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October 11, 2018

VIA EMAIL DELIVERY

Nicole.Cubbedge@stjohns.k12.fl.us

Nicole Cubbedge, AICP
St. Johns County School District
Director for Facilities Planning and
Growth Management
40 Orange Street
St. Augustine, Florida 32084

Re: NGMB Properties, LLC Parkland Preserve Project; analysis of
compliance with *Volusia County v. Aberdeen at Ormond Beach, L.P.*,
760 So. 2d 126 (2000)

Dear Nicole:

On September 6, 2018, Bill Schilling of Kimley-Horn forwarded me a January 12, 2018, memo with proposed partial covenant language for Parkland Preserve. I attach the draft language as Exhibit "A" to this letter.

He asked me to analyze the partial document language for compliance with *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (2000) (*Aberdeen*).¹ As you know, the Florida Supreme Court decision in *Aberdeen* controls whether an age-restricted community is exempt from school impact fees. The short answer is the proposed language complies, subject to the several points I raise below.

Most significantly, I assume for sake of discussion that the language is the entire proposed text concerning *Aberdeen* compliance for the project. While the *Aberdeen* court emphasized the need to construe the specific as controlling the general, I need to see the entire document to do a final review. My review of this portion is conditioned on ensuring the final, complete document complies with *Aberdeen*.

¹ As you know, we were prevailing counsel in *Aberdeen*. Therefore, we try to carefully follow its dictates on behalf of the School Board.

ABERDEEN

I turn now to what *Aberdeen* required for an age-restricted community to be exempt from school impact fees.

Aberdeen held:

- (1) school impact fees are presumed to be valid against new residential development;
- (2) provided those fees (a) do not exceed a pro rata share of reasonably expected costs of expansion of school capacity required to serve the new development and (b) the fees collected are only spent to meet the costs of expansion; and
- (3) the fees are due even against homes without children, unless a sufficiently binding covenant, running with title to the land, prohibits children from living in those homes. *See, St. Johns County v. NE Fla. Bldrs. Assn.*, 583 So.2d 635, 638 (public schools “serve each dwelling unit”; “[d]uring the useful life of the new dwelling units, school-age children will come and go”).

The *Aberdeen* Court emphasized its prior observation in *St. Johns* concerning binding recorded age restrictions on lots purchased by owners without minor children. “We would not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restrictions, minors could not reside.” *St. Johns*, 583 So.2d at 640, n. 6, quoted by *Aberdeen*, 760 So.2d at 135.

Aberdeen applied the *St. Johns* language to conclude: “In sum, *Aberdeen* neither contributes to the need for additional schools nor benefits from their construction.” *Aberdeen*, 760 So.2d at 136. *Aberdeen*’s supplemental declaration of restrictions established a mobile home community for persons at least 55 years of age or older. The Court emphasized *Aberdeen*’s minimum age requirements’ compliance with the HOPA. Additionally, the Court cited the following in concluding that *Aberdeen*’s supplemental restrictions authorized the exemption from school impact fees:

1. Exceptions to the minimum age requirement are permitted under limited circumstances;
2. persons under eighteen are prohibited from permanently residing in any dwelling unit;

3. While the developer reserved the right to modify or to revoke other covenants, the prohibition against minors was not subject to exception or waiver; and
4. the restrictions bound owners for thirty years from the date of revocation.

Aberdeen, 760 So.2d at 128, fn 1. The *Aberdeen* Court held that these factors combined to reasonably ensure that the development would not materially create a need for K-12 student stations. Therefore, the development did not need to pay school impact fees.

HOPA

I conclude it is necessary to actually quote the HOPA, and not just the *Aberdeen* Court's citation to the act. That way, we can better compare the requirements of *Aberdeen* against these facts.

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, codified at 42 U.S.C. s.s. 3601-3619) (FHA), prohibits housing discrimination under seven categories. *Id.* at 42 U.S.C. §3604. 1988 amendments to the FHA added "familial status" to protected classes. *Id.*

FHA covers a "dwelling," which includes "any building, structure or any portion thereof which is occupied as, or designed or intended for occupancy as a residence" by an individual or family, or "any vacant land which is offered for sale or lease for the construction or location thereon of any such buildings, structure, or portion thereof." 42 U.S.C. §3602(b). The 1988 amendments apply to any residential building with four or more dwelling units. 42 U.S.C. §3604.

