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## HOW NOT TO RUN A 55+ COMMUNITY

*"Active adult" communities offer a number of benefits to empty nesters who wish to enjoy the convenience of a common interest community. These communities are also very appealing to developers and towns. However, if the association of an adults-only community is not careful, it may lose its ability to prohibit families with children from moving into the community.*

Over the past several years, developers have created many new "active adult" communities. These communities, which are built as "housing for older persons," prohibit families with children from moving into the community and require that at least one person living in each unit be at least 55 years old.

Three factors are responsible for increased development of these "55+" communities:

1. Baby-boomers who are reaching retirement age and are looking for homes that are designed for older residents and require little or no exterior maintenance, prefer to live in communities without children.
2. Developers have discovered that with the high cost of land and construction, coupled with the retiring baby-boomers, 55+ communities can serve a fast-growing demographic that has significant economic resources to spend on housing.
3. Towns and other municipalities believe that 55+ communities are a way of increasing their property tax base without increases in enrollment and spending on schools.

### Legal Basis of a 55+ Community

Unfortunately, residents and developers of 55+ communities, and the officials of the towns and cities where they are located, do not always grasp the legal requirements under which these communities must be created.

Generally, state and federal fair housing laws make it illegal to discriminate against families with children when it comes to housing. In other words, it is usually illegal for a community association or other housing provider to deny people the chance to rent, buy, or otherwise occupy a home because they have children.

However, there is a narrow exception to this law. If the documents of a community require that at least 80% of the homes in the community be occupied by at least one resident over the age of 55, and the community is in compliance with these requirements, then the community may legally prohibit children from living there.

The 80% requirement is a minimum, not a maximum. The documents of many 55+ communities actually require that 100% of the units be occupied by at least one person over age 55. Therefore, it is very important that the association be aware of the document requirements in addition to the federal laws.

### Risks of Not Meeting the Legal Requirements

If a 55+ community wants to be able to exclude children, it is essential that the association and its documents meet these legal requirements. If they do not, then the community may have to allow families with children to live in the units.

If the association attempts to exclude children

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without meeting the legal requirements, the families with children may sue the association and the unit owners for violating the fair housing laws. If a court finds that the association is in violation, it can force the association to stop excluding children and order the association to pay the other side's attorneys' fees.

In addition, the Connecticut Commission on Human Rights and Opportunities ("CHRO") can enforce the fair housing laws against the association and unit owners. CHRO can take enforcement actions in or out of court. In addition to the relief that a court may order, CHRO can order the association to pay monetary penalties and force board members and unit owners to take classes and training on fair housing requirements.

For these reasons, it is important that directors, officers, and unit owners of 55+ communities understand and comply with the requirements of fair housing laws for housing for older persons

### Examples of What Not To Do

Here are a few examples of actions that some associations of 55+ communities have taken that may violate the fair housing laws and put the adults-only status of a community at risk. We have changed some details to avoid referring to specific communities.

#### Example 1

##### The Action:

A 55+ community simply ignores any age-based restrictions in its declaration or bylaws that apply to the people who can live in the units in the community.

##### The Non-Compliance:

Ignoring these restrictions is a violation of the documents. Furthermore, if the community does not meet the minimum 80% occupancy requirement, then it cannot legally exclude family with children from living in units.

##### The Solution:

The association must review and enforce the age restrictions contained in its governing documents.

Some associations confuse occupancy with ownership in 55+ communities. It does not matter who owns a unit, so long as the people living in the unit comply with the age restrictions. Nonetheless, some community documents impose age-based requirements for ownership of units. Such requirements are acceptable so long as they are in addition to, and not a substitute for, the 80% occupancy requirement of the fair housing laws.

#### Example 2

##### The Action:

A 55+ community complies with the 80% occupancy requirement. However, it uses the other 20% to permit anyone whom the directors, officers, or unit owners want to live in units in the community, regardless of their age and whether they have children.

##### The Non-Compliance:

Unfortunately, this is a common problem, particularly among the developers of 55+ communities. Fair housing laws require a 55+ community to show its intent to operate as housing for older persons. In deciding whether a community has shown the necessary intent, CHRO will look at how the community is described to prospective residents and whether the association consistently follows relevant procedures for deciding who may occupy units. Using the 20% buffer to permit anyone to live in the community undercuts the intent that the community operate as housing for older persons. Additionally, it is at odds with the consistent application of the age restrictions.

