market-rate units, though often the children prohibition is found in the master deed which applies to all units. The full memo is attached and the relevant paragraph is below:

Accordingly, it has long been DHCD's policy and practice not to approve affordable units under the Local Initiative Program ("LIP"), including Local Action Units ("LAUs"), in age-restricted housing for persons 55 years of age or older ("55+ housing"), if selection or occupancy policies, special permits or other zoning approvals, or underlying zoning would exclude persons 18 years of age or younger from occupying those affordable units.¹ DHCD is restating the policy at this time given the inquiries on the subject.

MassHousing and other subsidizing agencies will enforce this policy as well.

¹ Age-restricted housing for persons 55 years of age or older ("55+ housing"), to the extent permitted under federal and state law including the federal Fair Housing Act (42 U.S.C. § 3601 *et seq.*), as amended, and Massachusetts General Laws Chapter 151B, is not required to exclude persons 18 years of age or younger. Nothing in this policy is intended to prohibit compliance with applicable federal and state legal requirements (e.g., the requirement that at least 80% of the occupied units in the housing are occupied by at least one person who is 55 years of age or older).