The Fair Housing Act Amendments and Age Restrictive Covenants in Condominiums and Cooperatives

Nicole Napolitano
THE FAIR HOUSING ACT AMENDMENTS
AND AGE RESTRICTIVE COVENANTS IN
CONDONMINIUMS AND COOPERATIVES

Residential associations in condominiums and cooperatives have been described as "mini-government[s]," "residential private governments," and even as "quasi-government[s]—'... little democratic sub societ[ies] of necessity.'" These descriptions are due in part to the associations' broad powers over structural changes, as well as the ability to regulate the lives of both its

---


3 Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1320 (N.Y. 1990) (quoting Hidden Harbour Estates v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975)). The courts have generally used four different standards of review to evaluate residential board decisions. These include: the constitutional review, the equitable reasonableness standard, the business judgment rule, and a review based upon a consensual contract theory. See Lewis A. Schiller, Limitations on the Enforceability of Condominium Rules, 22 STETSON L. REV. 1133, 1140-51 (1993) (pointing out the need to turn to case law to find a basis for invalidating board decisions due to a lack of statutory authority); Judicial Review, supra note 1, at 656-66 (explaining that the tradition of likening property law to the limitation of land use agreements proves unworkable in the condominium concept because careful planning ensures that property law requirements are satisfied and this concern is the reason for the evolution of different standards of review); Residential Associations, supra note 2, at 475-90 (discussing the policies underlying the different standards of review); see also Richard Siegler, 'Levandusky' Revisited, N.Y. L.J., Mar. 4, 1998, at 3 (noting that the business judgment rule is so broad that the residential association’s judgment has been upheld against almost any challenge).

4 Residential associations run the daily operations of the community, regulate finances, adopt and amend restrictive covenants and regulations, institute or defend litigation, tax residents, and regulate such items as pets, parking spaces, and structural alterations through a democratic processes used to make decisions. See WARREN FREEDMAN & JONATHAN B. ALTER, THE LAW OF CONDOMINIA AND PROPERTY OWNERS’ ASSOCIATIONS 23-26 (1992) (defining the homeowner's association and contrasting it with community association management); THOMPSON, supra note 1, at § 36.08(a) (explaining the duties of a condominium residential association); Schiller, supra note 3, at 1137 (discussing the powers allocated to the residential association and the function of the executive board); see also Louise Hickok, Note, Promulgation and Enforcement of House Rules, 48 ST. JOHN'S L. REV. 1132,
members and prospective purchasers. Various covenants included within the by-laws or the lease enable these associations to determine who may be future members and exclude those they find undesirable. It has long been recognized that cooperative and condominium owners should, absent discrimination, decide for themselves whom they choose to live near and share their responsibilities. These restrictive covenants ensure that a prospective purchaser is compatible with the other members, as well as with the objective character of the community, e.g., adults only. However, these covenants have established a broad

1136-43 (1974) (discussing the residential association's control over alterations made by residents, their use of appliances, owning pets, and nuisances).

See Stewart E. Sterk, Minority Protection in Residential Private Governments, 77 B.U. L. Rev. 273, 277 (1997) (suggesting that residential associations have the ability to control lifestyles and allocate benefits and burdens to its members through the powers granted by the governing documents).

See Weisner v. 791 Park Ave. Corp., 160 N.E.2d 720, 722-24 (N.Y. 1959) (holding that the plaintiff was not entitled to assign his shares of stock in the defendant corporation because he did not receive the written consent of the board of directors, managing directors, or by lessees owning at least two-thirds of the stock in the corporation, which was required under the lease but was withheld without explanation). This decision is said to have given absolute discretion to associations to approve or disapprove prospective purchasers. See Patrick J. Rohan, Condominiums and the Consumer: A Checklist For Counseling The Unit Purchaser, 48 St. John's L. Rev. 1028, 1057 & n.89 (1974); see also Bachman v. State Div. of Human Rights, 481 N.Y.S.2d 858, 860 (App. Div. 1984) (noting that the board of directors in a cooperative apartment house has the “contractual and inherent power to approve or disapprove the transfer of shares and the assignment of proprietary leases”) (quoting Goldstone v. Constable, 443 N.Y.S.2d 380, 381 (App. Div. 1981)).

“[C]ondominium living is unique and requires a greater degree of control over and limitation upon the rights of the individual owners . . . .” Scott E. Mollen, Condominiums: Prohibition on Leasing Condominium Units is Not Unreasonable Restraint on Alienation, N.Y. L.J., Mar. 25, 1998, at 5 (quoting Four Brothers Homes at Heartland Condominium II v. Gerbino, Index No. 11623/97 (N.Y. Sup. Ct. Feb. 18, 1998) (allowing for blanket prohibition against leasing in condominium unit)). There is also no sympathy for the unit owner who cannot sell his unit to a family with children. See Covered Bridge Condominium Ass'n v. Chambliss, 705 S.W.2d 211, 213 (Tex. App. 1985) (noting that residents must accept the obligations of condominium regulations as well as the benefits).

See Stephen M. Golant, Housing America's Elderly 30 (1992) (pointing out that the dominant concern among condominium and cooperative owners or renters are the neighbors and whether they are socially compatible, loud, or clean (e.g., living next to someone with an noxious housing unit)); see also Mollen, supra note 6 (recognizing that a condominium association has the right to promote the objective character of the community through a blanket prohibition against leasing because of the lack of desire to live near a renter who might be careless in maintaining the unit and common areas); Sterk, supra note 5, at 322 (noting that because residential associations' actions are based on promoting the residential character of the common interest community, rentals may be prohibited for fear that lessees will not main-
reach because housing discrimination has always been difficult to prove.\(^6\)

One of the more controversial covenants is the age restrictive covenant.\(^9\) Although age discrimination exists when a family is rejected from a condominium or cooperative because of its children,\(^10\) this restriction had survived numerous attacks on its validity.\(^11\) This resulted from society's failure to attach any

\(^6\) See Iver Peterson, As Co-ops Spread, Discrimination Concerns Grow, N.Y. TIMES, Feb. 25, 1990, § 10, at 1 (citing that the chief of New York City's Commission on Human Rights believes that cooperative board members can easily discriminate against prospective purchasers because they "can hide behind the shared values system of one another"); James C. McKinley Jr., Panel Accuses Co-op of Violating Inheritance Rights in a Gay Partnership, N.Y. TIMES, June 12, 1992, at B3 (stating that it would be hard to prove that a cooperative association discriminated against a potential resident because of sexual preference due to the "enormous discretion" that such associations are afforded by law) (quoting Betsi Gertz, attorney for the New York City Human Rights Commission); Benjamin Weiser, A Co-op Must Pay $640,000 For Denying Sublet to Black, N.Y. TIMES, May 14, 1997, at A1 (reporting that critics of cooperative associations argue that racial discrimination often occurs by cooperatives but is too difficult to prove because of the associations' power to reject or accept applicants arbitrarily and without explanation); see also Barbara B. Buchholz, The Home Stretch: How to Make Sure Your Deal's a Deal, CHI. TRIB., May 23, 1997, § 8, at 1 (noting that the cooperative board's discretion is so broad it can reject any applicant without offering a reason).

\(^9\) Other covenants, which enable the association to control occupancy in the condominium or cooperative, include a right of first refusal or the right of the board to withhold consent prior to the sale. See Di Lorenz, supra note 7, at § 6.01. However, these covenants might not be as successful in attempting to block potential sales or leases. See id. at §§ 6.02[3][a][i], 6.02[2][a] (discussing whether consent by the board can be arbitrarily denied); see also Rohan, supra note 6, at 1057 (noting that a right of first refusal will rarely be exercised due to the fact that the purchase price would have to be raised via an assessment against the other unit owners).

\(^10\) Condominiums or cooperatives have also excluded children through restrictive covenants that limit the number of occupants in a housing unit. See, e.g., United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1360 (D. Haw. 1995) (finding such a covenant to be a "prima facie violation of the [FHAA]"); Fair Hous. Council v. Ayres, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (asserting the Act has been violated by imposing occupancy restrictions regardless of the intent behind them); United States v. Lepore, 816 F. Supp. 1011, 1023 (M.D. Pa. 1991) (finding a violation of the FHAA where there was a two person occupancy limit).

\(^11\) See Di Lorenz, supra note 7, at §§ 7.01-7.06 (noting that the restrictive covenant has been upheld despite challenges that it is unconstitutional, an unreasonable restraint on alienation, violative of state civil rights legislation, or simply unreasonable). See, e.g., Ritchey v. Villa Neuva Condominium Ass'n, 146 Cal. Rptr. 695, 698 (Ct. App. 1978) (finding reasonable restraint on alienation); White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 352 (Fla. 1979) (upholding constitutionality of an age restriction); Hill v. Fontaine Condominium Ass'n, 334 S.E.2d 690,
“moral stigma” to housing discrimination against children.  

