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PLANNING AND ZONING FOR  
AN AGING POPULATION**

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# **WHERE WILL THE BABY BOOMERS GO? PLANNING AND ZONING FOR AN AGING POPULATION**

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**FALL 2003**

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# Zoning and Land Use Planning

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## Where Will the Baby Boomers Go? Planning and Zoning for An Aging Population

### Introduction

On June 28, 2002 the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century (hereinafter "National Commission") delivered its final report to Congress with 50 recommendations.<sup>1</sup> The report, titled "A Quiet Crisis in America," understates the signifi-

cant challenges that face community planners and land use lawyers. According to the Administration on Aging, by the year 2030, there will be more people over the age of 65 (an estimated 70 million) than under the age of 15.<sup>2</sup> The National Commission reported that by 2020, the number of senior households will have grown by 53%, with more than 80% of these householders being homeowners. Forty-four percent of senior householders will be age 75 or older, and three-quarters of the senior householders with unmet housing needs will be homeowners.

The last decennial census points to the rapid graying of America. According to the 2000 census, in 2000 there were 35.5 million people age 65 and older, a 12% increase from ten years earlier.<sup>3</sup> The elderly represent 12.4% of the total population, and this number

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<sup>1</sup>For a copy of the report see [http://www.seniorscommission.gov/pages/final\\_report/html](http://www.seniorscommission.gov/pages/final_report/html). The Commission's recommendations were organized into the following five topic areas: (1) preserving the existing housing stock; (2) expanding successful housing production and services; (3) linking shelter and services; (4) reforming the financial delivery system for housing and services for seniors; and (5) creating new housing and service programs, models, and demonstrations.

<sup>2</sup>U.S. Department of Health and Human Services, Administration on Aging, Fact Sheet. See [http://www.aoa.gov/prof/statistics/profile/2\\_\\_pf.asp](http://www.aoa.gov/prof/statistics/profile/2__pf.asp).

<sup>3</sup>See [http://www.seniorscommission.gov/pages/final\\_report/html](http://www.seniorscommission.gov/pages/final_report/html).

is estimated to grow to 20% by 2030. Elderly households occupied 25% of the 106 million housing units in the United States. Looking at the picture from a bi-coastal perspective, in the State of New York the 75-and-over group will grow from 1.07 million in 1995 to 1.4 million in 2025, a 32% increase.<sup>4</sup> According to the California Office for the Aging, the number of Californians age 60 and over is projected to grow 154% in the next 40 years, and by 2010, 1 in 5 in Californians will be 60 or over.<sup>5</sup>

Approximately half (52%) of the 65-and-over population resides in nine states: California (3.6 million); Florida (2.8 million); New York (2.4 million); Texas (2.1 million); Pennsylvania (1.9 million); and just over one million in Ohio,

Illinois, Michigan, and New Jersey.<sup>6</sup> In 2000, most persons aged 65 and over lived in metropolitan areas (77.5%). Approximately 50% lived in the suburbs, 27% in the central cities, and 23% in non-metropolitan areas.<sup>7</sup> Looking at the ten largest cities, Philadelphia is home to the highest percentage of seniors—14.1% of the population.<sup>8</sup> New York City follows with 11.7% of the population, and Chicago, Detroit, San Antonio, and San Diego each have a senior population of over 10%.<sup>9</sup> According to the 2000 census, the West and the South experienced the greatest growth in total population and in older population.<sup>10</sup>

The National Association of Home Builders (NAHB) recently issued a study detailing the movement and interests of the active adult community,

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<sup>4</sup>New York State Office for the Aging, *Housing Older New Yorkers: Facts and Figures* (2001), available at <http://aging.state.ny.us/explore/housing/index.htm#facts>.

<sup>5</sup>See State of California, *Facts About California's Elderly*, available at <http://www.aging.state.ca.us/html/stats/demographics.html>.