FHA exempts "housing for older persons" from FHA prohibitions against discrimination due to familial status. 42 U.S.C. §3607(b)(2)(C) exempts housing that is intended and operated for residents who are 55-years-old or older, provided that the section's criteria are met.

HOPA expressly allows developments that comply with its mandate to discriminate on the basis of familial status. Otherwise, the Fair Housing Act bars housing discrimination against individuals living in households with one or more children who are under age 18. 42 U.S.C. §3604. The act defines "familial status" as follows:

One or more individuals (who have not attained the age of 18 years) being domiciled with a parent or another person having legal custody of such individual or individuals; or the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant

or is in the process of securing legal custody of any individual that has not attained the age of 18 years.

42 U.S.C. §3602(k).

Let's first examine what happens without an exemption. One need not claim discriminatory intent to make a familial status claim. 42 U.S.C. §3602(k) only requires a plaintiff to show standards for a development or other provider of housing facially discriminate against children or families with children. Generally, this only requires one to show that adult-only households are treated better than children or families with children. In *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992), for example, the appellate court found a single occupancy limit on a one bedroom apartment discriminated against a mother and her five-year-old daughter.

The 1988 Fair Housing Amendments Act (FHAA) created the 55 or older housing exemption to the FHA at 42 U.S.C. §3602(k). The Eleventh Circuit Court of Appeals, which has jurisdiction over Florida, upheld that section's requirements for a housing provider to discriminate against children or families with children. In *Seniors Civil Liberties Assn., Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992), the Court affirmed the Florida Middle District summary judgment holding that the 1988 FHAA exemption conditions were constitutional (761 F.Supp. 1528) (St. Johns County lies within the Middle District, so both decisions bind the School Board and San Salito).

The *Kemp* Court considered a condominium that prohibited children under the age of sixteen. The *Kemp Court* specifically found that the condominium violated the FHA:

The Riedels' condominium complex currently violates the [FHA]'s prohibition against familial status discrimination. More important, the complex fails to meet the statutory exemption for "housing for older persons" because the complex has failed to publish and adhere to "policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older." 42 U.S.C. §3607(b)(2)(c)(iii).²

965 F.2d at 1032.

² The original, 1988 FHAA version of 42 U.S.C. §3607(b)(2)(c) read:

[T]he Secretary [of HUD] shall develop regulations which require at best the following factors:

- (i) the existence of significant facilities and services specifically designed to meet the physical social needs of older persons
- (ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
- (iii) the publication of, and adherence to, policies and procedures which

demonstrate an intent by the owner or manager to provide for persons 55 years of age or older.

Id. The 1995 HOPA eliminated the “significant facilities and services” factor, and added express provision for compliance with HUD rules for verification of occupancy. We discuss that below. *Kemp* addressed the third prong, which was implemented at 24 C.F.R. §100.304(c)(2). That rule listed six, non-exclusive factors for compliance with the policies and procedure prong:

- (i) The manner in which the housing facility is described to prospective residents.
- (ii) The nature of any advertising designed to attract, prospective residents.
- (iii) Age verification procedures.
- (iv) Lease provisions.
- (v) Written rules and regulations.
- (vi) Actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules and regulations.

Id.

On April 2, 1999, this list was moved by 64 F.R. 16330 to 24 C.F.R. 100.306, and modified as follows:

§100.306 Intent to operate as housing designed for persons who are 55 years of age or older.

(a) In order for a housing facility or community to qualify as housing designed for persons who are 55 years of age or older, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. The following factors, among others, are considered relevant in determining whether the housing facility or community has complied with this requirement:

- (1) The manner in which the housing facility or community is described to prospective residents;
- (2) Any advertising designed to attract prospective residents;
- (3) Lease provisions;
- (4) Written rules, regulations, covenants, deed or other restrictions;
- (5) The maintenance and consistent application of relevant procedures;
- (6) Actual practices of the housing facility or community; and
- (7) Public posting in common areas of statements describing the facility or community as housing for persons 55 years of age or older.