In 1988, Congress finally amended the Fair Housing Act (“FHA”) to include protection against housing discrimination to those with familial status. With its passage, adult-only communities are prohibited, unless they qualify as housing for older persons. This Note will focus on the Fair Housing Act Amendments (“FHAA”) of 1988 and 1995 and how they apply to cooperatives and condominiums with respect to discrimination against families with children. Part I will discuss the FHAA of 1988 and 1995 and the history of the exemption provided for communities qualifying as “housing for older persons.” Part II will analyze the broad application of the FHAA to condominiums and cooperatives. Finally, Part III will briefly offer some reasons why senior-housing communities should be allowed to enforce restrictive covenants against families with children.

I. THE FAIR HOUSING ACT AMENDMENTS OF 1988 AND 1995

The FHA originally was enacted in 1968 to provide for protection against discrimination based upon race, color, religion, or national origin.  


12 See James A. Kushner, The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing, 42 VAND. L. REV. 1049, 1097-98 (1989) (noting that society justified this type of discrimination on the basis that it was visible through advertisements or covenants, thereby informing the victimized families of the reason they were denied residency).


14 See City of Edmonds v. Oxford House, Inc. 514 U.S. 725, 728 n.1 (1995) (discussing the inclusion of sexual discrimination under the FHA via the enactment of section 808(b) of the Housing and Community Development Act of 1974, 88 Stat. 729 (1974)); see also Deer Hill Arms II Ltd. Partnership v. Planning Comm’n, 686 A.2d 974, 977 (Conn. 1996) (describing the history of the Act, the policies behind the implementation of the Act, as well as subsequent amendments enacted to further
and, in 1988, its scope was further expanded to protect both the disabled and persons with familial status.\footnote{15 See 42 U.S.C. § 3604 (1994); see also United States v. Branella, 972 F. Supp. 294, 297 (D.N.J. 1997) (noting that the FHA of 1988 "accorded families broad protection—essentially as much as racial minorities and other groups protected by Title VII"); Arc of New Jersey, Inc. v. New Jersey, 950 F. Supp. 637, 642 (D.N.J. 1996) (noting that the FHAA was illustrative of the nation's commitment to end the exclusion of disabled persons from the mainstream of American life).}

Prior to the FHAA, neither the states nor the federal government provided effective relief to condominium and cooperative applicants who were being rejected because they had children.\footnote{16 See H.R. REP. No. 100-711, at 19 (1988), reprinted in 1998 U.S.C.C.A.N. 2173, 2180.} Although sixteen states recognized that families with children were being denied housing, the state laws were not effective remedies.\footnote{17 See id. These states included Arizona, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia. See id. & n.34. However, there was no consistency among the state laws. Arizona, Rhode Island, and Virginia exempted from its anti-discrimination laws housing with an occupancy limitation to those persons 18 or older. See id. & n.35. Maine, Massachusetts, and Minnesota allowed the segregation of families within a complex. See id. & n.36. New Hampshire and Michigan exempted retirement communities that had low entrance ages (45 and 50, respectively). See id. & n.37. Further, "New Jersey and Illinois protect[ed] only children under 14." Id. at 19. Finally, "[o]nline states cover[ed] only rental and not sale housing." Id. at 19 n.38.}

For example, before the FHAA, an age restrictive covenant allowed a condominium association to seek the eviction of a family with a nine-year old child.\footnote{18 See Jeanne DeQuine, Condo Wants Child Out: Her Family Hopes To Sell Home First, U.S.A. TODAY, Jan. 3, 1989, at 03A, available in 1989 WL 6234415 (describing the association's efforts to evict a child who was forced to move into the condominium with her father because her mother had died).}

"Familial status" under the FHAA extends protection to those persons under the age of eighteen who are domiciled with a parent, legal custodian or someone designated by them.\footnote{19 See id. There is now federal protection for adults with children and protection from gender discrimination, but there is no protection under the FHA for homosexuals who are denied housing by a residential association because of their sexual preference. See Richard Siegler Homosexual Discrimination: Sublet Policies, N.Y. L.J., May 1, 1991, at 3 (noting that homosexuals must rely on state and local laws for relief). There is also no federal protection based upon marital status. See Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of certiorari) ("[T]here is ... no 'firm national policy' against marital status discrimination in housing decisions" and there has never been any "heightened scrutiny" under the Constitution for housing discrimination based upon marital status) (quoting Bob Jones Univ. v. United State, 461 U.S. 574, 593 (1983)).} It also
extends to pregnant women and those in the process of securing legal custody of a child less than eighteen years of age. The FHAA does not provide protection against housing discrimination based upon any age, but only against families with children.

"Discrimination is particularly tragic when it means a family is refused housing near good schools, a good job, or simply in a better neighborhood to raise children." Congress recognized that the United States has a policy of protecting children and families by noting that families are "perhaps the most fundamental social institution of our society." Two national surveys conducted by the Department of Housing and Urban Development ("HUD") persuaded the government to provide housing protection to children. One survey showed that twenty-five per-

21 See Town of Northborough v. Collins, 653 N.E.2d 598, 599 (Mass. App. Ct. 1995) (questioning whether the eviction of a couple in their thirties from a condominium can be brought under the FHAA); see also 141 CONG. REC. H14967 (daily ed. Dec. 18, 1995) (statement of Rep. Frank) (recognizing that "if you are housing open to anybody, if you are housing open for people in their 20's, 30's, 40's, you may not discriminate against children").

However, children still are not protected to the full extent of the law as compared with adults. See id. at 364-65 (describing the disparity of fundamental right protection between adults and children as illustrated through the enforcement of juvenile curfews). Before the 1988 amendments to the Fair Housing Act, there was little development of equal protection of children in the housing context. See Michael P. Seng, Discrimination Against Families With Children and Handicapped Persons Under the 1988 Amendments To the Fair Housing Act, 22 J. MARSHALL L. REV. 541, 542 (1989). This limitation has been based upon the assertion that children are incapable of mature, socially-acceptable behavior. See DeLucia, supra, at 364.

24 See JANE G. GREENE & GLENDA P. BLAKE, U.S. DEPT OF HOUSING & URBAN DEV., HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN
cent of all rental units did not allow children. Furthermore, fifty percent were subject to restrictive policies that limited the ability of families to live in those units; almost twenty percent of the families surveyed were living in homes they considered less desirable because of these restrictive practices. Apparently, Congress did not approve of those age restrictions set forth by residential associations intended to exclude children from condominiums and cooperatives.

Critics of the FHAA argued that the Act violated the right to privacy by requiring that all housing communities open their doors to children. However, there is no affirmative duty upon residents to invite children into their own homes. It was also believed that the authorities would not provide as much support nor as many resources to combat this discrimination as they would in cases of racial or ethnic discrimination. Subsequently, many feared that the protection given to families with children would divert resources from the Act's fundamental purpose of prohibiting race, sex, and ethnic discrimination.


An added incentive to provide protection to families with children is that it also strengthens the fight against racial discrimination. See H.R. Rep. No. 100-711, at 21 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2182. Statistics show that minority households have a larger percentage of children. Additionally, a national survey conducted by HUD showed that housing units in predominately white neighborhoods contain restrictive covenants against children at a rate of 11.4% more than those in predominately black communities. The final result is to effectively minimize the potential for minority families to move into those neighborhoods. See id. But see Note, Why Johnny Can't Rent—An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing, 94 Harv. L. Rev. 1829, 1836-37 (1981) (suggesting that uniformly applied restrictive covenants probably do not provide an effective way to discriminate against minorities because too many families have white male householders to make such a practice an effective “smokescreen”) [hereinafter Why Johnny Can't Rent].

See id. at 51-53; see also id. at 54-59 (revealing the reasons why persons without children will either select housing to avoid them or move if families with children are allowed occupancy).

See Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1036 (11th Cir. 1992) (upholding the FHAA against a constitutional attack alleging a violation of the privacy right, and reasoning that the right to privacy does not include the right to control whether families with children can move next door). See infra notes 62-67 and accompanying text for a discussion of other claims of unconstitutionality.

See Seniors Civil Liberties Ass'n, 965 F.2d at 1036.

See Kushner, supra note 12, at 1097-98.

See id.
Congress did not believe that all housing that excludes children constitutes a discriminatory practice.\(^{31}\) Thus, appreciating the preference of many senior citizens to live in retirement communities without children, the FHAA exempted from its scope "housing for older persons."\(^{32}\) This exemption protected the rights of seniors to choose to live in communities with people their own age.\(^{33}\)

Under the legislation, a housing unit could qualify for this exemption in one of three ways. First, the unit could qualify if it was a state or federally-funded housing project that was "specifically designed and operated to assist elderly persons."\(^{34}\) The second qualification could be satisfied by those housing communities intended for persons at least sixty-two years of age and occupied solely by them.\(^{35}\) Third, a community could qualify if it was "intended and operated for occupancy by at least one person fifty-five years of age or older per unit."\(^{36}\)

For a housing facility to qualify for exemption under the third method, it was required to meet three additional criteria. First, such housing had to offer "significant facilities and services specifically designed to meet the physical or social needs of older persons."\(^{37}\) Second, at least eighty percent of the units had


\(^{34}\) 42 U.S.C. § 3607(b)(2)(A).