Furthermore, the governing documents may actually set a minimum occupancy requirement that is higher than 80%. Failure to observe this requirement may be a violation of the governing documents.

Although some developers, their real estate brokers, and even their attorneys may disagree with this interpretation, the safer approach is to require occupancy of all units by at least one person who is 55 years of age or older.

*The governing documents may actually set a minimum occupancy requirement that is higher than 80%. Failure to observe this requirement may be a violation of the governing documents.*

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#### The Solution:

In 55+ communities, associations and unit owners should use the 20-percent buffer to handle special circumstances and hardships. For example, an age-qualified occupant of a unit may have a spouse who is not age-qualified. If the age-qualified occupant dies or has to move into a nursing home, the spouse should not have to move out of the unit. The 20-percent buffer can accommodate the spouse's continued occupancy of the unit. The same approach can apply in the event of the divorce of an age-qualified spouse and a non-age-qualified spouse. Additionally, associations and unit owners may want to allow people who are a relatively short time away from their 55<sup>th</sup> birthday to occupy a unit in a 55+ community.

In any case, the association should limit the use of the 20% buffer to difficult or unusual situations.

#### Example 3

##### The Action:

The association does not publish, follow or enforce any policies or procedures that demonstrate its intention to operate the community as housing for older persons.

##### The Non-Compliance:

Fair housing laws require 55+ communities to publish and follow policies that prove their intent to operate as housing for older persons. If an association does not have any written and published policies, then it is unlikely to follow them in any consistent manner.

For example, the association may not require the developer, real estate agents or unit owners to describe the community to prospective residents as a 55+ community, may not consistently enforce the age-based occupancy restrictions in the declaration or bylaws, may not impose any controls on advertising designed to attract prospective residents, may not post signs in common areas describing the community as housing for people who are 55 years of age or older, and may not have any rules governing the community as a 55+ community. CHRO will

consider these factors and other factors in deciding whether a 55+ community has proven its intent to operate as housing for older persons.

#### The Solution:

An association does not usually market its own community. Nevertheless, the association should frequently remind anyone involved in the sale of units, including the developer who created the community, real estate agents, and individual unit owners, of the need to advertise that the community is operated as housing for older persons.

In addition to the age-based occupancy restrictions in the bylaws and rules, the association should adopt rules that govern its operation as housing for older persons. These rules can require directors, officers, property managers, unit owners and other representatives of the association to do the following things:

- Always describe the community to prospective residents as housing for persons 55 years of age or older;
- Ensure that any advertising designed to attract prospective residents describes the community as housing for persons 55 years of age or older;
- Ensure that all lease provisions require tenants to acknowledge that the community is operated as housing for persons 55 years of age or older and that they will comply with the age-based occupancy requirements;
- Apply the age-based occupancy requirements consistently;
- Include the use and occupancy restrictions and the operation of the community as housing for persons 55 years of age or older in all resale certificates; and

*The association should frequently remind anyone involved in the sale of units, including the developer who created the community, real estate agents, and individual unit owners, of the need to advertise that the community is operated as housing for older persons.*

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- Post signs describing the community as housing for persons 55 years of age or older in any common areas that are accessible by the public.

#### **Example 4**

##### **The Action:**

The association simply describes the community as “adult living” or an “adult community.”

##### **The Non-Compliance:**

Under fair housing laws, phrases such as “adult living,” “adult community,” and similar statements are not consistent with the intent that a 55+ community will operate as housing for older people.

##### **The Solution:**

The association and unit owners must be more specific about the operation of their community as housing for people who are at least 55 years old and should implement the policies discussed in Example 3.

#### **Example 5**

##### **The Action:**

The association never verifies the age of the people living in the units.

##### **The Non-Compliance:**

To comply with fair housing laws, associations for 55+ communities must be able to prove their compliance with age-based occupancy requirements by using reliable surveys and sworn statements. Without this proof of compliance, a 55+ community will not qualify as housing for older persons if CHRO brings a complaint for housing discrimination.

