



CITY OF SNOHOMISH

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**Office of the City Attorney
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March 5, 2014

Ted Hunter, Hearing Examiner
City of Snohomish
116 Union Avenue
Snohomish, WA 98290

RE: 17-13-CUP, Senior Assisted Living Facility

Dear Mr. Hunter:

Snohomish Planning Director Owen Dennison has advised that you have requested a legal opinion from the Snohomish City Attorney's office in the above-referenced matter. Normally, we would consider it part of the due diligence of the applicant to ascertain the applicable regulatory requirements for his proposed business operations, but since you have requested this opinion, we will oblige. This opinion is for the exclusive use of the City of Snohomish Hearing Examiner and planning staff, and may not be relied upon by any other person.

Issue: Does the proposed condition of approval of the senior assisted living facility restricting occupancy to those 62 years of age or older violate state law or the Federal Fair Housing Act of 1988?

Short answer: For certain licenses that the applicant might obtain from the Department of Social and Health Services, Yes. A restriction does not violate any general provision of state or federal anti discrimination law or any provision of RCW 18.20, but it could violate a DSHS administrative provision relating to certain licensees prohibiting "admission criteria that excludes (sic) individuals unless the criteria is necessary for the provision of assisted living facility services" in a somewhat unusual application of the ADA concept of "reasonable accommodation."

Discussion:

The proposal under consideration is for a conditional use permit to establish a 25-bed senior citizen assisted facility at 402 Avenue E, Snohomish, Washington. The proposed conditions of

approval are (1) occupancy of the Assisted Living Facility shall be limited to persons who are protected from housing discrimination under the Federal Fair Housing Act of 1988, (2) the Assisted Living Facility shall be operated in a manner consistent with the definition of Assisted Living Facility, RCW 18.20.020(2), and the facility will be operated under a license from the State of Washington in compliance with WAC 388-78A, and (3) the facility shall be occupied solely by persons 62 years of age or older.

The proposal does not violate the Federal Fair Housing Act Section 804 of the Federal Fair Housing Act of 1988, 42 U.S.C. §3607. This section prohibits discrimination in the sale or rental of housing on the basis of "race, color, religion, sex, familial status, or national origin." Discrimination on the basis of age is not prohibited, but discrimination on the basis of familial status is, that is, discriminating against a renter with children or a pregnant woman. A requirement for a minimum age of 62 would prohibit children, and constitute discrimination on the basis of familial status. However, Section 807 of the Act, 42 U.S.C. §3607, creates certain exemptions. Section 807(b)(1) provides in pertinent part "Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons." Section 807(b)(2)(B) defines housing for older persons as "intended for, and solely occupied by, persons 62 years of age or older." Therefore, the condition limiting occupants to 62 years of age or older does not violate the Act.

The state statute relating to assisted living facilities, chapter 18.20 RCW, and the DSHS implementing regulations, chapter 388-78A, address licensing of assisted living facilities as defined and operational requirements for such facilities, but do not address age at all. The proposed condition on age restriction violates no state or federal anti-discrimination law. A disabled person under age 62 denied admission to a facility would not be discriminated against on the basis of the disability but rather on the basis of age, for which the protected class is limited to persons over the age of 40.

However, RCW 18.20.090 confers rule making authority on DSHS. In its rules for an assisted living facility as defined by DSHS, DSHS has applied the ADA concept of "reasonable accommodation" to admission criteria. WAC 388-78A-2020 provides in its definition of "reasonable accommodations":

"Reasonable accommodation" and "reasonably accommodate" have the meaning given in federal and state anti-discrimination laws and regulations which include, but are not limited to, the following:

- (1) Reasonable accommodation means that the assisted living facility must:
 - (a) Not impose admission criteria that excludes individuals unless the criteria is necessary for the provision of assisted living facility services;

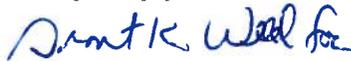
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An admission criterion that excluded persons under age 62 would violate the DSHS restriction on admissions criteria in the definition of "reasonable accommodations" because a criterion based on the age of the resident does not appear to be necessary to the provision of the assisted living facility services.

One may question whether this is a proper application of the ADA concept of "reasonable accommodation" where the discrimination is not on the basis of disability but rather the age of a person not in a protected class for age, but one may not question the authority of DSHS to promulgate the regulation.

Conclusion: If the applicant for the conditional use permit seeks a license for an assisted living facility from DSHS, the applicant may not be able to honor a city condition of approval limiting occupancy to those 62 years of age and remain in compliance with DSHS's licensure requirements and regulation of admissions criteria contained in the definition of "reasonable accommodation."

Very truly yours,



Pat Anderson

PBA:bj

cc: Owen Dennison