\(^{37}\) 42 U.S.C. § 3607(b)(2)(C)(i) (1994), amended by 42 U.S.C. § 3607(b)(2)(C)(i) (Supp. 1998). If a housing provider found it impracticable to provide "significant facilities and services" then it could still qualify for the exemption through the third exemption if it were shown that "the provision of such facilities and services [was] not practicable, [and] that such housing [was] necessary to provide important housing opportunities for older persons." Id. The amendment no longer includes this provision. See 42 U.S.C. § 3607(b)(2)(C) (Supp. 1998). "This alternative was created for 'those unusual circumstances where housing without such facilities and services..."
to be occupied by someone who was a minimum of fifty-five years of age. Third, the manager or owner of the housing complex was required to publish and adhere to policies and procedures demonstrative of an intent to provide housing for persons of at least fifty-five years of age.

However, the "significant facilities and services" standard produced many problems for retirement communities trying to qualify for the "housing for older persons" exemption. There were no clear regulations describing what type of facilities and services were needed. Residents considering selling their units were uncertain which applicants they could accept or reject because they did not know whether their condominium or coopera-

provides important housing opportunities for older persons. Secretary ex rel. Lawson v. TEMS Ass'n, No. HUDALJ 04-91-0064-1, 1992 WL 400528, at *11 (H.U.D. Apr. 9, 1992) (quoting 134 Cong. Rec. S10456) (daily ed. Aug. 1, 1988); see also Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3257 (1989) (providing guidance for the interpretation of the exemption based upon statements of Representative Edwards asserting that the exemption is not to be interpreted broadly and will not be satisfied merely because services and facilities are expensive or impracticable).

See 42 U.S.C. § 3607(b)(2)(C)(ii) (1994), amended by 42 U.S.C. § 3607(b)(2)(C)(i) (Supp. 1998). There were several purposes recognized by Congress in allowing 20% of the units to be occupied solely by persons under the age of 55. One purpose was to protect those persons younger than 55 when a spouse or other member of the household over the age of 55 dies or leaves the unit. See Implementation of the Fair Housing Act of 1988, 54 Fed. Reg. 3232, 3255 (1989) (considering the legislative history of the provision and reviewing the opinions of commentators). It also protects incoming households, including, for example, those under the age of 55 who inherit a condominium from a loved one. See id. However, practical concerns preclude an owner from setting aside exactly 20% of the units. See id. Were an owner to attempt this, a significant risk of losing the exemption would arise if the over-55 resident in one of the units died, leaving only person(s) under the age of 55. See id.

See 42 U.S.C. § 3607 (b)(2)(C)(iii) (1994), amended by 42 U.S.C. § 3607 (b)(2)(C)(ii) (Supp. 1998). The only way the housing facility may be occupied by persons who fail to meet the age requirements and still qualify for the "housing for older persons" exemption is if those occupants lived in the complex prior to September 13, 1988, and if the new occupants meet the restrictions. See 42 U.S.C. § 3607(b)(3)(A); see also Harry Wood, "For Sale" Signs Can Be Nixed, St. Petersburg Times, June 4, 1989, at 4H, available in 1989 WL 6605353 (describing residents not subject to the Act because of their occupancy prior to this date as "grandfathered"). Furthermore, unoccupied units may qualify for the exemption if they are reserved for persons who meet the age restrictions. See 42 U.S.C. § 3607 (b)(3)(B).

See S. REP No. 104-172, at 2-3 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 779-80 ('For the last 7 years, it has been unclear what the phrase 'significant facilities and services' means. The Department of Housing and Urban Development (HUD) regulations have not been sufficiently clear or helpful.'.)
tive was exempt from the statute. "Nobody, including the Government, [could] figure out what the phrase 'significant facilities and services' mean[t]."

The absence of clear regulations by HUD resulted in a narrow construction of the exemption. In an effort to prevent housing discrimination, there was a consistent belief that "[e]xemptions from the Fair Housing Act [were] to be construed narrowly." An investigation conducted by the legal counsel of the American Association of Retired Persons (AARP) proved that no housing facility had qualified for the exemption when asserted as a defense against a claim of housing discrimination.

---

41 See, e.g., Judy Garnatz, Condominium Owner Can Challenge An Age Requirement, ST. PETERSBURG TIMES, Oct. 3, 1990, at 4, available in 1990 WL 8079102 (advising a condominium owner that his only recourse was to challenge the age requirement); Harry Wood, Only Courts Can Rule On Age Bias Series: Condominiums, ST. PETERSBURG TIMES, July 23, 1989, at 12H, available in 1989 WL 6792144 (illustrating the uncertainty of condominium owners in this regard by having to answer a resident's questions as to whether his cooperative was exempt from the Act); see also Walt Albro, Danger Zone: 55 and Older, TODAY'S REALTOR, Apr. 1, 1996, at 26 (noting that the confusion was a problem for realtors in areas with high concentrations of elderly and age-restrictive homes).


43 Age-restricted condominiums also were having trouble securing the exemption because the age and status of their residents were continuously changing, with the result that residents would be eligible one year, but not the next. See Andree Brooks, Condo Age Limits Running Into Problems, STAR TRIB. NEWS (Minneapolis-St. Paul), Dec. 29, 1990, at 3R, available in 1990 WL 5351905. Less than 25% of the age-restricted condominiums were qualifying for the exemption. See id.

44 Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1475 (11th Cir. 1993) (considering the minimum 16-year age-requirement of a Florida residential community); see also United States v. City of Hayward, 36 F.3d 832, 837 (9th Cir. 1994) (concluding that the "significant facilities and services" requirement would not be satisfied if the community's only service, specifically-tailored to the needs of seniors, was visits by health care officials); Elliott v. City of Athens, 960 F.2d 975, 978-79 (11th Cir. 1992) (noting that of the few courts that had considered the exemption, none had found the amendments to be applicable), abrogated on other grounds by City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995); Housing for Older Persons; Defining Significant Facilities and Services; Proposed Amendments, 59 Fed. Reg. 34,902, 34,903 (1994) (expressing the Department's belief that the FHA "impose[d] a strict burden," that required all claimants of the exemption to "provide credible and objective evidence").

45 See H.R. REP. NO. 104-91, at 4-5 (1995); see also S. REP. NO. 104-172, at 9 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 785 (views of Sen. Kyl) ("[I]lawyers could not find a single instance in which a senior community was able to defend successfully against a challenge to its exempt status . . . [t]his was not supposed to be an impossible test but to sort out the facilities that were really for older persons..."
This had the potential to destroy many of the nation's 26,000 age-restricted condominiums. Furthermore, it resulted in severe financial problems for some board members because some residential associations did not cover their members for personal liability.

HUD attempted to define "services and facilities" with a non-exclusive list. The list, however, provided only minimum guidance because it focused on services and facilities for the disabled. Commentators began questioning whether housing communities without services and facilities for the disabled could qualify for the exemption. Both the federal courts and administrative law judges ("ALJs") began equating "older living" with...
debilitation. The services and facilities had to be "designed, constructed, or adapted to meet the particularized needs of older persons." The fact that a community was not designed for children did not automatically qualify it as "housing for older persons." It could not satisfy the exemption if it merely provided amenities that any housing community could provide to its residents.

For example, in *Secretary ex rel. Bellfy v. Ocean Parks Jupiter Condominium Ass'n*, a condominium complex could not...
qualify as "housing for older persons" because it was not aimed at providing amenities for the elderly. Wheelchair ramps were provided, but they were not available for individual units in the condominium, and the bathrooms were not accessible to the disabled. Sidewalks were not provided throughout the community and the gravel paths that existed were not well lit. Furthermore, the residential association did not hire an activity coordinator.

The economic effects of this rule were disastrous. Housing communities were being forced to provide additional services and facilities, thereby creating financial burdens on their residents and discouraging future applicants. The increase in payments was extremely difficult for seniors living on fixed incomes.