##### **The Solution:**

Associations for 55+ communities must have an ongoing plan of action to determine the age of the residents of the units.

- As part of the normal arrangements for the sale or lease of units, the association should obtain information on the age of the residents of units to confirm that each unit has at least one occupant who is 55 years of age or older.

- The association must update the age information at least once every two years. The association can do the update by a survey or other means. A summary of the results must be available for inspection by anyone who asks after reasonable notice.

- As proof of age, the association can rely on a driver’s license, birth certificate, passport, immigration card, military identification, or such other official state, local, national, or international documentation containing a birth date or stating a current age. Additionally, the association can rely on a certification signed by an adult occupant of a unit, asserting that at least one occupant is 55 years of age or older.

- If the occupants of a unit refuse to comply with the association’s procedures, the association may rely on other evidence that shows that unit is occupied by at least one person who is 55 years of age or older. Such other evidence may include governmental records or documents, prior forms or applications, or a statement signed under penalty of perjury by someone who has personal knowledge that at least one person in the unit is at least 55 years old.

For additional information regarding the operation of a 55+ community, please take the time to read the article *Keeping Your Active Adult Community Active*, which appeared in the Fall, 2006 issue of this Newsletter.



## CLEARING THE AIR ON SMOKING BANS

*More and more associations are considering a ban on smoking in the common elements, and even in the units. Here are some things to consider if your association is thinking about a smoking ban.*

Nonsmokers frequently view second-hand tobacco smoke as a nuisance and a possible health threat. The courts of several states have ruled that second-hand smoke is a nuisance. Additionally, several states including Connecticut have enacted laws creating smoke-free environments in bars, restaurants, airports and other public places.

Many community associations want to make their communities smoke-free as well. The procedures for doing so, however, may vary depending on where and why the association wishes to enforce the ban.

### **Banning Smoking in the Common Elements**

In most cases, an association can ban smoking in the common elements by a rule adopted by the board.

The governing documents of most Connecticut associations empower the association to adopt rules that regulate the conduct of people within the community. Additionally, Section 47-244 of the Connecticut Common Interest Ownership Act grants associations with the certain powers, including rule-making authority. While the Act did not become effective until 1984, some of its provisions, including Section 47-244, apply to all common interest communities regardless of when created.

Subsection 47-244(a)(6) of the Act empowers the association, through its board, to adopt rules regulating the use of the common areas. This power permits the association to adopt a rule that prohibits smoking in the common elements.

### **Banning Smoking in Units**

The ability of an association to prohibit smoking within the units is more limited and may require an amendment to the governing documents adopted by the unit owners.

An association may enforce a rule prohibiting smoking in units only when the smoke migrates into other units or the common elements, adversely affecting other members of the community. Frequently, we see this in high-rise condominiums served by central HVAC systems or in communities with older buildings, where smoke from one unit or the common elements easily migrates into other units or the common elements.

Prohibiting smoking is considered a restriction on the use or occupancy of the unit. Subsection 47-244(c) of the Act permits an association to adopt rules governing the use or occupancy of units only to:

- a. Prevent a use that violates the declaration;
- b. Regulate an occupancy that adversely affects the use and enjoyment of other units or the common elements; and
- c. Restrict leasing in certain situations.

If the smoke does not migrate from the unit and adversely affect people in other units or the common elements, then the association must amend the governing documents to enforce the ban.

### **Amendments to Prohibit Smoking in Units**

Even if the smoke does not migrate into other units or the common elements, an association can ban smoking anywhere in the community through a properly adopted amendment to the governing documents. However, the approval required to adopt the amendment varies based on when the community was created.

*If the smoke does not migrate from the unit and adversely affect people in other units or the common elements, then the association must amend the governing documents to enforce the ban.*

*Smoking Bans continued from page 5*

Communities created before 1977. Prior to 1977, Connecticut law did not specify procedures for amending the documents of a common interest community. The amendment procedures depend solely on the provisions of the documents.

Communities created between January 1, 1977 and December 31, 1983. The Connecticut Condominium Act became effective on January 1, 1977. It applies only to condominiums, but not to cooperatives nor planned communities.