(b) Phrases such as “adult living”, “adult community”, or similar statements in any written advertisement or prospectus are not consistent with the intent that the housing facility or community intends to operate housing for persons 55 years of age or older.

(c) If there is language in deed or other community documents which is inconsistent with the intent to provide housing for persons who are 55 years of age or older housing, HUD shall consider documented evidence of good faith attempt to remove such language in determining whether the housing facility or community complies with the requirements of this section in conjunction with other evidence of intent.

(d) A housing facility or community may allow occupancy by families with children as long as it meets the requirements of §§ 100.305 and 100.306(a).

The Eleventh Circuit further explicated the exemption the following year, in *Massaro v. Mainlands Section 1&2 Civic Assn.*, 3 F.3d 1472 (11th Cir. 1993). A homeowners association attempted to evict two families with infants for violating a declaration of covenants and restrictions that limited residents to “permanent residents sixteen (16) years of age or older.” 3 F.3d at 1474.

Significantly, the *Massaro* Court held that an owners’ association, while not an “owner or operator” as listed in the statute and rule, is eligible for the exemption. *Id.* at 1477. The Court listed three reasons. First: “In this case, the Association acts as an owner in performing functions which are relevant to the goals of the Act.” *Id.* Second: “Congress intended to rid the entire housing market of discrimination and homeowners’ associations are not expressly omitted from the reach of the Act.” *Id.* Last, the Court “previously ha[d] considered a homeowner association’s eligibility for the older persons’ exemption to the Fair Housing Act.” *Id.*, citing *Rogers v. Windmill Pointe Village Club Assn., Inc.*, 967 F.2d 525 (11th Cir. 1992).

The *Massaro* Court emphasized the heavy burden an association carries in proving an FHA exemption:

[U]nder the law of this circuit, the Association carries the burden of proving its eligibility for the exemption. *Rogers* [...] 967 F.2d 525, 527 Exemptions from the [FHA] are to be construed narrowly, in recognition of the important goal of preventing housing discrimination. *Elliott v. City of Athens*, 960 F.2d 975, 979 (11th Cir. 1992).

Massaro, 3 F.3d 1472, 1475-76.

The *Massaro* Court held that the original exclusion there, of residents under 16, did not meet the exemptions. Second, the discrimination, attempting to evict the families with infants, occurred prior to the association amending its governing documents to attempt to meet the 55 and older standards. Finally, the association did not enforce the 55 and older limitations except against families with children. Under the strict narrow reading that the FHA exemption required, *Massaro* held that the association failed to meet its burden. *Id.* at 1480, citing *Rogers*, 967 F.2d at 527, *Elliott*, 960 F.2d at 979.

1995 amendments creating HOPA created a new subsection (C) to 42 U.S.C. §3607(b)(2) that defines and delineates authorized 55 and older housing³ as housing:

- (C) intended and operated for occupancy by persons 55 years of age and older, and –
 - (i) at least 80 percent of the occupied units are

³ HOPA also exempts housing that is intended for, and occupied solely by, persons who are 62-years-old or older. 42 U.S.C. §3607(b)(2)(B). The subsection that applies here is (C), which allows 80 percent of units occupied by families with at least one person who is 55-years-old or older.

- occupied by at least one person who is 55 years of age or older;
- (ii) 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 [HUD] Secretary 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.

Balvage v. Ryderwood Improvement and Service Assn., Inc. 642 F.3d 765 (9th Cir. 2011), addressed the need for continuing compliance with the current HOPA. The association did not perform age verification from 2000-06 as expressly required by HOPA. The association claimed that “although it did not conduct adequate verification surveys during that period, it ‘engaged in less formal processes that were equally effective.’” *Id.* at 777.

Nonetheless, the records provided were current in 2007, and did not include data compiled in 2000-06. The association attempted to convince the Court to infer that the association compiled the requisite information in 2000-06 as well. The Court disagreed, holding that HOPA requires verification at least every two years, “at fixed points in time.” *Id.* at 778. See also:

Current compliance with the verification requirement, in other words, will not shield a community from liability for discrimination occurring before compliance was ordered.