Ironically, in 1992, in Seniors Civil Liberties Ass'n v. Kemp, it was determined that the provision was not unconstitutionally vague. Although the district court acknowledged that it was very difficult to determine what the phrase meant, the statutes and regulations were deemed to have satisfied due process. They were not vague, but simply "flexible." On appeal the Eleventh Circuit agreed and found that, together, the statutes and regulations provided enough information to enable a com-

---

57 See id.
58 See id.
59 See id. at *32. The association maintained the coordinator position as a volunteer post and, thus, had difficulty keeping it filled. See id.
61 See id.
62 761 F. Supp. 1528 (M.D. Fla. 1991), aff'd, 965 F.2d 1030 (11th Cir. 1992). The condominium facility at issue failed to qualify for the exemption because it had not published or adhered to policies or procedures that would demonstrate an intent to provide housing for persons at least 55 years of age. See Seniors Civil Liberties Ass'n, 965 F.2d at 1033.
63 In addition to asserting that the provision was unconstitutionally vague, the seniors argued that the amendments were unconstitutional because they violated the Commerce Clause, the states' power under the Tenth Amendment, the right of association, the right of privacy, and the right to equal protection under the law. See id. at 1033; see also Shelley D. Cutts, Comment, The Fair Housing Amendments Act of 1988: An Incomplete Solution to the Problem of Housing Discrimination Against Families, 30 ARIZ. ST. L.J. 205, 210-17 (1998) (discussing the district court's decision as to each claim that the amendments were unconstitutional and criticizing the outcome).
64 See Seniors Civil Liberties Ass'n, 761 F. Supp. at 1553-54 (analyzing the non-exclusive list set forth by HUD).
65 See id. at 1555.
66 See id. (noting that the legislative history indicated "[f]lexibility is the key").
In 1995, HUD proposed new rules that rejected the stereotype that every older person was disabled. Under the new rules, a housing community could “self-certify” that it qualified for the over-55-exemption. The purpose behind the self-certification was to permit communities to ascertain with confidence whether or not they qualified for the exemption. Therefore, HUD set forth “a ‘menu’ of facilities and services” from which each housing community could choose. To qualify, the residential community had to provide at least two facilities or services from five of twelve categories, for a total of ten facilities or services.

Although this method of self-certification seemed acceptable, Congress questioned whether it would withstand judicial analysis. First, Congress was concerned that some of the facilities and services listed were of the type that any landlord would provide, rather than facilities designed specifically for seniors. Second, Congress worried whether these facilities and services rose to the level of significance needed to qualify for the exemption in

67 See Seniors Civil Liberties Ass’n, 965 F.2d at 1036.
68 See Housing for Older Persons; Defining Significant Facilities and Services; Proposed Amendments, 60 Fed. Reg. 13,840, 13,841 (1995) (recognizing that most seniors are healthy individuals that lead active lives). The proposed rules did not require that the amenities be designed to meet the needs of older, disabled persons. See id. For example, a housing community could qualify for the exemption without providing nursing services or congregate dining areas. See id.
69 See id. The Department would assume that communities that were self-certified were in compliance with the Act’s requirements. See id.
71 See id. at 43,322. HUD did not revise the proposed self-certification rule, despite criticism from commentators. See id. at 43,326.
72 The 12 categories included services and facilities designed to accommodate older persons’ social, educational, physical, health, transportation, and leisure needs. See Housing for Older Persons; Defining Significant Facilities and Services; Proposed Amendments, 60 Fed. Reg. 13,841, 13,843-44. These categories encompassed: social and recreational services provided on a regular and organized basis, continuing education activities, information and counseling services, homemaker services, outside maintenance/health and safety services, emergency and preventative health care programs, congregate dining, transportation to facilitate access to social services, services to encourage and assist residents in using available facilities and services, social and recreational facilities, an accessible physical environment, and any other facility or service designed to meet the needs of older persons (age 55 or older). See id.
the eyes of the courts. Finally, these regulations seemed to benefit the rich, who were the only ones able to afford such facilities and services.

In fact, the provision of "significant facilities and services," as proposed by HUD in 1995, proved to be a "disaster." After 15,219 letters and comments, Congress was forced to amend the act and eliminate the requirement of "significant services and facilities." Elimination of the controversial phrase provided the courts with better direction in determining which senior housing qualifies for the exemption, without hurting older persons financially. The decrease in litigation also saves the taxpayers thousands of dollars. As amended, "housing for older persons"

---

74 See id. Congress identified services and facilities as "significant" by the overall number, as well as in terms of use by the elderly. See id.

75 See id. at 3 (noting low-income seniors cannot afford the costs of additional services); 141 Cong. Rec. S18065 (daily ed. Dec. 6, 1995) (statement of Sen. Brown) (noting that the "HUD designed guidelines that, for the normal seniors in this country, became exorbitantly expensive."). But see Housing for Older Persons; Defining Significant Facilities and Services; Proposed Amendments, 60 Fed. Reg. at 13,841 (noting that the proposed regulations accommodate regional differences, and differences stemming from the nature and cost of housing and, thus, are not limited to the affluent); Housing for Older Persons; Defining Significant Facilities and Services; Amendments, 60 Fed. Reg. 43,324, 43,324 (noting that the scope of the menu was broad enough to cover all types of senior housing "without undue burden or expense").


77 See Housing for Older Persons; Defining Significant Facilities and Services; Amendments, 60 Fed. Reg. 43,322, 43,322 (1995). Based on written comments and comments received at five public meetings held around the country, HUD decided to change the proposed rule.

The 1995 amendment also created a "good faith exemption" that shields persons accused of familial status discrimination if they reasonably relied on the belief that a housing community qualified for exemption under the provision. 42 U.S.C. § 3607(b)(5)(A) (Supp. 1997).

78 Senator Jon Kyl noted that the 1995 proposed rules by HUD would affect both low and wealthy income communities. See S. Rep. No. 104-172, at 10. The lower income communities would be affected through an inability to pay for additional services such as bowling trips, tai-chi classes, and pet therapy for residents' animals. See id. The wealthier income communities would be affected through developers' reluctance to build senior communities in the future. See id. Developers believe that the regulations would destroy any desire by older persons to live in either of these communities. See id.

79 See id. at 5 (noting that the provision's uncertainty creates a threat of litigation). But see id. at 7 (noting that while the amendment could lead to a reduction in the number of lawsuits brought before the DOJ or HUD regarding "housing for older persons," it is not expected that the bill will cause a significant decrease in the costs
means housing:

(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons . . . ; or

(B) intended for, and solely occupied by, persons 62 years of age or older, or

(C) intended and operated for occupancy by persons 55 years of age or older, and—

(i) at least 80 percent of the occupied units are 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 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.80

Critics of this amendment argued that it undermines the purpose of protecting families with children. Senator Joseph Biden argued that to qualify for the exemption more than mere animosity toward children should be necessary.81 Senior residences should remain distinguishable from other residences by retaining certain characteristics that communities occupied by children did not provide.82 Furthermore, by relaxing the requirement for services and facilities, the housing complex would not have to provide any amenities and could still be exempted from the FHAA with more than fifty percent of its residents younger than fifty-five years of age.83 Nevertheless, the confus-
ing phrase, "significant services and facilities," was the only provision deleted under the 1995 amendments.

II. THE FAIR HOUSING ACT AMENDMENTS APPLIED TO CONDOMINIUMS AND COOPERATIVES

The Fair Housing Act Amendments have affected thousands of people and will continue to do so in the years to come. In 1997, there were 32,951,000 families with children under eighteen; that number is predicted to remain approximately the same for the next ten years. By 1990, half of the complaints filed with HUD alleged discrimination based upon familial status. By September, 1992, familial status was alleged as the basis of discrimination in 7,613 complaints filed with HUD, constituting 23.6 percent of the total number of complaints filed for that period.

older. See id. Out of 200 occupants, 80 persons can be 55 or older compared to 120 persons younger than 55. See id. This standard allows 60% of the population to defy the age requirement while allowing the housing community to keep families with children out. See id.

In the past fiscal year, HUD obtained $9.6 million in settlements for victims seeking relief for housing discrimination. See Cuomo Announces Las Vegas Builder to Pay Settlement for Disability Housing Discrimination Complaint, U.S. NEWSWIRE, May 5, 1998, available in 1998 WL 5685462. This is an increase of $5.2 million from the year before. See id. As part of President Clinton's One American Initiative, his proposed federal budget for 1999 seeks to distribute $22 million in increased funding to combat housing discrimination. See id. This increase would enable HUD's office of Fair Housing and Equal Opportunity to spend $52 million in its efforts to fight discrimination, and would result in the largest budget increase for the protection of civil right in two decades. See id.

See BUREAU OF THE CENSUS, U.S. DEPT COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 59, tbl.67 (1997) (predicting that the number of families with children under 18 will be 33,001,000 in 1998; 33,058,000 in 1999; 33,117,000 in 2000; 32,699,000 in 2005; 32,203,000 in 2010).

See Allen, supra note 51, at 303. More complaints were filed with state or local agencies based on familial status discrimination than any other protected class, except for race. See id. (citing OFFICE OF ASSISTANT SECRETARY FOR FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEPT OF HOUS. & URBAN DEVELOPMENT, 1993 CONSOLIDATED ANNUAL REPORT TO CONGRESS ON FAIR HOUSING PROGRAMS, 13-14 (1995). From 1992 through 1993, 26% of all complaints filed with HUD alleged familial discrimination. By 1994, the agency found that there was reasonable cause to find familial status discrimination in two-thirds of the complaints submitted. See id. (citing Chief Administrative Law Judge Alan Heifetz); see also John M. Payne, Enforcing the New Fair Housing Act, 19 REAL EST. L.J. 151, 156-57 (1990) (expressing doubt as to whether the federal government will allocate the resources necessary to combat discrimination based on the backlog of complaints at the HUD soon after the passage of the 1988 amendments).

