

02-098

HOUSING: VIRGINIA FAIR HOUSING LAW.

Reserving existing or future vacancies in established mobile home park solely for seniors, to satisfy federal and state 80% senior occupancy rate requirement, could be interpreted to discriminate against families with children, in violation of state and federal fair housing laws. If mobile home park eventually reaches senior occupancy rate requirement and does not otherwise violate state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors.

The Honorable R. Steven Landes
Member, House of Delegates
December 10, 2002

Issue Presented

You ask whether an established mobile home park, which does not meet the fair housing law eighty-percent senior occupancy requirements to operate and advertise as housing for seniors¹ may later qualify to operate and advertise as such as a result of reserving unoccupied housing units only for seniors.

Response

It is my opinion that reserving any vacancies that exist or become available in an established mobile home park solely for seniors could be interpreted as discriminating against families with children, in violation of federal and state fair housing laws.² If, however, the mobile home park eventually reaches the eighty-percent senior occupancy rate, and it does not otherwise violate the state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors.

Background

Your inquiry concerns the application of federal and state antidiscrimination housing laws to an established mobile home park.³ You relate that the mobile home park currently has a senior occupancy rate below eighty percent.

Applicable Law and Discussion

The Federal Fair Housing Act was enacted as part of the Civil Rights Act of 1968.⁴ The Virginia Fair Housing Law, originally enacted in

1972,⁵ is modeled after the federal law. Both the federal and state fair housing laws seek to prevent the denial of housing opportunities based on, among other classifications, familial status. "However, Congress recognized that many senior citizens wish to live in senior-oriented communities and that the prohibition against familial status discrimination might reduce the availability of affordable senior housing. Congress therefore exempted 'housing for older persons' from compliance with the FHA's familial status provisions."⁶

Section 36-96.3(A), a portion of the Virginia Fair Housing Law, provides:

It shall be an unlawful discriminatory housing practice for any person:

1. To refuse to sell or rent ..., or other wise make unavailable or deny, a dwelling to any person because of race, color, religion, national origin, sex, elderliness, or familial status.

Section 36-96.7 provides:

A. Nothing in [the Virginia Fair Housing Law] regarding unlawful discrimination because of familial status shall apply to housing for older persons. As used in this section, "housing for older persons" means housing: ... (ii) intended for, and solely occupied by, persons sixty-two years of age or older; or (iii) intended for, and solely occupied by, at least one person fifty-five years of age or older per unit. The following criteria shall be met in determining whether housing qualifies as housing for older persons under clause (iii) of this subsection:

1. At least eighty percent of the occupied units are occupied by at least one person fifty-five years of age or older per unit; and
2. The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

B. Housing shall not fail to meet the requirements for housing for older persons by reason of:

1. Persons residing in such housing as of September 13, 1988, who do not meet the age requirements of clauses (ii) and (iii) of subsection A, provided that new occupants of such housing meet the age requirements of those clauses; or

2. Unoccupied units, provided that such units are reserved for occupancy by persons who meet the provisions of clauses (ii) and (iii) of subsection A.

Your question pertains to a mobile home park open to the general public that has operated for several years and now seeks to operate and advertise as a facility for seniors. The facility does not have an eighty-percent senior occupancy rate. If eighty percent of the occupied units are occupied by seniors, the mobile home park may operate and advertise as housing for seniors and rent or sell only to seniors without violating state and federal laws that prohibit discrimination in housing based on familial status.

Section 36-96.7(A) creates an exemption from the antidiscrimination provisions of § 36-96.3 for those facilities seeking to operate and advertise as housing available for seniors. To qualify for the exemption, a facility must meet the conditions of § 36-96.7(A). In addition, the facility must adhere to the federal antidiscrimination housing laws and regulations. The effect of § 36-96.7(B)(2) is that unoccupied units are not counted toward meeting the eighty-percent occupancy requirement, so long as those units are reserved for occupancy by at least one senior person. Reserving unoccupied units for occupancy by seniors, however, may violate fair housing laws based on familial status if a provider does not already qualify for the "housing for older persons" exemption.

Recently, the Secretary of Housing and Urban Development issued regulations providing for a transition period for established housing providers that desired to qualify as housing for older persons.⁷ The regulations set forth the specific requirements for housing facilities or communities to qualify as housing designed for seniors.⁸ For a period of one year following enactment of the regulations,⁹ a housing provider could reserve all new and unoccupied units for occupancy by seniors, until reaching the eighty-percent occupancy requirement.¹⁰ During this one-year period, a housing provider that otherwise qualified as housing for older persons could refuse to sell or rent to applicants based on their familial status without violating the fair housing law. Thereafter, an established housing provider that failed to meet the requirements to claim the exemption for housing for older persons prior to the expiration of the one-year transition period must market available vacancies to the general public and rescind any restrictive policies that negatively impact families with children. If, however, the mobile home park eventually reaches the eighty-percent occupancy rate with occupants that satisfy the age requirement, and it does not otherwise violate the state and federal fair housing laws based on familial status, it may become eligible for the exemption.

Conclusion

Accordingly, it is my opinion that reserving any vacancies that exist or become available in an established mobile home park solely for seniors could be interpreted as discriminating against families with children, in violation of the state and federal fair housing laws.¹¹ If,

however, the mobile home park eventually reaches the eighty-percent senior occupancy rate requirement, and it does not otherwise violate the state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors.

¹The term "senior(s)," as used in this opinion, applies to any person(s) meeting the federal and state fifty-five and older age requirement to qualify for elderly housing.

²See 42 U.S.C. § 3604 (2000); Va. Code Ann. § 36-96.3 (Michie Repl. Vol. 1996) (providing that it is unlawful to refuse to sell or rent dwelling or discriminate in terms, conditions or privileges of sale or rental based on familial status).

³You do not relate when the mobile home park was established. For the purposes of this opinion, I assume the mobile home park was established prior to May 3, 1999.

⁴See Pub. L. No. 90-284, tit. VIII, §§ 801-819, 1968 U.S.C.C.A.N. (82 Stat. 73, 81-89) 89, 99-109 (codified as amended at 42 U.S.C. ch. 45, §§ 3601-3619 (2000)).

⁵See 1991 Va. Acts ch. 557, at 979 (repealing Chapter 5 of Title 36, §§ 36-86 to 36-96, as initially enacted by 1972 Va. Acts ch. 591, and adding Chapter 5.1 in Title 36, consisting of §§ 36-96.1 to 36-96.23).

⁶Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 832 (quoting 42 U.S.C. § 3607(b)(1) (1994)), **reprinted as amended**, 125 F.3d 1281 (9th Cir. 1997).

⁷See 24 C.F.R. pt. 100, subpt. E, §§ 100.300 to 100.308 (2002) ("Housing for Older Persons").

⁸See *id.* §§ 100.304 to 100.308.

⁹See Implementation of the Housing for Older Persons Act of 1995, 64 Fed. Reg. 16324, 16329-31 (Apr. 2, 1999) (amending 24 C.F.R. pt. 100, subpt. E, by revising § 100.304 and adding §§ 100.305 to 100.308) (effective May 3, 1999).

¹⁰24 C.F.R. § 100.305(e)(5).

¹¹See *supra* note 2.