Id. at 780 (e.i.o.).

HUD FAQ

HUD discusses the types of policies and procedures necessary to meet subsection (C)(iii)(II):

Question 4

What are some examples of the types of policies and procedures that would demonstrate an intent to provide housing for 55 years of age or older?

Answer

Examples include:

- a) the written rules, regulations, lease provisions, deed or other restrictions, [SIC]
- b) the actual practices of the owner/management of the housing facility/community as well as the manner in which the facility/community is described to prospective residents;
- c) the kind of advertising used to attract prospective residents to the housing facility/community as well as the manner in which the facility/community is described to prospective residents;
- d) the housing community's/facility's age verification procedures, and its ability to produce, in response to a familial status complaint, verification of required occupancy.

HUD, Questions and Answers Concerning the Final Rule Implementing the Housing for Older Persons Act of 1995 (HOPA) at Q. 4, p. 3. https://hud.gov/sited/documents/DOC_77_69.PDF (HUD FAQ).

The HUD FAQ document demonstrates the strict compliance required:

Question 5

May a housing facility advertise as "adult" housing and still demonstrate the intent to be housing for older persons [under HOPA]?

Answer

Use of the word "adult" or "adult community" in an advertisement, sign or other informational material, or when describing the facility or community to prospective renters or purchasers or members of the public, does not demonstrate an intent to be housing for older persons as defined by the final rule. The use of these terms, on the other hand, does not destroy the intent requirement of HOPA. If a facility or community has clearly shown in other ways that it intends to operate as housing for older persons, and meets the 80% requirement, and has in place age verification procedures, the intent requirement can be met even if the term "adult" is occasionally used to describe it. The Department will look at the totality of the circumstances in the investigation of a complaint alleging that the facility does not qualify as housing for older persons.

Id.

HUD discussed nonexclusive, but exacting examples of age verification:

Question 8

What is considered reliable age verification documentation?

Answer

The following documents are considered to be reliable for age verification: birth certificate, drivers license, passport, immigration card, military identification, or any other state, local, national or international documentation, provided it contains current information about the age or birth of the possessor.

Question 9

Is there any other documentation that would be considered reliable for age verification?

Answer

Yes. A self certification in a lease, application affidavit, or other document signed by an adult member of the household asserting that at least one occupant in the unit is 55 years of age or older will satisfy the requirement.

Id. at p. 5.

ANALYSIS OF HOPA AND ABERDEEN AS APPLIED TO PARKLAND PRESERVE

The age restriction language tracks the most current version of 42 U.S.C. § 3607(b)(2)(C). As stated above, that subsection states a development that houses at least one person who is at least 55-years-old in at least 80 percent of occupied units meets HOPA. Subsection 1.1 of Parkland Preserve's draft meets and exceeds that standard. It requires at least one person who is 55-years-old or older in every "occupied Home."⁴ That requirement likewise meets *Aberdeen*.

More to the point, subsection 1.1.B. meets *Aberdeen* by stating that "[n]o person under the age of nineteen (19) shall Occupy⁵ a Home." Subsections 1.1.C. and D. supplement and further support the minimum age restriction *Aberdeen* requires. Subsection C. requires sellers and landlords to state in conspicuous type in any agreement or contract, and buyers and tenants to acknowledge in writing, that no occupants younger than 19 are allowed. Subsection D. allows hardship exceptions, but "provide[s] that no exception to subsection B. above shall be granted."

⁴ I assume for sake of this letter that the capitalized word "Home" is defined in a common sense fashion elsewhere in the declaration.

⁵ As with the term "Home," I assume for the sake of this letter that "Occupy" means a resident of the Unit. I would, however, appreciate a copy of the declaration to confirm this.

I've historically allowed Declarant sales language similar to subsection 1.2. That subsection generally allows the Declarant to sell to buyers of Lots or Homes that will be occupied by persons between 45 and 55. The language bars more such sales than would be allowed by HOPA "or any such State and Federal laws." That means up to 20% of homes may be occupied by at least one person who is between 45 and 55.