See S. REP. NO. 103-40(II), at 281 (1993). By October, 1992, HUD received
The FHAA’s effect on condominiums and cooperatives is currently a growing concern since both types of housing communities are quickly increasing at a substantial rate and are now more affordable than in past years. By 1990, there was an increase of nearly 2.6 million condominiums, as compared to the previous decade. From 1984 to 1995, the number of cooperatives in New York increased from 247,000 to 416,000. This is extremely significant because 95% of the cooperatives found within the United States are located in New York. In today’s housing market, a drop in sales of coops or condos in a certain region is more likely the result of unavailability and not due to a lack of interest.

A. Condominiums and Cooperatives Are Covered Within the Scope of the Fair Housing Act Amendments

There is no doubt that the FHAA covers both condominiums and cooperatives. A dwelling is defined as, “any building, structure, or portion thereof which is occupied as, or designed or in-

---

20,000 complaints. See S. REP. NO. 104-172, at 5. Of these complaints, 17,000 were closed that year, resulting in over $7 million in penalties. See id.

See Michael A. Wolff, Comment, The Fair Housing Amendments Act of 1988: A Critical Analysis of “Familial Status,” 54 MO. L. REV. 393, 394 (1989) (predicting that the FHAA would have its greatest impact on rental housing and condominiums since most discrimination against families with children occurs in such places).

See BUREAU OF THE CENSUS, STATISTICAL BRIEF, CONDOMINIUMS (1994). The regions that were affected most dramatically were the South, with an increase of nearly one million, and the Northeast, with an increase of over 700,000. See id. (listing a breakdown of the number of condominiums in each state). See Brooks, supra note 43 (noting that age-restricted condominiums are flourishing in New Jersey, Connecticut, Florida, California, and Arizona).


See id. at 1246-47 (giving an overview of the housing market in New York).

See Adrienne Albert, Residential Sales Market Turns Around, REAL EST. WKLY., June 26, 1996, available in 1996 WL 9283310 (noting that a 12.6% decrease of sales in condominiums in Manhattan, as compared to a 12.8% gain in cooperative sales, was a result of the condominium market’s inability to keep up with consumer demands).

See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12 (1972) (noting that the statute should be broadly construed in the attempt to implement the policy).
tended for occupancy as a residence by one or more families. During the passage of the FHAA, some commentators argued that cooperatives, condominiums, and mobile home parks were not dwellings. Congress, however, wanted the Act to be interpreted as broadly as possible. Therefore, HUD responded by stating that the definition of a "dwelling" is "clearly broad enough to cover ... mobile home parks, trailers, courts, condominiums, cooperatives, and time-sharing properties." The regulations do not provide any specific examples as to what constitutes a dwelling because of a fear that such a list would be construed as exhaustive.

Administrative agencies' interpretations of statutes have always been given a great deal of deference. Accordingly, the courts have followed the advice of HUD and construed the definition of a "dwelling" to include both cooperatives and condominiums. Furthermore, the word "any" has always received a

---

56 See id. (stating that the statutory definition of "dwelling" is broad).
58 "[T]he need to leave open the extent and scope of the terms defined in the Fair Housing Act outweighs the need to provide comprehensive examples in connection with this rulemaking." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. at 3233. Subject to certain restrictions, however, single-family homes sold or rented by the owner are exempt from the provisions of the Act. See 42 U.S.C. § 3603(b) (1994).
59 See Louisiana Acorn Fair Hous., 952 F. Supp. at 358 (providing examples of Supreme Court and Circuit Court cases that construed statutes according to the construction provided by administrative agencies).
60 See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036 (2d Cir. 1979) (finding that the definition of a "dwelling" under the Act includes cooperatives); United States v. Tropic Seas Inc., 887 F. Supp. 1347, 1359 (D. Haw. 1995) ("A cooperative apartment building is a 'dwelling' within the meaning of the Fair Housing Act."); Kemp, 761 F. Supp. at 1543 (concluding that the scope of the Act covers both the sale and rental of condominiums, single-family homes, and mobile homes).

A dwelling has also been construed to include "summer bungalows, farm labor camps, an AIDS hospice, a children's home, a homeless shelter, [and] a nursing home." Louisiana Acorn Fair Hous., 952 F. Supp. at 359 (footnotes omitted). Motels have not been considered dwellings. See id. In making this determination, the major factors considered are: the length of time a person stays at the place in question and whether there is an intent to return. See id.
broad construction by the courts.\textsuperscript{101}

The FHAA also applies to residential associations\textsuperscript{102} which grants them the ability to qualify for the "housing for older persons" exemption. In \textit{Massaro v. Mainlands Section 1 & 2 Civic Ass'n},\textsuperscript{103} the residential association attempted to evict a family with an infant because the by-laws restricted occupancy to persons over the age of sixteen.\textsuperscript{104} In 1990, the association amended its by-laws to restrict occupancy to persons over the age of fifty-five and attempted to evict another family with children.\textsuperscript{105}

There was an issue as to whether the residential association could qualify for the exemption because the amendments of 1988 were based upon the actions and intentions of owners and managers.\textsuperscript{106} This particular association did not own, rent, or lease any of the dwellings, and did not advertise vacancies to attract future applicants.\textsuperscript{107} The Eleventh Circuit, however, declared that the entity did qualify for the exemption because the association's power to enforce the declaration and exclude persons from the community was similar to that of a manager or owner.\textsuperscript{108} Furthermore, because residential associations are not expressly excluded from the FHAA, the court determined that Congress had intended for them to be within its scope.\textsuperscript{109} Additionally, since the 1995 amendments to the "housing for older persons" exemption are not based upon the actions of owners and managers, they could qualify for the exemption.

\textsuperscript{101} See Citizens' Bank v. Parker, 192 U.S. 73, 81 (1904) (noting that there are no limitations when an exemption is defined by the word "any"); see also City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 739 n.1 (1995) (Thomas, J., dissenting) (noting broad construction of the word "any" as applied to an interpretation of ERISA and stating that "[a] broad interpretation of the word 'any' is hardly novel").

\textsuperscript{102} See Bill Miller, \textit{D.C. Condo Owners To Pay for Member's Racial Insults}, WASHINGTON POST, June 10, 1998, at A01 (noting that a court's ruling upholding a condominium resident's right to sue the association signaled that the FHA applied to condominium associations).

\textsuperscript{103} 3 F.3d 1472 (11th Cir. 1993).

\textsuperscript{104} See id. at 1474-75. The Mainlands was a residential community of approximately 530 single-family homes owned in fee simple by each resident. See id.

\textsuperscript{105} See id. at 1475. The Mirabile family also received a letter from the Association informing them of the violation of the age restriction due to the presence of an infant daughter. See id.

\textsuperscript{106} See id. at 1477; see also 42 U.S.C. § 3607(b)(2)(C)(iii) (1994 & Supp. 1997) (changing language to apply to any "housing facility"). The residential association has the burden of proving its eligibility for the exemption. See Massaro, 3 F.3d at 1475.

\textsuperscript{107} See Massaro, 3 F.3d at 1477.

\textsuperscript{108} See id.

\textsuperscript{109} See id.
managers but rather the "housing community," there is no question that the broader definition encompasses residential associations.

Legislative history shows that Congress never intended to deny communities the right to the exemption simply because they had pre-existing age limitations lower than the age of fifty-five. As Senator Ted Kennedy noted, it is possible for the community to qualify for the exemption as long as any pre-existing age limitation is enforced in a manner consistent with the FHAA. Therefore, the community must illustrate that it had intended its housing to be for older persons. However, the fact that the restriction existed at a time prior to the enactment of the FHAA was, by itself, insufficient to demonstrate such an intent. If it were sufficient, then any preexisting age restriction would bring a community out of the Act and virtually destroy the protection afforded to families with children. The residential association in Massaro could not qualify for the exemption because policies and procedures were not in place to demonstrate an intent to house older persons.

