



WESTPORT CONNECTICUT

OFFICE OF THE
TOWN ATTORNEY

To: Planning & Zoning Commission

From: Ira Bloom, Town Attorney *I.W.B.*
Gail Kelly, Assistant Town Attorney *G.K.*

Date: March 3, 2010

Re: Text Amendment #625/ Appl.# 11-001

PRELIMINARY SUMMARY:

Our office has been asked the questions below as a result of a discussion during the Planning and Zoning Commission's public hearing on whether preferences for Westport residents could be implemented in connection with the development of affordable senior housing which includes a skilled nursing facility. The answer is "yes". Preferences are permitted under the law but they must be implemented in a way that does not violate the law against discrimination, whether that law is the Fair Housing Act, the tenant selection rules of a particular state or federal funding source, the state laws prohibiting discrimination against a person based upon such person's ability to pay, or any other applicable state or federal law or regulation governing admissions procedures for continuing care facilities of this nature.

Text amendment # 625 addresses, among other things, the development of a Senior Residential Community which may include Independent Living Facilities, Assisted Living Facilities and Full Care Living Facilities (as those terms are defined). Two of the components are residential and the third is a skilled nursing facility which may or may not be considered a residence in all cases because of the short term healthcare services. The questions and responses

are separated accordingly.

As part of our research we reviewed the Fair Housing Act (“FHA”), the laws governing Health Care Institutions under Chapter 368v of the Connecticut General Statutes; Regulations of Connecticut State Agencies applicable to nursing homes, in particular Section 17-311-209 (governing admissions to nursing homes which receive payments from the state); and relevant sections of the Department of Housing and Urban Development (“HUD”) Occupancy Handbook. We also consulted with a number of attorneys with expertise in this area as well as administrators of comparable facilities. It is clear that facilities with a skilled nursing component are highly regulated by a variety of laws, including, but certainly not limited to, the FHA. But it is also clear that preferences are allowed as long as they are imposed in a manner consistent with the laws.

We found that comparable facilities which comply with these laws do primarily attract and serve members of their own community. As our governing bodies look at these issues, they should be reassured that both the law and practical realities of how these critical life choices are made will permit these facilities to primarily serve the Westport community.

QUESTIONS:

a) May the Independent Living and Assisted Living facilities have a preference for Town residents?

The answer, to repeat, is “yes.” However, the administration of the preference must be consistent with the Constitution and civil rights laws. Title VIII and Title IX of the Civil Rights Act of 1968, commonly called the Fair Housing Act, governs. The Act applies to discrimination based on race, color, religion, sex, handicap, familial status, or national origin. The FHA prohibits discrimination in various transactions having to do with dwellings. The term

“dwelling” includes any building occupied or intended to be occupied as a residence. This is not a new law and, in fact, it is one which the town has dealt with before.

The specifics of the administration of a residency preference will vary depending upon what, if any, state or federal funding sources are used to build the housing. Those specifics cannot be determined at this time. However, as an example, for developments that obtain funding from HUD, owners must receive HUD approval in order to impose a residency preference, and HUD will approve of the preference only if it does not result in discrimination. The Connecticut Department of Economic and Community Development requires recipients of state financial assistance to create an affirmative fair housing marketing plan. In this case, applicants are required to identify the group(s) "least likely to apply" for the housing through the submission of relevant demographic data and to reach out to those groups through marketing in media targeted to that population—audience-specific newspapers, television, radio stations, community contacts.

b) May the “Full Care Living Facility” (a.k.a. skilled nursing facility) have a preference for Westport residents?

The answer is also “yes”. Section 17-311-209 of the Connecticut State Regulations sets forth several exceptions to the rule that applicants to a nursing home must be admitted in the order in which their names appear on a waiting list. Two of the exceptions relate to residency preferences. Section 17-311-209 (15) states that a facility may admit applicants other than in the order in which they appear on the waiting list if “ [A] municipality owned and operated facility with residency requirement with resident applicants admitted in the order in which their names appear on the waiting list”. Section 17-311-209 (19) states that an applicant may be admitted out of order if “(19) The facility is owned or operated by a non-stock, non profit corporation exempt

from taxation for federal income tax purposes which (1) provides now and provided in its original charter or certificate of incorporation that it is established for the benefit of the municipality in which it is located, and (2) receives financial assistance through grants or donations from the municipality in which it is located and/or the residents thereof, provided that all applicants who are residents of such municipality are admitted in the order of application without regard to their source of payment...”

To conclude, after speaking with several representatives from agencies which provide skilled nursing facilities for seniors (one of the components of the proposed text amendment) and which comply with the laws and regulations applicable to their agency insofar as admissions and preferences is concerned, the overwhelming response was that the reality of how people make the decision of where to live and where to get healthcare results in an overwhelming percentage of local residents living in or taking advantage of the healthcare services of a local facility. Comparable facilities which comply with the laws do attract and serve members of their community.

cc. Gordon F. Joseloff, First Selectman
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