While 1.2 does not undermine the 1.1.B. prohibition on residents who are younger than 19, I'd be more comfortable if it included such language, similar to 1.1.C. and D. I don't believe it absolutely necessary. Nonetheless, it's helpful.

The registration and enforcement language at subsections 1.3 and 1.4 is not expressly required by *Aberdeen*. It is, however, required by HOPA and implementing regulations. The language complies.

Subsection 1.5 is fine. Nonetheless, it would benefit from discussion of strict HOPA compliance's impact on strict familial status obligations under the FHA.

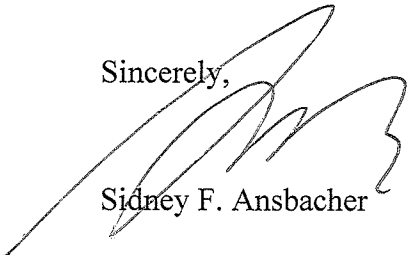
RECOMMENDATIONS

The language generally meets requirements. In addition:

1. I need to see declaration language that states the declaration will burden the property for at least thirty (30) years, consistent with *Aberdeen*.
2. I need to see language in the section provided that states the specific language in the section affecting occupancy and alienation controls over any conflicting language elsewhere in the declaration or any other document concerning the property.
3. I'd like to see the definitions of "Home" and "Occupancy."
4. Subsection 1.6 is fine, but might benefit from a reference to strict HOPA compliance vis a vis strict compliance with familial status obligations under the FHA.
5. I see no reason that the School Board cannot be an express, intended third party beneficiary of this portion of the declaration. I prefer it in all cases.
6. As I state at the beginning, my analysis is subject to review of the final, complete declaration for compliance with *Aberdeen*.

I remain,

Sincerely,



Sidney F. Ansbacher

Covenants, Conditions and Restrictions
Parkland Preserve Subdivision
January 4, 2018

Section 1. **Restrictions Affecting Occupancy and Alienation.**

1.1. **Restrictions on Occupancy.** Subject to the rights reserved to Declarant in Section 3.2 below, the Lots within the Subdivision are intended for the housing of persons fifty-five (55) years of age or older. The provisions of this Section are intended to be consistent with and are set forth in order to comply with the Fair Housing Amendments Act, 42 U.S.C. §3601 et seq. (1988), as amended, the exemption set out in 42 U.S.C. §3607(b)(1) and (b)(2)(c) and the regulations promulgated thereunder (collectively, as may be amended, the "Fair Housing Act") allowing discrimination based on familial status. Declarant or the Association, acting through the Board, shall have the power to amend this Section, without the consent of the Owners or any person or entity except Declarant, for the purpose of maintaining the age restriction consistent with the Fair Housing Act, the regulations adopted pursuant thereto and any related judicial decisions in order to maintain the intent and enforceability of this Section.

A. Each occupied Home shall at all times be occupied by at least one person fifty-five (55) years of age or older (an "Age-Qualified Occupant"); however, in the event of the death of an Age-Qualified Occupant who was the sole occupant of a Home, any qualified occupant may continue to occupy the same Home as long as the provisions of the Fair Housing Act are not violated by such occupancy.

B. No person under the age of nineteen (19) shall Occupy a Home.

C. Nothing in this Section shall restrict the ownership of or transfer of title to any Lot; provided, no Owner under the age of fifty-five (55) may occupy a Home unless the requirements of this Section are met nor shall any Owner permit occupancy of the Home in violation of this Section. Owners shall be responsible for including a statement that the Lots within the Subdivision are intended for the housing of persons fifty-five (55) years of age or older and that occupancy by any person under the age of nineteen (19) is prohibited, as set forth in this Section, in conspicuous type in any lease agreement or other occupancy agreement or contract of sale relating to such Owner's Lot, which agreements or contracts shall be in writing and signed by the lessee or purchaser and for clearly disclosing such intent to any prospective lessee, purchaser, or other potential occupant of the Lot. Every lease agreement of a Lot or Home shall provide that failure to comply with the requirements and restrictions of this Section shall constitute a default under the lease agreement.