<sup>6</sup>U.S. Census 2000, *The 65 Years and Over Population: 2000* (October 2001), available at <http://www.aoa.dhhs.gov>.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

defined as households headed by someone aged 55-74.<sup>11</sup> According to the report, slightly more than 19% of this population bought homes between 1995 and 2000, ranging from a low of 12% in Pennsylvania to a high of 40% in Nevada.<sup>12</sup> Nationally, 6.8% of homes occupied by owners aged 65-74 were built since 1995.<sup>13</sup> The top counties for recent adult homebuyers include: Sumter (FL); Nye (NV); Archuleta (CO); Washington (UT); Collier (FL); Summit (CO); Pinal (AZ); Beaufort (SC); Yavapai (AZ); and Flagle (FL).<sup>14</sup>

These reports and statistics point to the following facts: more people are living longer, healthier lives; seniors as a group comprise a significant percentage of the housing market; and as the average age of the voters rises in communities across America, planning and zoning boards and commis-

sions will need to be more responsive to the unique demands and desires of this segment of the population.

### **Aging in Place**

It is a myth that seniors, in large numbers, voluntarily plan to leave the state and region where they spent their working and family-rearing years to retire somewhere else. In fact, a recent Harvard study reveals that 9 out of 10 seniors prefer to remain in their homes.<sup>15</sup> According to a 1992 study by the American Association of Retired Persons (AARP), 85% of those seniors surveyed said that they wanted to “stay where they are and never leave.”<sup>16</sup> Of the survey respondents, 28% had lived in their current residence for over 30 years, and more than 50% had lived in the same area for more than 30

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<sup>11</sup>Paul Emrath, “Active Adults in the 2000 Census: Total Population, Population Share, and Overall Growth,” available at <http://www.nahb.org/generic.aspx?genericContentID=11031>.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Paul Emrath, “Hot Counties for Active Adult Communities,” available at <http://www.nahb.org/generic.aspx?genericContentID=10949>.

<sup>15</sup>Joint Center for Housing Studies of Harvard University, Housing America’s Seniors, (2000) available at [http://www.jchs.harvard.edu/publications/seniors/housing\\_america\\_seniors.pdf](http://www.jchs.harvard.edu/publications/seniors/housing_america_seniors.pdf).

<sup>16</sup>Ada-Helen Bayer and Leon Harper, Fixing to Stay: A National Survey on Housing and Home Modification Issues (1992), available at [http://research.aarp.org/il/home\\_mod\\_1.html](http://research.aarp.org/il/home_mod_1.html).

years.<sup>17</sup> Fifty-five percent of those who had moved within the past 5 years relocated within the same city or county.<sup>18</sup> This phenomenon was demonstrated in a study released in May of 2003 by the AARP entitled, "These Four Walls . . . Americans 45+ Talk About Home and Community."<sup>19</sup> In the most recent study, 4 out of 5 people surveyed (83%) own their own homes, and the majority are not planning to move within the next five years.<sup>20</sup> Most people who responded said that they wanted to stay in their current homes for the rest of their lives.<sup>21</sup> When seniors move, they tend to: move near to family members; move back to where they grew up; settle at a favorite vacation spot; or go where they spent a significant portion of their lives.<sup>22</sup> The options other than moving to a

favorite vacation spot show the need for connectivity with family and friends who can provide a vital support network; familiarity and comfort with the surroundings and a sense of place; and access to long-time doctors and other care providers known to the individuals. A 2003 NAHB survey of builders who build housing for the 50-years-and-over market revealed that 58% of the respondents said buyers of their housing in this age group relocated within the same community, and 57% reported that buyers relocated from different communities in the same state.<sup>23</sup> Approximately 24% of the builder-respondents indicated that the purchasers relocated from different states within the same region, and 22% said their buyers relocated from other states that had colder climates.<sup>24</sup>

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<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>Mathew Greenwald & Associates, Inc., *These Four Walls . . . Americans 45+ Talk About Home and Community* (2003), available at [http://research.aarp.org/il/four\\_walls.html](http://research.aarp.org/il/four_walls.html).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>National Association of Home Builders, *2003 Builder Survey: An Industry Update of Current Trends of Age-Restricted, Age-Targeted, and Independent Living Communities*, available at [http://www.nahb.org/fileUpload\\_details.aspx?contentID=7358](http://www.nahb.org/fileUpload_details.aspx?contentID=7358).