Under Sections 47-70 and 47-80 of the Condominium Act, restrictions on the use of units may appear in either the declaration or the bylaws. Section 47-70a provides that, with few exceptions, the association of a condominium may amend the declaration by a two-thirds vote of the unit owners. It may amend the bylaws by a majority vote of the unit owners. In either case, notice of the amendment must be sent to all mortgagees appearing in the association's records.

Cooperatives and planned communities created between 1977 and 1983 may adopt amendments using whatever procedures their governing documents require because the Condominium Act only applies to condominiums.

Communities created since January 1, 1984. The Connecticut Common Interest Ownership Act became effective on January 1, 1984. It applies to all forms of common interest communities created since 1984. As mentioned above, some provisions of the Act also apply to preexisting communities.

Under Subsection 47-244(b) of the Act, any restrictions on the use of units should appear in the declaration. Subsection 47-236(f) requires the vote or agreement of unit owners having 80% of the total voting power in the association to adopt an amendment that restricts the permitted uses or occupancy of units. Furthermore, the amendment must provide reasonable protections, such as "grandfathering," of any previously permitted use or occupancy.

The declarations of communities created since 1984 also frequently require the approval of a specified percentage of "eligible mortgagees." An eligible mortgagee is usually defined as the holder of a mortgage who informs the association, in writing, that it holds the mortgage. Few mortgage holders contact the association and become eligible mortgagees. Therefore, your association may or may not have any eligible mortgagees.

### **Deciding How to Proceed**

Adopting a rule, as opposed to an amendment, is most likely easier and less expensive to accomplish. Enforcement of the rule, however, may prove more difficult.

We suggest that the association consider the following in deciding how to proceed:

- The decision to ban smoking in units is controversial. Generally speaking, people strongly object to any restrictions on their activities within their own homes. When deciding whether to ban smoking, the association should really consider whether smoking in one unit impacts other units or the common elements.
- Rules adopted by the association under one group of board members can be rescinded by a subsequent board. Therefore, the ban on smoking may not be permanent.
- Given the controversial nature of a smoking ban, it is likely that someone will challenge it. Historically, courts are much more deferential to an amendment adopted by a vote of the unit owners than to a rule.

Of course, no solution is right for all communities. Whatever action your association takes will depend on the unique needs of your community.

## OFFICERS AND DIRECTORS: OFTEN THE SAME PEOPLE WEARING DIFFERENT HATS

*Some of the most commonly misunderstood concepts in association governance are the differences between officers and directors. On paper, these are two very distinct groups. In practice, however, the distinctions are often confused.*

### Who Are the Directors?

The directors are the members of the association's board. They are elected by the unit owners at the annual meeting of the association. Under Connecticut corporate law, which governs most associations because they are nonstock corporations, the board must consist of at least three directors.

In most communities, there are no distinctions between the directors. Each director has the right and obligation to attend meetings of the board, either in person or by some method of telecommunication. The directors, acting as a group, take action on behalf of the association by voting. In most cases, each director has an equal vote.

We are aware of some communities where there are distinctions between directors. This happens most frequently in cases of a master association governing several smaller communities, or when the community contains different types or classes of units. In these situations, the governance structure varies from that of a typical association to better meet the needs of the community.

### Who Are the Officers?

The officers are the president, vice president, secretary and treasurer of the association. Some associations also have officers like an assistant secretary or assistant treasurer. The directors, not the unit owners, elect the officers in most associations.

While directors frequently serve as officers, this is not a requirement. Usually, the only offices that must be held by directors are that of president and vice president. The directors may choose any other person to serve as one

of the other officers. That person need not even be a unit owner. Additionally, one person may usually hold more than one office.

Officers have specific job descriptions. For example, the president serves as the chair of meetings of the association. The treasurer maintains the financial records of the association. The secretary is responsible for keeping the minutes of meetings and a record of actions taken by the association.

Officers do not vote when the board is considering some action. If someone is a director and an officer, then he or she votes as a director, but not as an officer.

### Who Can Remove the Directors?

Directors serve at the pleasure of the unit owners. The owners elect the directors. They can also remove the directors. Directors usually cannot remove one another.

### Who Can Remove Officers?

The officers serve at the pleasure of the directors. The directors elect the officers. They can also remove the officers. Unit owners usually cannot remove officers.

