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NJ Appellate Division Rules that Municipal Ordinance Restricting Ownership to Individuals Over 55 Violates Fair Housing Act and NJ Law Against Discrimination

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What You Need to Know

- In a matter of first impression, the New Jersey Appellate Division recently ruled that a municipal ordinance restricting ownership in age-restricted communities to individuals over the age of 55 is invalid on the grounds that it violates, and is preempted by, the federal Fair Housing Act and the New Jersey Law Against Discrimination.
- The Court ruled that the ordinance improperly discriminates on the basis of familial status and improperly infringes on the well-established and constitutionally protected right to own and sell property.
- This is the first decision in the country to directly deal with the issue of whether age-restricted communities or municipalities can restrict ownership based upon the purchaser's age and shines a bright light on the need for age-restricted communities and municipalities that currently have such discriminatory age requirements to take immediate action to modify their rules or ordinances to eliminate those requirements.

On July 31, 2024, the New Jersey Appellate Division issued its ruling in *New Jersey REALTORS® v. Township of Berkeley*, upholding a trial court's decision invalidating a municipal ordinance requiring that the owners of units in age-restricted communities be 55 years of age or older. The Court ruled that the ordinance violated and was preempted by both the federal Fair Housing Act (FHA) and the New Jersey Law Against Discrimination (NJLAD). The Court also held that the requirement was

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arbitrary, capricious and unreasonable because it improperly infringed on the well-established and constitutionally protected right to own and sell property.

The dispute in this case dates back to March 29, 2022, when the Township of Berkeley enacted Ordinance No. 22-13-OA. The ordinance amended the Township's land use provisions to limit property ownership in age-restricted housing communities to individuals who are 55 and older. New Jersey REALTORS® filed a complaint against the Township seeking to have the ordinance declared invalid.

The trial court granted summary judgment in favor of New Jersey REALTORS®, finding that the ordinance violated the FHA and the NJLAD by restricting ownership and thus was preempted and invalid. The trial judge noted the significant "unintended consequences" of the ordinance, including preventing elderly owners from transferring title to their adult children for purposes of estate planning.

The Township appealed the trial court's decision, arguing that the ordinance was a valid exercise of the municipality's police powers and was neither invalidated nor preempted by the FHA or the NJLAD. The Appellate Division rejected the Township's arguments and upheld the trial court's decision.

Both the FHA and the NJLAD include a "housing for older persons" exemption to discrimination against families that allows age-restricted communities where 80% of the units have at least one resident who is 55 or older. There is no exemption in either law for age-restricted communities to require that owners be 55 or older.

Relying on the plain language of those statutes – as well as letters from the New Jersey Department of Community Affairs (DCA) to the Township and New Jersey REALTORS® and responses to comments by the DCA to inquiries made during the rule-making process for regulations implementing the NJLAD – the Appellate Division ruled that the Township cannot require, or permit, discrimination in the ownership of age-restricted housing by requiring that owners be 55 or older.

The Appellate Division also considered whether the ordinance was a valid exercise of the Township's police powers or an arbitrary, capricious and unreasonable act. The Court noted that although municipal ordinances are entitled to a presumption of validity, they must be necessary to address a legitimate public need. The Court determined that the Township's ordinance was arbitrary, capricious and unreasonable because it unreasonably and irrationally exceeded the public need and unreasonably infringed upon the well-established and constitutionally protected right to own and sell property.

The Appellate Division's decision in this matter is significant for numerous reasons. First, it protects the rights of adult children to purchase a home in their own name in an age-restricted community on behalf of parents who cannot afford to purchase the home, and then allow parents who are 55 or older to live there. Next, it similarly permits parents to transfer title to their home to their adult children for estate planning reasons. In addition, it allows a husband or wife who is under 55, whose spouse who was over 55 passes away, to continue to own their marital home instead of being forced to sell solely because they are under 55. Finally, the discriminatory age restriction on who could purchase a home in an age-restricted community limited the potential buyers for those homes and therefore artificially suppressed the value of

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homes in those communities, thereby damaging every homeowner in the community.

This is the first decision in the country to directly deal with the issue of whether age-restricted communities or municipalities can restrict ownership based upon the age of the purchaser. There are numerous age-restricted communities in New Jersey and around the country that have a requirement that owners be 55 or older, even though the law only allows them to require that 80% of the units be occupied by at least one person who is 55 or older. The decision sends a clear message to age-restricted communities, as well as to the municipalities where those communities are located, that they can no longer impose these discriminatory age restrictions on who can own property in those communities. As a result, any age-restricted communities and municipalities that have such discriminatory age requirements should immediately take steps to modify their rules or ordinances to eliminate this illegal requirement.

The authors of this Alert, **Barry S. Goodman** and **Conor J. Hennessey**, are partners in the firm's Litigation Department and Real Estate Brokerage Practice Group. Mr. Goodman successfully argued this case on behalf of New Jersey Realtors®, with Mr. Goodman of counsel and on the brief, and Mr. Hennessey on the brief. Please contact them with questions concerning this case or to discuss your specific business circumstances.

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