<sup>24</sup>*Id.*

Every community is going to have to respond to the aging baby boomers with a plan to meet the housing needs of the aging population. This will require community studies to reveal the demographic trends and projections; an assessment of the housing stock to accommodate the needs and desires of seniors (e.g., ranch-style housing with bedrooms, bathrooms, and the kitchen area on one floor); an evaluation of community amenities to service the aging population; an element in the local comprehensive land use plan addressing senior housing; and amendments to local zoning codes to allow for a wide spectrum of senior housing needs. The AARP has published a livability community guide to assist localities in ensuring there is appropriate housing stock for seniors.<sup>25</sup>

### **Housing Affordability**

In May 2003, the General Accounting Office issued a report to the U.S. Senate Special Committee on Aging identifying housing affordability as the single greatest problem facing elderly households.<sup>26</sup> According to the American Association of Homes and Services for the Aging, an estimated 1.4 million low-income elderly households spend at least half of their income on housing, or live in substandard housing.<sup>27</sup> While there is no doubt that many seniors live their “golden years” in retirement on a fixed income, NAHB offers another dimension of senior housing—seniors may be house-rich—pointing to a 2000 statistic noting that the average value of homes owned by ac-

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<sup>25</sup>Patricia Baron Pollack, *Livable Communities: An Evaluation Guide* (1999), available at [http://research.aarp.org/consume/d16905\\_\\_communities.html](http://research.aarp.org/consume/d16905__communities.html).

<sup>26</sup>U.S. General Accounting Office, “Elderly Housing: Project Funding and Other Factors Delay Assistance to Needy Households,” GAO-03-512 (May 30, 2003), available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=d03512.txt&directory=/diskb/wais/data/gao>.

<sup>27</sup>American Association of Homes and Services for the Aging, “Affordable Housing Vital to Meeting the Needs of an Aging Population,” available at <http://www2.aahsa.org/SiteSearch/SearchResults.asp?SC=Media%20Info/News%20Releases/Elderly%20Housing#>.

tive adults was \$160,000.<sup>28</sup> Although this number may seem to indicate on its face that housing affordability is not a problem given the value of the homes, seniors on fixed incomes, even in the more expensive homes, face rising property taxes and the cost of home maintenance, including routine and extraordinary repairs. While one option, the reverse mortgage, would allow seniors to “age in place,” it has not attracted a large market of seniors ready to sell their homes to the bank in exchange for monthly payments enabling them to live in the house.

### Housing Preferences

According to the NAHB study, 1.8 million active adult households live in conventional, single-family, and multifamily structures in age-qualified communities, and 7.7 million active adults live in communities that are not age-qualified.<sup>29</sup> This is consistent with national trends that show that only 10% of seniors live in

some form of retirement or age-segregated environment.<sup>30</sup> According to a wide variety of literature available from NAHB, AARP and other senior-housing related websites, seniors tend to want living arrangements that provide privacy, independence to the greatest extent possible, and personal control over their daily activities. Seniors, as group, tend to desire: single-family homes; family apartments; senior housing apartments; congregate housing; continuing care communities; elder cottages and accessory dwelling units; shared living alternatives; and lastly, institutional alternatives. These preferences (which may change from community to community) must be balanced with fiscal concerns regarding housing affordability, failing health issues that creep into the aging process, and concerns about loss of independence.

The May 2003 AARP study indicates that baby boomers want: a safe place to live as they age; to reside in close

<sup>28</sup>Emrath, *supra* note 14.

<sup>29</sup>National Association of Home Builders, Senior Housing Facts (2003), available at <http://www.nahb.org/generic.aspx?sectionID=280&genericContentID=5436>.

