

**BEFORE THE MUNICIPALITY OF ANCHORAGE
BOARD OF ADJUSTMENT**

HOME AND LANDOWNERS)
ORGANIZATION, INC.,)

Appellant,)

v.)

MUNICIPALITY OF ANCHORAGE,)
PLANNING AND ZONING)
COMMISSION,)

Appellee.)
_____)

CASE NO. _____

P & Z Case No. 2006-142;
Tax ID No. 020-181-61

APPELLANT'S SUPPLEMENTAL BRIEF

**ON APPEAL FROM THE MUNICIPALITY OF ANCHORAGE,
PLANNING AND ZONING COMMISSION**

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I. DISCUSSION

The Board has asked for supplemental briefing regarding the potential application and impact of 24 CFR § 100.303¹ as it applies to AMC 21.35.020(B), which defines "housing for the elderly." HALO's point on appeal No. 8² (R. 004) addressed this very issue. The Code defines "housing for the elderly" as:

Multiple family housing especially designed for occupancy by persons 62 years of age and older and requires 30 percent to the units within the

¹ 24 CFR § 100.303 provides:

(a) *The provisions regarding familial status in this part shall not apply to housing intended for, and solely occupied by, persons 62 years of age or older.* Housing satisfies the requirements of this section even though:

(1) There are persons residing in such housing on September 13, 1988 who are under 62 years of age, provided that all new occupants are persons 62 years of age or older;

(2) There are unoccupied units, provided that such units are reserved for occupancy by persons 62 years of age or over;

(3) There are units occupied by employees of the housing (and family members residing in the same unit) who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing. (b) The following examples illustrate the application of paragraph (a) of this section:

Example (1): John and Mary apply for housing at the Vista Heights apartment complex which is an elderly housing complex operated for persons 62 years of age or older. John is 62 years of age. Mary is 59 years of age. If Vista Heights wishes to retain its "62 or over" exemption it must refuse to rent to John and Mary because Mary is under 62 years of age. However, if Vista Heights does rent to John and Mary, it might qualify for the "55 or over" exemption in § 100.304.

Example (2): The Blueberry Hill retirement community has 100 dwelling units. On September 13, 1988, 15 units were vacant and 35 units were occupied with at least one person who is under 62 years of age. The remaining 50 units were occupied by persons who were all 62 years of age or older. Blueberry Hill can qualify for the "62 or over" exemption as long as all units that were occupied after September 13, 1988 are occupied by persons who were 62 years of age or older. The people under 62 in the 35 units previously described need not be required to leave for Blueberry Hill to qualify for the "62 or over" exemption.

² The point on appeal provides:

The Commission erred in its interpretation of the definition of 'housing for the elderly' by allowing any occupant of this type of housing to be under the age of 62. The definition clearly states that elderly housing is 'housing especially designed for occupancy by persons 62 years of age or older' AMC 21.35.020(B).

1 facility to be handicapped accessible with accommodation for
2 wheelchairs. The facility may include, as accessory uses, central
recreation and dining areas and health services.

3 AMC 21.35.020(B) (emphasis added). Thus, *both* the MOA Code and federal law
4 mandate the housing unit occupancies to be “solely occupied” (federal law) by persons
5 “62 years of age and older” (federal law and MOA Code, AMC 21.35.020(B)). The Fair
6 Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601-
7 3619) (the Act) exempts "housing for older persons" from the prohibitions against
8 discrimination because of familial status or age. In other words, if Legacy Pointe fails
9 to adhere to the mandate of 62 years of age or older for *all* occupants at *all* times, it is in
10 violation of federal law.
11

12 The P & Z approved a site plan (R. 624), however, that violates both federal law
13 and the MOA zoning requirements when it approved Legacy Pointe as a project that
14 allowed people as young as 19 to reside in the condominiums, as long as one person
15 was 62. The site plan provides:
16

17 (b) This site plan approval is for Housing For the Elderly permitted use in
18 the PLI District. Occupancy is age-restricted: *a minimum of one*
19 *occupant* per unit shall be 62 years of age or older, or as otherwise
20 provided by Title 21 code definition and the Federal Fair Housing Law,
21 whichever is more restrictive, and no one under the *age of 19 years is*
permitted permanent occupancy. The sale or subleasing of these units
shall be consistent with these age restrictions.