D. Any Owner may request in writing that the Board make an exception to the requirements for an Age-Qualified Occupant of this Section with respect to a Home on his or her Lot, based on documented hardship. The Board may, but shall not be obligated to, grant exceptions in its sole discretion, provided that all of the requirements of the Fair Housing Act would still be met, and further provided that no exception to subsection B. above shall be granted.

E. In the event of any change in occupancy of any Home, as a result of a transfer of title, a lease or sublease, a birth or death, change in marital status, vacancy, change in location of permanent Home, or otherwise, the Owner of the Home shall immediately notify the Board in writing and provide to the Board the names and ages of all current occupants of the Home and such other information as the Board may reasonably require to verify the age of each occupant required to comply with the Act. In the event that an Owner fails to notify the Board and provide all required information within ten (10) days after a change in occupancy occurs, the Association may levy monetary fines against the Owner and the Lot for each day after the change

Exhibit A

in occupancy occurs until the Association receives the required notice and information, regardless of whether the occupants continue to meet the requirements of this Section, in addition to all other remedies available to the Association under the Declaration and Florida law.

1.2. **Sales by Declarant.** Notwithstanding the restriction set forth in this Section, Declarant reserves the right to sell Lots and Homes for Occupancy by Persons between forty-five (45) and fifty-five (55) years of age; provided, such sales shall not affect the Community's compliance with all applicable State and Federal laws under which the Community may be developed and operated as an age-restricted community, including requirements that a minimum percentage of Homes be occupied by at least one Age-Qualified Occupant as required under the Act or any other such State and Federal laws.

1.3. **Monitoring Compliance; Appointment of Attorney-in-Fact.** The Association shall be responsible for maintaining records to support and demonstrate compliance with the Act, including initial registration with the Florida Commission on Human Relations and renewal every two (2) years thereafter. The Board shall adopt policies, procedures and rules to monitor and maintain compliance with this Section and the Act, including policies regarding visitors, updating of age records, the granting of exemptions to compliance and enforcement. The Association shall periodically distribute such policies, procedures and rules to the Owners and make copies available to Owners, their lessees and Mortgagees upon reasonable request.

1.4. **Enforcement.** The Association may enforce this Section in any legal or equitable manner available, as the Board deems appropriate, including, without limitation, conducting a census of the occupants of Homes, requiring that copies of birth certificates or other proof of age for one new Age-Qualified Occupant per Home be provided to the Board on a periodic basis, in its sole discretion, taking action to evict the occupants of any Home which does not comply with the requirements and restrictions of this Section. Association's records regarding individual Members shall be maintained on a confidential basis and not provided except as legally required to governing authorities seeking to enforce the Act. Each Owner shall fully and truthfully respond to any Association request for information regarding the occupancy of Home on his or her Lot which, in the Board's judgment, is reasonably necessary to monitor compliance with this Section. Each Owner hereby appoints the Association as its attorney in fact for the purpose of taking legal or equitable action to dispossess evict or otherwise remove the occupants of any Home on his or her Lot as necessary to enforce compliance with this Section.

1.5. **Owner Compliance and Indemnity.** Each Owner shall be responsible for ensuring compliance of its Lot with the requirements and restrictions of this Section and the Association rules adopted hereunder, by itself and by its lessees and other occupants of its Lot or Home. Each Owner, by acceptance of title to a Lot or Home agrees to indemnify, defend and hold Declarant, any affiliate of Declarant and the Association harmless from any and all claims, losses, damages and causes of action which may arise from failure of such Owner's Lot to so comply. Such defense costs shall include, but not be limited to, attorney fees and costs.

1.6. **Household Composition.** The Association shall not interfere with the freedom of Members and Residents to determine the number of qualified occupants within a household, except that it may limit the total number of persons entitled to occupy a Home based upon the size of the Home (based on such factors as the number of bedrooms), not to exceed the number permitted under current zoning ordinances and limit the number of occupants per household who have full privileges as members to use of the Common Area.