



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, DC 20410-0500

April 10, 2007

GENERAL COUNSEL

James E. Barnett
County Attorney
Office of the County Attorney
224 Ballard Street
P.O. Box 532
Yorktown, VA 23690-0532

RECEIVED

APR 13 2007

COUNTY ATTORNEY
YORK COUNTY, VIRGINIA

RE: Proposed Senior Housing Zoning Ordinance, York County, Virginia

Dear Mr. Barnett:

This responds to your March 20, 2007 request for review of your county's proposal to amend its zoning ordinance on senior housing. This was a follow-up to your original inquiry emailed to our office on March 9, 2007, and a subsequent telephone conversation you had with one of my staff attorneys on March 15, 2007. Upon receipt of your email, we faxed you the Housing for Older Persons (HOPA) Questions and Answers (Qs&As)¹, and directed you to Q&A 16, which we believe addresses your concern.

The Housing For Older Persons Act² (HOPA), 42 U.S.C. § 3607(b)(2)(C), allows a community to impose an age restriction more limiting than the minimum age required by HOPA and still qualify for the exemption from the familial status non-discrimination provision of the Fair Housing Act.³ As noted in the answer to Question 16 in the Qs&As, a housing community or facility may require that age eligibility begin after age 55 for at least one person in each unit, or that more than 80% of the units may be limited to at least one age eligible person per unit. Thus, one person age 55 years old in 80% of the units is the minimum age and percentage of residents for which a housing facility may qualify as HOPA housing. However, in addition to the age and percentage requirements of HOPA's 807(b)(2)(C) exemption, a facility must also show three factors:

- (1) that the housing be intended and operated for persons 55 years of age or older;
- (2) that the housing facility or community publish and adhere to policies and procedures that demonstrate its intent to qualify for the exemption; and,
- (3) that the facility comply with rules issued by HUD for the verification of occupancy.

¹ <http://www.hud.gov/offices/fheo/seniors/index.cfm>.

² HOPA amends the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*

³ The Fair Housing Act prohibits, *inter alia*, familial status discrimination, which means one or more individuals who have not attained the age of 18 years being domiciled with (1) a parent or another person having legal custody of such individual or individuals or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections against familial status discrimination apply to persons who are pregnant or who are in the process of securing legal custody of any individual who is not yet 18 years old.

The Fair Housing Act regulations, at 24 C.F.R. § 100.304, address the requirements for compliance with housing for persons who are 55 years of age or older. The regulations at 24 C.F.R. § 100.304(b) define “housing facility or community,” and provide examples of such, which includes “a municipally zoned area.” The appendix to the regulation, which is published at 64 Fed. Reg. 16324, 16332 (April 2, 1999), section 3 (intent to operate as housing for persons who are 55 years of age or older), example 2, provides guidance to municipally zoned areas that wish to satisfy the requirement of intent to operate as housing for persons who are 55 years or older. The example states that the intent requirement is satisfied if:

- (1) zoning maps containing the “senior housing” designation are available to the public;
- (2) literature distributed by the area describes it as “senior housing”;
- (3) the “senior housing” designation is recorded in accordance with local property recording statutes; and
- (4) zoning requirements include the 55 or older requirement or a similar provision.

The materials that you provided included a draft of the proposed ordinance, amendments to Section 24.1-104, to modify the definition of “senior housing.” You also provided us with selected portions of the York County zoning code. We note that the proposed zoning ordinance must conform to the intent requirement, identified above, in order to comply with the HOPA exemption to the familial status provision of the Fair Housing Act. Further, we note that the amendments defining “senior housing” are confusing as drafted, as they do not accurately state the terms of the Housing for Older Persons Act of 1995. See Section 42 U.S.C. § 3607(b)(2)(C). For example, the York County ordinance begins, “Consistent with the terms of ...the federal Housing for Older Persons Act of 1995 (HOPA)...senior housing or housing for older persons can include...(ii)a housing community or facility wherein at least 95% of the units are occupied by at least one person 62 years of age or older and wherein none of the residents in the community or facility are under the age of nineteen (19).” While this narrow definition of housing for older persons is permitted by the terms of the Housing for Older Persons Act, its regulations and related guidance, the terms are not consistent with the Act, and therefore the introductory language (e.g. “consistent with”) should be revised.

As we explained to you, HUD cannot give you an advisory opinion as to the outcome in a specific case. However, if a fair housing complaint were filed with HUD, we would evaluate the matter based on relevant information gathered in the course of an investigation about the compliance of the “municipally zoned area” with the provisions of Section 807(b) of the Fair Housing Act and the implementing regulations at 24 C.F.R. §100.300. Please note, however, that persons who believe they have been aggrieved by discriminatory acts are not obligated to use HUD’s administrative complaint processing; courts may approach the issue differently than would

HUD in making a determination of whether reasonable cause exists to believe that a violation of the Act has occurred. Without adherence to the Housing for Older Persons Act regulatory requirements for “municipally zoned areas,” housing that operates to exclude families with children from high-density areas may violate the Fair Housing Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda M. Cruciani". The signature is written in a cursive, flowing style.

Linda M. Cruciani
Assistant General Counsel
Fair Housing Enforcement