In Westwood Community Two Ass'n v. Lewis, the declarations of restrictions, recorded in 1972, limited occupancy in the condominium to persons over the age of sixteen and declared that this restriction was to run with the land until the year 2022. Similar to the Federal Act, Florida's Fair Housing Act was amended in 1989 to prevent discrimination based upon familial status, thus voiding the condominium's age restrictions. In response to the amendment, the "[residential] association amended its by-laws in an [effort] to fit within the 'housing for

---

110 42 U.S.C. § 3607(b)(2)(c)(ii) (Supp. 1997) ("The housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph.").
111 See Massaro, 3 F.3d at 1479.
113 See id.
114 See id.
115 See id. ("The declaration's restriction on residency by children cannot show that the community intended its housing to be for older persons because then any policy against families would suffice for the exemption, swallowing the rule against such discrimination.").
116 See id.
118 See id. at 297.
older persons' exemption."\textsuperscript{119}

The residential association acted without authority because the by-laws amendment was found to have conflicted with the declarations.\textsuperscript{120} More importantly, the court held that a residential association could not simply amend its by-laws because an age restriction was invalidated by the state amendments of 1989.\textsuperscript{121} Utilizing the same reasoning found in Massaro, the court held that pre-existing age restrictions, standing alone, were insufficient evidence to prove that the condominium intended to provide housing for older persons and, therefore, were inconsistent with the state statute.\textsuperscript{122}

\subsection*{B. Broad Grants of Standing Under the FHA}

Under the Fair Housing Act, any "aggrieved person" may bring a discrimination claim. An "[a]ggrieved person" is defined as, "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."\textsuperscript{123} It includes corporations, fair housing organizations, trustees, testers, legal representatives, and the Secretary of HUD.\textsuperscript{124}

The Supreme Court has interpreted standing under the FHA to be as broad as Article III of the United States Constitution will permit, thus allowing claims to be brought by persons ordi-

\begin{footnotesize}
\begin{thebibliography}{99}
\bibitem{119} Id.
\bibitem{120} See id. (quoting the by-laws as stating "'[n]o amendment shall be made which is in conflict with the Declaration of Restrictions'.")
\bibitem{121} See id. at 297-98.
\bibitem{122} See id. at 298.
\bibitem{124} See F. Willis Caruso & William H. Jones, \textit{Fair Housing in the 1990's: An Overview of Recent Developments and Prognosis Of Their Impact}, 22 \textit{J. MARSHALL L. REV.} 421, 434 (1989). A fair housing agency can also establish standing under the FHA by simply showing that the agency spent its time and its money either counseling or directing its efforts towards ending discrimination against a particular housing community. \textit{See} Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990). Further, in cases involving discriminatory practices, the Seventh Circuit has allowed the addition of aggrieved persons after a complaint has already been filed. \textit{See} United States v. Stanec, 914 F. Supp. 322, 323 n.1 (E.D. Mo. 1995).
\end{thebibliography}
\end{footnotesize}
narily barred by the prudential rules of standing. The only requirement necessary for standing is that the claimant have suffered "minima of injury in fact." This is established by evidencing "a distinct and palpable injury" that is traceable to the defendant's conduct.

It is clear that standing under the act does not require membership in the protected class. A non-class member has standing to challenge a discriminatory practice as an "aggrieved person" if two elements are shown. He or she must have suffered actual injury that was proximately caused by discriminatory acts against a protected class member and challenge the discriminatory policy on behalf of a class member.

This implies that the FHAA are intended to provide protection for persons who own a condominium or cooperative where the by-laws or lease contains a restrictive covenant denying occupancy to families with children. These covenants thereby shrink the number of potential qualified buyers, and consequently restrict the ability of such owners to sell their housing units. Of course, the residential association can raise the af-

---

125 See Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) (noting that standing extends to the limit of Article III); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 & n.9 (1979) (same); Trafficante Metropolitan Life Ins. Co. 409 U.S. 205, 209 (1972) (holding that standing under the FHA extends to the limits of the Constitution); see also Halet v. Wend Investment Co., 672 F.2d 1305, 1308-09 (9th Cir. 1982) (noting that a Caucasian man did not have standing under the Fourteenth Amendment or the Civil Rights statutes to challenge racial discrimination against African Americans and Hispanics through housing policy, but did have standing under the FHA).

126 Havens Realty Corp., 455 U.S. at 372.

127 Id. (quoting Warth v. Selden, 422 U.S. 460, 501 (1975)).

128 See Gladstone, Realtors, 441 U.S. at 103 n.9 (allowing non-minority members of a village to sue under the FHA because discriminatory sales deprived them of a racially-integrated community); Trafficante, 409 U.S. at 203-12 (finding that white tenants had standing under the Act to sue a landlord who discriminated against minorities because the white tenants were deprived of social benefits, business opportunities, and professional advantages, and were forced to suffer the stigmatization of being "residents of a 'white ghetto' "); see also Simovits v. Chanticleer Condominium Ass'n, 933 F. Supp. 1394, 1400 (N.D. Ill. 1996) (holding that the plaintiff did not have to be a victim of the discrimination to have standing to sue).

129 See Wasserman v. Three Seasons Ass'n No. 1, 998 F. Supp. 1445, 1447 (S.D. Fla. 1998) (observing that the FHA protects those persons whose daily activities will be affected by the practices of a housing community, as well as those at whom the discrimination is directed); see also Gorski v. Troy, 929 F.2d 1183, 1189 (7th Cir. 1991) (reasoning that foster parents obtained standing under the FHA despite the fact that they never obtained legal custody of children during the occupancy, because they suffered injury when evicted).
firmative defense that the housing community qualifies under the “housing for older persons” exemption, however, it has been illustrated that residents without “familial status” can also be protected by the Act.

For example, in Simovits v. Chanticleer Condominium Association, the condominium by-laws restricted occupancy to persons eighteen years or older, absent consent from the Board of Managers. When the plaintiffs attempted to sell their condominium, they were forced to decline two offers because both potential applicants had minor children. After reducing the price of the condominium by $42,500, a childless couple purchased it after receiving consent from the Board of Managers. The plaintiffs sued the residential association for their financial loss.

Although the plaintiffs had not been directly discriminated against by the covenant in the condominium by-laws, the court held that standing was established. The plaintiffs were not part of the protected class, but were still afforded protection from the discriminatory practices of the residential association. The alleged financial loss and emotional injury constituted a “distinct and palpable injury” arising from the inability to sell the condominium at a higher price and the need to make additional mortgage payments. The reduction in value of the condominium and the subsequent financial loss were traceable to the association’s discriminatory conduct in enforcing the restrictive covenant that caused the loss of potential buyers with children under the age of eighteen.

However, standing by a non-class member cannot be established under the FHAA unless there is some relationship between the actual injury and the alleged discriminatory practice. In Wasserman v. Three Seasons Association, No. 1, a married

---

131 See id. at 1397-99. Three appraisers agreed that the value of the condominium was $145,000 with the covenant, but there was disagreement as to the value of the condominium without the covenant. The Association was found liable for discriminatory conduct under the Act and the court awarded the Simovits $26,060.15, which included $12,500 for the reduction in value of the condominium, $3560 for the additional mortgage payments, and $10,000 in punitive damages. See id. at 1408.
132 See id. at 1399-1400.
133 See id. at 1400 (stating that the plaintiffs had standing to sue because their “financial and emotional injuries are fairly traceable” to the Association’s alleged misconduct”) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982)).
134 See id.
couple with no children applied for housing at a condominium complex. During the screening process, they were questioned as to whether they intended to have children. They were also asked to sign a declaration stating that they “swear on all that is holy in the Hebrew religion” not to reproduce while living at the condominium.\footnote{id at 1446.} If, by accident, the wife did become pregnant, the document made them promise to move out of the condominium before the wife gave birth.\footnote{See id.}

The couple refused to sign the document and, not surprisingly, their application was denied. Their subsequent lawsuit alleged that they were discriminated against because of their “familial status” under the FHAA. The wife was not pregnant, nor did they establish that they intended to procreate in the near future. They objected to the document based upon both philosophical differences and the fear that one day, if she did become pregnant, they would be forced to vacate the condominium.\footnote{See id. at 1446-48.}

The court dismissed the case because the Wassermans lacked standing.\footnote{See id. at 1448.} The non-class members had not established under which protected class they were bringing suit. Fear of future discrimination was not enough of a stake in the controversy to establish standing; the Wassermans had not suffered any injury as a result of the association’s discrimination against protected class members.\footnote{See id.}

C. Deer Hill Arms II—An Example of the Broad Construction of the “Housing for Older Persons” Exemption Since 1995

The 1995 amendments broadened the opportunities for “adult only” communities to qualify for the “housing for older persons” exemption. This has had a significant impact on both condominium and cooperative residents who want to live in a setting without children.\footnote{The median age of residents in condominiums and cooperatives in New York City is 50 years old, with a median income of $57,600. See Michael H. Schill & Benjamin P. Scafidi, Housing Conditions and Problems in New York City: An Analysis of the 1996 Housing and Vacancy Survey at tbl.5 (visited March 11, 1999) <http://www.nycrgb.com/conference/Schill/stable5.html>.