### Check Your Documents

The discussion above applies to most Connecticut associations. However, the procedures for electing and removing officers and directors, and their powers and duties, may vary depending on the governing documents of the association. If you have any questions regarding the governance structure of your association, look first to your governing documents for answers.

*Directors serve at the pleasure of the unit owners. The owners elect the directors. The officers serve at the pleasure of the directors. The directors elect the officers.*



## RESALE CERTIFICATES: ARE YOURS CORRECT AND UP TO DATE?

*Under Connecticut law, a unit owner who is selling his or her unit must provide the buyer with a resale certificate. The association prepares the certificate and gives it to the unit owner, who then gives it to the buyer. The buyer will rely on the information in the certificate when deciding whether to buy the unit. If the information in the certificate is incorrect, the association may be vulnerable to a lawsuit.*

### **Providing the Resale Certificate**

Under Section 47-270 of the Common Interest Ownership Act, the association must provide a unit owner with a resale certificate within 10 days after receiving a written request and payment of the fee for the certificate. The unit owner must then give the certificate to the buyer of the unit. The buyer has five to seven days to review the certificate, during which the buyer may cancel the purchase contract for any reason.

### **Contents of the Resale Certificate**

The certificate must include copies of the declaration, bylaws and the rules. It must contain thirteen other specific disclosures, including limitations on who can live in the unit, the association's annual budget, and "a statement of any capital expenditures in excess of one thousand dollars approved by the executive board for the current and next succeeding fiscal year."

For more information regarding what the certificate must disclose, please read the article *Resale Certificates: What to Provide, When to Provide, and How to Provide*, which appeared in the Spring, 2003 issue of this Newsletter.

### **Importance of the Resale Certificate**

The resale certificate is important to the buyer because it gives him or her information about living and owning in the community. The buyer will rely on this information when he or she decides whether or not to purchase the unit.

The certificate is important to the association because it puts the buyer on notice of the contents of the governing documents, the amount of unpaid charges and assessments, and other information that is crucial to the operation of the community. If the buyer becomes a unit owner, he or she cannot later claim to be uninformed about things disclosed in the certificate.

### **Problems Caused by Inaccurate Resale Certificates**

If, after buying the unit, the new owner discovers that the information in the resale certificate was incomplete or incorrect, he or she has a claim against the association for any resulting loss or damages. For example, if the association failed to disclose a charge or assessment, it may be barred from collecting it from the new owner.

Until recently, real estate prices were steadily rising. A new owner who was disappointed with his or her purchase could resell the unit at a profit. Because of this, few claims were made against associations for errors in their resale certificates.

Now, however, prices are dropping. It can take many months to sell a unit, even at a reduced price. As a result, a disappointed new owner is more likely to sue the association and the manager who prepared the resale certificate if the certificate misrepresented something about the community.

The claim is typically that the association failed to disclose that it was considering an action that, after the owner purchased the unit, resulted in a large increase in common charges or a special assessment. This issue was raised in two trial court rulings reported during the past year. *See, Lee v. Kellenberger*, 44 Conn. L. Rptr. 450 (Conn. Super. Ct. November 14, 2007) and *Fisher v. Terrace Heights*, 2007 WL 1121116, (Conn. Super. Ct. March 29, 2007).

In each case, the court ruled that the unit owners asserted claims which, if proved at trial, could provide the basis for recovery against the association or its manager. Both of these decisions were on preliminary motions and it remains to be seen how the court will rule after a complete trial. Nevertheless, they should serve as a caution to all associations to take care that their resale certificates are complete and accurate.

Another likely claim is that the association failed to disclose all of the provisions in its documents restricting the use and occupancy of the units. Such restrictions may include minimum age requirements, limitations on home businesses or leasing, or prohibitions against dogs.