<sup>30</sup>Retirement Living Information Center, “Senior Housing Market Faces Challenges and Opportunities,” in Retirement Living News (March 2000), available at <http://www.retirementliving.com/RLart47.html>.

proximity to a hospital and a doctor's office; nearby access to places of worship; and easy access to shopping centers, grocery stores, and drug stores.<sup>31</sup> An NAHB survey in 2000 revealed that the number one amenity seniors desire when looking for a place to live is walking or jogging trails.<sup>32</sup> The age group as a whole values outdoor space, public transportation, open space, lakes, outdoor pools, security guards at a gate, clubhouses, an exercise room, and a business center.<sup>33</sup>

These housing preferences are a good starting point for community boards to use in evaluating the desirability of applications to build senior housing. There are a number of different types of senior housing options, including simple modified homes to meet the physical challenges of aging, accessory dwelling units<sup>34</sup> and elderly cottage housing units (ECHO units), shared living arrangements, and co-housing. In addition, housing alternatives

that provide different levels of assistance and medical attention include, but are not limited to, continuum of care retirement communities, assisted living housing, dementia care facilities, and nursing homes.

### **Adopting Zoning Ordinances to Accommodate Senior Housing**

Local governments must, in addition to considering the aging population in comprehensive land use plan amendments, make modifications to their zoning ordinances to ensure adequate housing for this population group. Municipalities across the country have already begun to do this. One of the first drafting considerations is applicability, or who is to be included in the definition of "senior." Research indicates that municipalities have chosen different approaches rather than a standard definition. For example, a review of New York

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<sup>31</sup>Mathew Greenwald & Associates, Inc., *supra* note 19.

<sup>32</sup>National Association of Home Builders, *Most Popular Amenities for 55+ Home Buyers* (2003), available at: <http://www.nahb.org/generic.aspx?sectionID=280&genericContentID=6145>.

<sup>33</sup>Interestingly, the survey revealed that seniors do not put as much value on tennis courts, baseball, softball and soccer fields, billiard rooms, basketball courts, equestrian facilities, and daycare centers.

<sup>34</sup>American Association of Retired Persons, *Accessory Dwelling Units, Model State Act and Local Ordinance*, available at [http://research.aarp.org/consume/d17158\\_\\_dwell\\_\\_1.html](http://research.aarp.org/consume/d17158__dwell__1.html).

local zoning laws focusing on senior housing discloses that various municipalities have selected 55 and over, 60 and over, 62 and over, and 65 and over as the definition of "senior" for purposes of their municipal laws. Typically included in these definitions is the concept that at least one of the residents in senior housing must meet the age limitation in order for spouses, and perhaps significant others and other family members, to be allowed to reside in an age-restricted community as well.

The public purpose section of the senior housing zoning law/amendment is also a good way to let people know what the intended effect/impact of the law is. For example, the zoning ordinance for the Town of Smithtown, New York that creates a retirement community district identifies "an increasing need by persons of or nearing retirement age for reasonably priced dwelling accommodations in planned separate residential areas which will be inhabited by persons similarly situated."<sup>35</sup> Affordability was also a concern for

the Town of Westport in Connecticut, whose local law provides that it was enacted "to promote the public health, safety and general welfare of the community by providing decent, safe and sanitary housing units for elderly persons at *reasonable rents*, to assure housing facilities specially adapted for elderly persons as a public use in the public interest, and to allow multiple-family housing for elderly persons . . . subject to a special permit" (emphasis added).<sup>36</sup> This is consistent with the Golden Age District created by the Village of Massapequa, New York, whose approach was slightly different: "The intent of the Golden Age District includes the provision of *affordable owner-occupied housing for senior citizens* in the Village . . . with said housing located *on sites proximate to necessary facilities, services and transportation*" (emphasis added).<sup>37</sup> The Village of Walden, New York enacted a local law to allow for senior housing developments, indicating sensitivity to the desires of seniors for independence tied to the lo-

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<sup>35</sup>Zoning Ordinance, Town of Smithtown § 322-49 (1990).

<sup>36</sup>See "Cori Menkin, Senior Citizen Overlay Districts and Assisted Living Facilities: Different But the Same," 21 Pace L. Rev. 482 (Spring 2001), citing to Town of Westport Zoning Amendment #80 (1975).