\footnote{See id.}} A community’s failure to qualify for the exemption gives both applicants and residents who wish to
sell their units to families with children another avenue to challenge the residential association's right of first refusal, the withholding of consent, and the restrictive covenants.142

Since 1995, however, the courts have given the FHAA exemption as broad an interpretation as possible in order to protect senior citizen housing. One example of the exemption's broad scope is found in Deer Hill Arms II Limited Partnership v. Planning Commission of Danbury,143 which involved two condominium buildings, Deer Hill Arms I and II. Deer Hill Arms I consisted of twenty-eight dwelling units available to persons of any age, whereas Deer Hill Arms II consisted of thirty-two dwelling units available solely to adults over the age of fifty-five who did not have any children.144 At issue was whether Deer Hill Arms II could qualify for the "Housing for Older Persons" exemption. The residential association argued that eighty percent of its condominium units were occupied by persons at least fifty-five years of age.145

If the court treated both buildings as a single project, then only fifty-one percent of the housing units were occupied by a person of at least fifty-five years of age.146 However, if Deer Hill Arms II were treated as its own separate entity, it would unquestionably qualify for the exemption because every unit was occupied by someone older than fifty-five years of age.147 Significantly persuaded by the intent of the legislature in 1995 to afford senior citizens the opportunity to exclude children,148 the Su-

142 See Lippman v. Bridgecrest Estates I Unit Owners Ass'n, No. 72762, 1998 WL 549272 (Mo. Ct. App. Sept. 1, 1998) (reasoning that the condominium residential association violated the FHAA because it failed to qualify for the exemption, and it exercised its right of first refusal solely to discriminate against persons under 52 years of age).

143 686 A.2d 974 (Conn. 1996).

144 See id. at 976-78.


146 See Deer Hill Arms II, 686 A.2d at 974.

147 See id.

148 The court was persuaded by statements made by Congressmen during the amendment of 1995, actually quoting statements by Senators Kennedy, Cranston, and Metzenbaum and Representatives Fish, Pepper, Edwards, and Synar. See id. at
The Supreme Court of Connecticut treated the buildings as separate entities, even though they shared a common driveway and legal title to the land was in the name of “Deer Hill Arms Condominium.”

The court justified its holding by stating that the buildings were operated by separate residential associations. Further, the residents of one building did not have access to the other building’s common areas, nor did they pay its common charges or expenses.

It was also possible that Deer Hills Arms I and II violated specific HUD regulations and should, therefore, have been considered one entity when the percentage of older Americans in the condominium was calculated. The regulations prohibit assigning anyone “to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of... familial status.” However, the regulations were deemed inapplicable because there was no centralized residential association that assigned persons to one of the two buildings.

If a condominium or cooperative cannot qualify for the exemption, it is subject to the terms of the FHAA and prohibited from discriminating on the basis of familial status. Therefore, it is relevant to note the elements of a prima facie case for age discrimination.

C. The Elements of a Prima Facie Case

A prima facie case for a discrimination claim under the Act can be established based on one of two theories: disparate impact or disparate treatment. A discrimination claim will not suc-
ceed against a housing community if it is based solely upon the fact that a person falls within the protected class and is rejected from a particular housing community.\textsuperscript{156}

The disparate impact theory applies to cases where housing practices are neutral on their face, but operate in a discriminatory manner to produce a discriminatory result.\textsuperscript{157} The majority of courts hold that discriminatory intent is not a factor.\textsuperscript{158} Under this approach, potential applicants do not have to prove that the residential association intended to discriminate against them because of their children. Some courts, however, have refused to acknowledge that every act that produces a discriminatory effect violates the Act.\textsuperscript{159} The Supreme Court has yet to decide whether intent is a necessary element under the discriminatory impact theory.\textsuperscript{160}

\textsuperscript{156} Cf. Russell v. Popper, No. 89-2311, 1990 WL 140591, at *2 (6th Cir. Sept. 27, 1990) (per curiam) (unpublished table decision) (dismissing plaintiff's complaint because it consisted only of the fact that she was a black female that was denied housing by the residential association of a condominium complex).

\textsuperscript{157} See Pechillis v. Massachusetts Comm'n Against Discrimination, No. 917512B, 1993 WL 818592, at *3 (Mass. Super. Ct. May 28, 1993) ("The theory applies to cases in which . . . housing practices are facially neutral and 'fair in form, but discriminatory in operation.'") (quoting Griggs v. Duke Power, 401 U.S. 424, 431 (1971)); see also Keith v. Volpe, 858 F.2d 467, 482 (9th Cir. 1988) (observing that in a disparate impact claim, the plaintiff must prove at least that the residential association's actions produce a discriminatory effect); Branella, 972 F. Supp. at 297 (describing the theory behind discriminatory impact).

\textsuperscript{158} See Branella, 972 F. Supp. at 298 (holding that disparate impact alone does not need proof of discriminatory intent); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1046 (2d ed. 1997) (stating that only discriminatory operation need be proven); see also JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 454 (4th ed. 1998) (noting that discriminatory effect is sufficient to satisfy the prima facie case and discriminatory motive is not necessary).

\textsuperscript{159} See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (requiring the consideration of four factors when determining whether the action has a discriminatory impact, although not requiring a strong showing as to any factor). The factors considered by the Seventh Circuit are: (1) the strength of the plaintiff's case based upon discriminatory effect; (2) whether there is some evidence of discriminatory intent; (3) the defendant's interest in taking the action complained of; and (4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for a protected class or restrain the defendant from interfering with property owners who wish to sell their dwellings. See id.; see also Knapp v. Eagle Property Management Corp., 54 F.3d 1272, 1280 (7th Cir. 1995) (observing that the Supreme Court has never recognized that the disparate impact analysis is appropriate in every situation).

\textsuperscript{160} See Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1989) (refusing to answer whether the disparate impact test without proof of discriminatory intent is the appropriate test under a Title VII action because the ap-
The better view seems to be the one taken by the majority of courts in this country. These courts have held that a plaintiff needs to show merely that the practices of the residential association have a statistically adverse effect on the protected class. The only limitation is that the statistical inequality must be “sufficiently substantial” to raise an inference that the residential association’s alleged discriminatory acts caused the unfair treatment of the residents.

Under a disparate treatment theory, the discriminatory intent of the residential association is the dominating factor. Alpellant conceded the applicability of the disparate impact theory; see also Frederic S. Schwartz, The Fair Housing Act and Discriminatory Effect: A New Perspective, 11 NOVA L. REV. 71, 74 (1986) (illustrating, by way of example, a violation of the FHAA).

Intent is an elusive concept that is difficult to prove. See Metropolitan Hous. Dev. Corp., 558 F.2d at 1290 (“[A] requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy.”); Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (stating that motive and purpose are “elusive concepts” that can only be inferred from facts). Also, motive can easily be concealed by intelligent people. See 12 Robinson v. Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979); United States v. Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974) (recognizing that a court should focus on discriminatory effect in order to provide fairness to private rights and the public interest).

See Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1178 (E.D. Va. 1995) (stating that statistics have a critical effect on the significance of the alleged disparity).

Id. (noting the discrimination claims of African-Americans, Hispanics, and disabled cooperative residents as the cooperative underwent conversion under the FHA). Although there is no specific formula for determining whether there is an inference of causation, some courts use a standard deviation. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 996 (1988); Williams, 891 F. Supp. at 1178. No statistical analysis, including the standard deviation approach, can prove what, in fact, caused the results, but attempts to eliminate chance as the underlying reason. See Watson, 487 U.S. at 996, n.3 (stating that the standard deviation or other statistical information play an important, but not dispositive, role in discrimination cases); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 323 n.20 (7th Cir. 1988) (same).

The standard deviation is a statistic used to measure the dispersion of a distribution from an expected value. See Williams, 891 F. Supp. at 1180 n.22 (providing definition of the standard deviation). Courts use both the binomial and hypergeometric distributions. See id. See generally PROBABILITY AND STATISTICS FOR ENGINEERS AND SCIENTISTS 116-131 (Ronald E. Walpole et al. eds., 6th ed. 1998) (describing both the binomial and hypergeometric distributions and their relationship to each other). A result may differ according to the formula used. See EEOC v. Western Elec. Co., 713 F.2d 1011, 1019 (4th Cir. 1983) (questioning whether a different statistical outcome may arise if a binomial distribution was used instead of a hypergeometric distribution).

See Martin v. Palm Beach Atlantic Ass'n, 696 So. 2d 919, 920 (Fla. Dist. Ct. 1999)
though it does not have to be the sole motivating factor, the plaintiff must show that his or her "familial status" is a motivation behind the residential association's denial of the application.\(^{165}\) Intent can be established by indirect evidence\(^{166}\) or direct evidence.\(^{167}\) However, the latter will be more difficult to prove.\(^{168}\)

Establishing a prima facie case raises a rebuttable presumption of discriminatory intent.\(^{169}\) This shifts the burden to the defendant who must then produce evidence that the refusal to rent or negotiate for a rental was motivated by non-

---

\(^{165}\) See Branella, 972 F. Supp. at 298; cf. Robinson, 610 F.2d at 1042 (holding that, in a racial discrimination case, an African-American male had to show only that his race was one of the reasons he was rejected by the cooperative residential association).