22 (R. 624). The P & Z site plan, as worded, is flatly prohibited by the Fair Housing Act,
23 and in direct contravention of AMC 21.35.020(B), both of which mandate, without
24 exception, *all* occupants to be “62 years of age or older” not just “one occupant” and
25

1 certainly not a temporary occupant under age 19. Federal law specifically states that the
2 units must be "solely occupied" by persons "62 years of age or older." One of the
3 examples in the federal code is directly in-point:

4 b) The following examples illustrate the application of paragraph (a) of
5 this section:

6 *Example (1):* John and Mary apply for housing at the Vista Heights
7 apartment complex which is an elderly housing complex operated for
8 persons 62 years of age or older. John is 62 years of age. Mary is 59 years
9 of age. If Vista Heights wishes to retain its "62 or over" exemption it must
10 refuse to rent to John and Mary because Mary is under 62 years of age.

11 24 CFR § 100.303 (b)(1). As this example establishes, Legacy Pointe, as approved,
12 cannot allow any occupant under age 62, much less occupants (permanent or temporary)
13 under age 19.

14 The MOA attorney tried to advise the P & Z on this point, as his admittedly
15 quick read of the definition confirmed that age restriction, but his legal advice was
16 overridden by Mr. Nelson:

17 MR. REEVES: Madam Chair, I'm looking at the code. I'm looking at
18 the definition of housing for the elderly. I don't see a statement that
19 requires that -- in so many words that every single person would be 62
20 years of age or older but it seems to imply that, certainly, from my look.

21 (R. 326). (Actually, the code does not merely "imply" this requirement, it expressly
22 mandates it: "Multiple family housing especially designed for occupancy by persons 62
23 years of age and older . . ."). But, Mr. Nelson informed the P & Z that only one
24 person need be 62 and, after that point, based on Mr. Nelson's erroneous legal advice,
25 the Commission erred. (R. 327).

1 It appears the P & Z acknowledged federal supremacy in this regard, and
2 provided that, if “the Federal Fair Housing Law” was “more restrictive,” it should
3 govern. (R. 624) It is obvious both federal law and Title 21 are “more restrictive” than
4 what the P & Z approved and that Legacy Pointe, in order to be in compliance with
5 federal law, has to be limited to housing “solely occupied by persons 62 years of age or
6 older.” This failure to comply with federal law, and with the definition of “housing for
7 the elderly” under Title 21, reinforces HALO’s primary objection that Legacy Pointe is
8 essentially high-end, private, non-institutional condominiums with no age limits other
9 than that one person need be 62. As currently written, a 62 year old man, with a 42 year
10 old wife, and two children under the age of 18 who go to a boarding school six months
11 out of the year, could live at Legacy Pointe. That is not “housing for the elderly.” The
12 federal law and Title 21, when defining “housing for the elderly” (especially in light of
13 the greatly reduced parking requirements for institutional housing), all lead to the same
14 conclusion: “housing for the elderly” as a permitted use in the PLI district was intended
15 to be an institutional format run by a state or local government or non-profit for real
16 seniors over age 62, not simply another condominium project.
17
18

19 Finally, as Mr. McCollum testified, the point of determining and classifying
20 “housing for the elderly” has generally focused on the age of the occupants, not the
21 ownership of the units. (R. 319-321) This is true since the code presumed public or
22 quasi-public ownership. This assumption was well grounded since the stated intent of
23 PLI was addressing “public institutions.”
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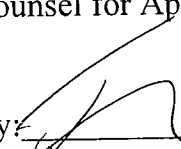
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II. CONCLUSION

As adopted by the P & Z, the Legacy Pointe plan violates the federal Fair Housing Act. Legacy Pointe, in order to be lawful, has to be restricted "solely" to persons 62 years of age or older, without exception. By pointing this out, HALO is not waiving its argument that, irrespective of the age of the occupants, the facility must be public or quasi-publicly owned or operated, like the Chugiak Senior Center or the Pioneers Home. At a minimum, this plan must be reversed and remanded to correct this violation.

DATED this 25th day of August, 2008, Anchorage, Alaska.

**CLAPP, PETERSON, VAN FLEIN,
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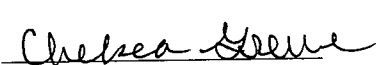
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I certify that a true and correct copy of this document was served by U.S. Mail on August 25 2008, to the following recipients:

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