<sup>37</sup>Local Law No. 4 of 1998 of the Village of Massapequa.

cation of proposed uses.<sup>38</sup> The purpose clause states “there is a need for housing projects located and designed to meet the special needs and habits of older people . . . to contribute to the dignity, independence and meaningful activity of older people[.] [Such housing,] if not properly located, constructed and maintained, may be detrimental to the general welfare[.]”<sup>39</sup> The Village of Briarcliff, New York established an eldercare community in recognition of “the need to enable and encourage flexibility of design and development of assisted living facilities in the Village . . . so as to provide opportunities for individuals to find housing with convenient care in appropriate locations within the village[.]”

Some municipalities have opted to provide more specific direction to ensure housing affordability for seniors. The local law creating the Town of Bedford, New York’s Housing for the Elderly District provides in part, “Because many of the elderly live on limited incomes, it is the intent . . . to provide the lowest cost hous-

ing possible in the district[.] [A]t least twenty percent of the dwelling units constructed . . . shall be middle-income dwelling units[.]”<sup>40</sup> The zoning law in the Town of Smithtown, New York requires that dwellings in its Retirement Community District “shall be made available at a cost to the tenants below prevailing rental costs in the Town . . . at the time of occupancy.”<sup>41</sup> Other tools can be used to provide affordable housing for seniors, including incentive zoning by identifying the need, and providing an incentive to developers to provide a certain amount of suitable housing in exchange for density bonuses.

### Using the Floating Zone

In furtherance of the goal of enabling flexibility to best meet the needs of the aging population, many municipalities have opted to use a floating zone. The benefit of the floating zone is that while it must be described in the zoning ordinance, it need not be assigned to a specific area in the municipality. The landowner/

<sup>38</sup>Local Law No. 4 of 1999 of the Village of Walden.

<sup>39</sup>*Id.*

<sup>40</sup>Zoning Ordinance, Town of Bedford § 125-29.5. EL Housing for Elderly District (1991).

<sup>41</sup>Zoning Ordinance, Town of Smithtown § 322-49 (1990).

developer simply requests permission to build a particular senior housing project when all of the criteria in the local law for the floating zone have been met. The use of this technique allows for the siting of senior housing anywhere it may be appropriate, rather than relegating the location to only one or two specific zoning districts or areas. Caution, however, must be used to ensure that the criteria are not overly restrictive so that they in essence prohibit the siting of senior housing. The Town of Warwick, New York uses the floating zone concept “to enable the Town Board to permit, on a case by case basis, senior housing that satisfies the need . . . where they will not detract from surrounding land uses[.]”<sup>42</sup> Warwick’s floating zone allows for two-family dwellings, town homes, apartments and congregate housing, or any combination thereof.<sup>43</sup> The zone also requires that there be reasonable access to public transportation, hospital and medical services, shopping, and drug stores.<sup>44</sup>

### **Special Use Permits for Senior Housing**

Another popular technique to accommodate various senior housing arrangements is the special use permit. Seniors are often empty-nesters. Their children have grown and moved out, and as the household ages, the occupants find less need for large homes with more rooms to maintain, and large outdoor lots to manage. Surveys consistently reveal that seniors are social and that they find safety and comfort in socializing and interacting regularly with their peers. The Town of Carmel, New York employs special use permits to accomplish some of these goals.<sup>45</sup> The zoning law authorizes the construction of multi-family dwellings for the elderly by special permit in all zoning districts in the Town.<sup>46</sup> Multi-family dwellings for the elderly are defined as buildings “containing three or more dwelling units all of which are occupied exclusively by persons fifty-five years of age or

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<sup>42</sup>Local Law No. 2 of 1992 of the Town of Warwick.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>Local Law No. 9 of 1998, Town of Carmel.

<sup>46</sup>*Id.*

older and the spouse[.]’<sup>47</sup> The conditions for the special use permit include location in or contiguous to a residential zone, and a density of no more than 40 dwelling units per acre and 150 dwelling units per development.<sup>48</sup>

The special permit can be an effective tool to ensure board review of certain specified criteria in a residential housing project that would be of particular need and community interest for seniors. Special permits can also be of limited duration, requiring review at certain intervals to make certain that any private company responsible for provision of specified services or amenities is living up to its responsibilities.