*If, after buying the unit, the new owner discovers that the information in the resale certificate was incomplete or incorrect, he or she has a claim against the association for any resulting loss or damages.*



Resale Certificates continued from page 8

### **Improving the Accuracy of Your Resale Certificates**

Here are some things your association can do to reduce the risk of claims of incomplete or incorrect resale certificates:

- Make sure that the copies of your documents are complete and accurate. Include all amendments. The declaration should be a copy of the signed original taken from the town land records. If your bylaws are recorded, they too should be taken from the land records. The rules, and the bylaws if not recorded, should be verified from the association's minutes.
- Some associations have member handbooks and other documents that contain provisions regulating the use of the common elements and the units. Even though the association may not refer to them as "rules," they should be included with the copy of the rules.
- Make sure that the budget you disclose is current and correct. If there are any special assessments that have been approved, disclose them as well, even if not currently payable.
- Disclose any capital expenditures under consideration. Section 47-270 of the Act requires the disclosure of any capital expenditures "approved by the executive board," but it doesn't define what constitutes approval. If the board has taken any votes to move the association toward a major expenditure, disclose what is being done and what votes have been taken, even if the final contract or any assessment has yet to be approved.
- If the current owner is delinquent and has been referred to the association's attorneys for collection, be sure to include the current amount due for attorneys' fees and costs of collection in the statement of charges owed by the unit owner.
- When responding to the requirement that the certificate state "the existence of any pending suits in which the association is a defendant," be sure to list any mortgage foreclosures against individual unit owners, in which the association is a defendant.
- Include an itemized statement of the costs charged to the unit owner for the preparation of the certificate as required by Subsection 47-270(b)(1) of the Act.
- Keep a copy of each resale certificate that the association prepares.
- If the unit owner, or his or her representative, picks up the certificate in person, have him or her sign for it. If the association mails or sends the certificate by express or courier, make note of the address to which it was sent and the date.
- Include a statement that the association will not update the information in the resale certificate unless it receives a new written request from the unit owner.
- Include a statement that the disclosures in the certificate are limited to the requirements of Section 47-270 of the Act.

### **Completing Mortgage Questionnaires**

Mortgage companies sometimes ask associations to complete questionnaires in connection with the sale and refinance of units. These questionnaires ask for some of the same information contained in the resale certificate. They may also ask for other information, such as the percentage of the units in the community that are occupied by renters.

Mortgage companies sometimes furnish copies of these questionnaires to their borrowers, who may rely on their contents in deciding whether to purchase the unit. We have heard of suits brought against associations and their managers in other states over errors contained in these questionnaires. The association should take the same care in responding to these questionnaires that it takes in furnishing resale certificates.

The provisions of the Common Interest Ownership Act relating to resale certificates have been amended several times, most recently in 2005. If you would like assistance in making sure that your association's resale certificate is up to date and that the responses it contains comply with the requirements of the Act, we would be happy to assist you.

### **New Clients**

*We are often asked  
if we are accepting  
additional clients.  
We are, and are  
always happy to  
meet with  
interested parties  
to discuss our firm  
and how we may  
serve them*

## NEWS ABOUT OUR PEOPLE

### *PERLSTEIN, SANDLER & McCracken, LLC*

*Providing legal services  
to condominium and  
community associations  
including:*

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Matt Perlstein is listed in *The New York Area's Best Lawyers*, a guide to legal representation in New York, New Jersey and Connecticut. He is also listed in the 2007 and 2008 editions of *The Best Lawyers in America*. *Best Lawyers* is the oldest and most respected peer-review publication in the legal profession. Because lawyers are neither required nor allowed to pay a fee to be included, a listing in *Best Lawyers* is regarded within the legal profession as a significant honor conferred on a lawyer by his or her peers.

Matt attended the 29<sup>th</sup> Annual Community Associations Institute Law Seminar on January 25 and 26, 2008, in Las Vegas. The seminar is presented by the College of Community Association Lawyers, of which Matt is a member. Matt attended numerous seminars discussing legal issues facing association throughout the country, and enjoyed the opportunity to share knowledge and experiences with other attorneys who are interested in community association law.

Scott Sandler now serves as the President of the Connecticut Chapter of the Community Associations Institute. Scott has been a member of the board of the Chapter since 2004, working to address the needs of the associations who are members of the Chapter. Scott also serves as a member of the Chapter's Legislative Action Committee.

Greg McCracken continues to serve on the Executive Committee of the Real Property Section of the Connecticut Bar Association. He remains a member of the Section of State and Local Government Law of the American Bar Association, and he is the Reporter for the forthcoming second edition of the *Common Interest Ownership Manual*.



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