### **Accessory Units, Elder Cottages and ECHOs**

Accessory dwelling units, also referred to as “granny flats,” elder cottages, and ECHO units, are typically unattached units located in close proximity to a main dwelling unit. These accessory dwelling units typically have their own

kitchen, bedroom, and bathroom space, allowing for privacy and independent living very close to a family member or caregiver. Sometimes, an accessory dwelling unit can be defined as an attached apartment, as opposed to a detached building. Lawyers and other drafters should be careful to clearly articulate definitions and desired distinctions in local zoning laws. Municipal approaches to these types of housing arrangements range from broad authorization to very specific and prescribed time frames and dwelling occupants. For example, the Town of North Hempstead, New York allows for a temporary “mother-daughter” residence where the accessory apartment tenant and the primary residence owner are related.<sup>49</sup> To ensure compliance with this condition, the Village requires that the special use permits be renewed every two years. By doing this, and by requiring proof of residency, the Village is better able to ensure that the apartment is not being rented to

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<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Brar and Holohan, *Housing Alternatives for an Aging Population* (Government Law Center of Albany Law School) (May 1999) at 52, citing Scully, “Making Room for Renter,” *Newsday* (June 26, 1998).

someone who does not fit the intended profile.<sup>50</sup>

Elder cottages, while also referred to as accessory dwelling units, are by definition separate, detached, and typically temporary one-family structures that are accessory to a one- or two-family home on the same lot. These cottages, also called ECHOs (Elder Cottage Housing Opportunity), are basically small homes for the elderly. According to the AARP, elder cottages can be purchased for approximately \$25,000.<sup>51</sup> A major benefit from a community character perspective is that these units can be removable. The Town of Ithaca, New York regulates elder cottages by means of special permits. Conditions for permits include use limitations, dimensional limitations, location limitations, and a requirement of annual review and re-approval.<sup>52</sup> The Town of Wawayanda, New York allows for ECHO units and requires

site plan approval through the zoning ordinance.<sup>53</sup> In addition to annual review of the special permit, the Town requires the posting of a certified check or irrevocable letter of credit to ensure that the ECHO unit will be removed upon termination of the special use permit.<sup>54</sup> Requiring such security up front signals not just to the property owner, but also to the neighborhood, that this accessory use is an important temporary social amenity that will cease to exist when the intended occupant is no longer residing in the unit. It is a powerful tool that makes the use of these cottages more palatable in all types of communities.

### **High-End Housing for the Active Seniors**

While a substantial portion of this column focuses on affordable housing and housing to meet the needs of those who may require more care and attention, the NAHB reports do

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<sup>50</sup>For more detailed discussion of accessory dwelling units for seniors, see, Cobb, Zoning for Accessory Dwelling Units, Zoning News (American Planning Association, Jan. 1997).

<sup>51</sup>American Association for Retired Persons, Housing Options for Older People, available at <http://www.aarp.org/confacts/housing/housingoptions.html>.

<sup>52</sup>Local Law No. 5 of 1995, Town of Ithaca, "To Amend the Zoning Ordinance to Permit the Placement of Elder Cottages in Residential Districts."

<sup>53</sup>Zoning Ordinance, Town of Wawayanda § 5.20 (1991).

<sup>54</sup>*Id.*

indicate that there is a growing segment of healthy, wealthy seniors who are looking for very different types of housing. Many people age 55 and older are purchasing second homes, and many aging baby boomers are retiring early and searching for housing communities with attractive amenities. Municipalities must also make sure that this segment of the market has choices and the ability to “age in place” in the community or region where they have lived.

### **Other Legal Considerations**

Both the 1988 Federal Fair Housing Act Amendments (FHAA) and the Americans with Disabilities Act (ADA) mandate local government compliance through planning and zoning decisions that could impact senior housing related decisions. For example, the FHAA was used successfully in the Third Circuit to prevent

housing discrimination after an application for a variance to build a nursing home was denied.<sup>55</sup> It was also successfully employed in the Fifth Circuit where a request for special zoning accommodations was to allow the operation of a group home for Alzheimer’s patients in a residential district.<sup>56</sup> In a recent case, the Second Circuit found no violation of the FHAA where it was alleged that proposed senior housing would have a disparate impact on the non-white areas of the town, the court relying in part on the fact that the developer was required to make a contribution of \$2.5 million for affordable housing in other areas of the Town.<sup>57</sup> Other courts have found no violation of the FHAA where denials for exemptions to house additional elderly persons in a group home raised parking concerns,<sup>58</sup> and where a denial of a 95-bed facility for the elderly was denied based upon traffic safety issues, including inade-

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<sup>55</sup>Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 17 A.D.D. 817 (3d Cir. 1996).

<sup>56</sup>Groome Resources Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192 (5th Cir. 2000).

<sup>57</sup>Fair Housing in Huntington Committee Inc. v. Town of Huntington, N.Y., 316 F.3d 357 (2d Cir. 2003).

<sup>58</sup>See Bryant Woods Inn, Inc. v. Howard County, Md., 911 F. Supp. 918, 14 A.D.D. 1039 (D. Md. 1996), where the court also noted the fact that vacancy rates in assisted living facilities in the area were at 18-22%.

quate access for emergency vehicles.<sup>59</sup>

The ADA provides in part, “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>60</sup> Although initially there was some doubt as to the applicability of this language to zoning decisions, this question has since been answered in the affirmative.<sup>61</sup> This means that requests by seniors for variances to allow for ramps to provide access or entry to their homes must be granted as a reasonable accommodation where a disability is demonstrated. Other types of building accommodations may also be required to meet these needs.

Another federal law, the Housing for Older Persons Act

of 1995 (HOPA), also applies to discrimination in housing.<sup>62</sup>

In 2003, Congress introduced yet another piece of legislation aimed at addressing the senior housing crisis. The LEGACY Act of 2003 (Living Equitably: Grandparents Aiding Children and Youth Act of 2003) directs the Secretary of the Department of Housing and Urban Development to implement a demonstration program “to provide assistance for intergenerational dwelling units for intergenerational families in connection with the supportive housing program under section 202 of the Housing Act of 1959.”<sup>63</sup> The bill would also amend the Cranston-Gonzales National Affordable Housing Act to include cottage housing opportunities installed adjacent to existing 1- to 4-family dwellings that are occupied by children who are members of covered families.<sup>64</sup>

<sup>59</sup>See *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Tp. of Scotch Plains*, 284 F.3d 442 (3d Cir. 2002).

<sup>60</sup>42 U.S.C.A. § 12132.

<sup>61</sup>See, e.g., *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 23 A.D.D. 197, 7 A.D. Cas. (BNA) 1284 (2d Cir. 1997).

<sup>62</sup>For a discussion of HOPA see Panjwani, “Housing for Older Persons Act of 1995,” 5 J. of Afford. Housing 197 (1996) and Cashmore, Weiss, and Yots, “Housing for Older Persons: Providing for a Graying America or Unlawfully Excluding Balance?” 6 J. of Afford. Housing 212 (1997).

<sup>63</sup>H.R. 2592.

<sup>64</sup>*Id.*

## Conclusion

The goal of this column is to spur spirited discussion at the local level on the subject of planning for an aging community. If the column makes only two points, they are: (1) The 2000 census data proves that the 65-and-over population is the fastest growing segment of society, signaling a strong need to quickly start planning for future changes in our neighborhoods and communities; and (2) There are so many creative options available to meet the challenge of providing decent, safe, affordable and desirable senior housing that municipalities have no choice but to begin the dialogue on housing the aging population. The most obvious undercurrent in all of this, and perhaps what makes the case even more compelling, is regardless of gender, race, and socio-economic status, we share at least one common feature—we are all aging. Planning for the aging population benefits the elderly, their children, and society as a whole. Take this article to your next planning and zoning commission meeting, or to the next meeting of your local legislative body, and begin planning for tomorrow today.