\(^{166}\) See Branella, 972 F. Supp. at 298; see also Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984) (approving the standard that was applied to adult-only rental policies before the amendments of 1988 were passed).

\(^{167}\) The direct method of proving intent can be satisfied by circumstantial evidence. See Cavalieri-Conway v. L. Butterman Assocs., 992 F. Supp. 995, 1003 (N.D. Ill. 1998). Circumstantial evidence can be in the form of suspicious timing, ambiguous statements or behavior or comments made to the protected group, or it can be evidence that other residents or applicants received systematically better treatment. See id.

In the absence of direct evidence, a complainant may still prove a prima facie case of housing discrimination by satisfying the four part test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972), and detailed below. See Secretary ex rel. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990) (noting that this standard applies to Fair Housing cases); cf. Gilligan v. Jamco Dev. Corp. 108 F.3d 246, 249-50 (9th Cir. 1997) (refusing to apply the McDonnell Douglas standard to the pleadings); United States v. Lepore, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991) (holding that where direct evidence is available to prove discriminatory intent, the McDonnell Douglas standard does not apply).

The McDonnell Douglas test is as follows: First, the complainant must show that he or she is a member of the protected class. See McDonnell Douglas Corp., 411 U.S. at 802. Second, it must be proven that the applicant applied for and was qualified to rent the housing unit in question. See id. Third, it must be shown that the complainant was rejected and, fourth, that the unit remained available after the rejection. See id. For an example of the failure to satisfy the prima facie case in a condominium familial status discrimination claim, see Martin v. Palm Beach Atl. Ass'n, 696 So. 2d 919 (Fla. Dist. Ct. App. 1997).

\(^{168}\) See United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1360 (D. Haw. 1995); see also United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992) (stating that "direct proof of unlawful discrimination is rarely available").

discriminatory reasons. If this burden is satisfied, then the plaintiff must show, by a preponderance of the evidence, that the reasons the defendant offered are pretextual. Intentional discrimination may be inferred from an association's failure to rebut either the prima facie case or the plaintiff's evidence that the justifications are pretextual.

\[170\] See id.; Blachwell, 308 F.2d at 870. The defendant must show that it could not achieve its goals with a less discriminatory alternative. See SINGER, supra note 158, at 1046; see also Schanz v. Village Apartments, 998 F. Supp. 784, 789 (E.D. Mich. 1998) (concluding that poor credit and inadequate income are valid non-discriminatory reasons to reject an applicant to an apartment building); Murphy v. 253 Garth Tenants Corp., 579 F. Supp. 1150, 1156 (S.D.N.Y. 1983) (holding that a cooperative's subjective non-discriminatory reasons for rejecting an applicant, such as being non-responsive, will not defeat a prima facie case of housing discrimination); Weiser, supra note 8, at A1 (quoting a federal judge who stated that a cooperative's defense that an applicant was "arrogant" was simply a "code name for... discrimination").

Some courts require only that the defendant show that a policy was established for a legitimate non-discriminatory business reason, while other courts apply a test similar to the constitutional strict scrutiny test, requiring a defendant to demonstrate that the least restrictive means were used to achieve a compelling business interest. See Fair Hous. Council of Orange County, Inc. v. Ayres, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (explaining the court's position with respect to the defendant's burden); see also Broome v. Biondi, 17 F. Supp. 2d 211, (S.D.N.Y. 1997) (illustrating a prima facie case of racial housing discrimination analyzed using the business standard).

\[171\] See McDonnell Douglas Corp., 411 U.S. at 807.

\[172\] See Kushner, supra note 12, at 1075 (reporting how a violation under the Fair Housing Act is established and how it compares to the burden of proof under the equal protection clause).

A claim that a residential association has a history of rejecting applicants because of their familial status is insufficient to establish that the association's reasons for rejecting the applicant were simply pretextual. See Blackwell, 908 F.2d at 870; Hitter v. Rubin, 617 N.Y.S.2d 730, 732 (App. Div. 1994) (indicating that an elderly applicant's age discrimination claim failed because it was based solely upon a statement from her broker in which she was told the cooperative had a history of discouraging the elderly to buy because they were so much of a burden). On the other hand, a residential association cannot avoid a discriminatory finding by claiming that the exclusion of children was based on the lack of safety in the common areas. See Tropic Seas, Inc., 887 F. Supp. at 1354; United States v. Grishman, 818 F. Supp. 21 (D. Me. 1993) (noting that a housing provider does not have the power under the 1988 amendments to weigh the safety risks of the premises and conclude that the premises are inappropriate for children). Discrimination may still exist even if the association was afraid that the death or injury of a child would result in financial ruin of the members. See Tropic Seas, Inc., 887 F. Supp. at 1361. For an example of the failure of an applicant to prove that the condominium association's reasons were pretextual, see Laurenti v. Water's Edge Habitat, Inc., 837 F. Supp. 507 (E.D.N.Y. 1993).
III. AGE RESTRICTIVE COVENANTS IN CONDOMINIUMS AND COOPERATIVES BENEFIT OLDER PERSONS

The underlying issue is whether society should view these senior communities as practicing age discrimination, especially when only ten percent of Americans over the age of fifty live in age-restricted communities and the number of persons over the age of fifty-five is dwarfed by the number of children under the age of eighteen. The issue presented is even more disturbing when only five percent of elderly households are in condominiums or cooperatives. However, this will probably be less controversial when the "baby-boomers" retire in approximately fifteen years and the number of retirees reaches an all-time high.

There is a rise in the number of older persons who are choosing to live in senior housing. Older persons often move

---

173 See James Brooke, Young Unwelcome in Retirees' Haven, N.Y. Times, Feb. 16, 1997, at 16 (describing the Fair Housing Act as prohibiting discrimination based upon race, religion, sex or familial status, but actually allowing discrimination against children through the exemption).

174 See id. Age-restricted condominiums are prevalent in New Jersey, Connecticut, Florida, California, and Arizona. See Brooks, supra note 43, at 3R. In Arizona, approximately half of its residents age 55 or older live in an age-restricted community. See Brooke, supra note 173, at 16.

175 For example, in Florida, those age 55 and over total 588,552, compared to 2,866,237 children under the age of 18. See Bureau of the Census, U.S. Dept of Commerce, 1990 Census of Population and Housing: Summary Population and Housing Characteristics 1 (1991). In Georgia, those over 55 total 259,735 as compared to 1,727,303 children under 18. See id. In California, there are 1,133,907 over-55 citizens, compared to 7,750,725 under 18. See id.

176 See Golant, supra note 7, at 29 (noting, in addition, that approximately 82% were homeowners).

177 See Charles R. Morris, The AARP: America's Most Powerful Lobby and the Clash of Generations 97 (1996) (noting that, in 1995, there were 24 million Americans over the age of 70, which is predicted to grow to 27 million by 2010, at which point, the baby boomers start reaching retirement age and the number of retirees increases to 48 million in 2030).

178 The American Association of Retired Persons conducted two national surveys in 1986 and 1989. See Golant, supra note 7, at 14. The 1986 survey included only persons over the age of 59 and the 1989 survey included only persons over the age of 54. See id. In 1989, 6% more respondents would rather live in an age-restricted building than one with all age groups. See id. This is supported by a decrease of 10% in the number of older persons who preferred to live in a household consisting of more than one age group. See id.; David Hackett Fischer, Growing Old in America: The Bland-Lee Lectures Delivered at Clark University 149 (1977) (reporting the results of a survey in which 73% of older persons responded that they would prefer to live in communities occupied by a majority of retired people).
into age-restricted communities, not because they are presently living in unmanageable or intolerable housing conditions, but simply because they have found their former home to be too expensive, time-consuming or exhausting to maintain.\(^{179}\) Additionally, it is not uncommon for older persons to want to associate with those who share common interests and hobbies and have similar economic and social backgrounds.\(^{180}\) Generally, they no longer have an interest in organizations designed for younger persons, such as professional groups and the PTA, but join age-related associations such as leisure and fraternal clubs.\(^{181}\)

There is no evidence that residency in a childless community is associated with a lack of desire to have any contact with children.\(^{182}\) One result of living in a childless community is that it

\(^{179}\) See Graham A. Allen & Rebecca G. Adams, *Aging and the Structure of Friendship*, in *OLDER ADULT FRIENDSHIP: STRUCTURE AND PROCESS* (Rebecca G. Adams & Rosemary Blieszner eds., 1989) (noting that older persons relocate to new residences because their homes are too large and too expensive to maintain or the individuals, themselves have lost their physical mobility or the capacity to drive a car); Golant, *supra* note 7, at 71; John P. Dwyer & Peter S. Menell, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 807-808 (1998) (suggesting that the rise of common interest communities is due to tax motivation; securing the integrity of the neighborhood; maintenance-free common areas; additional services, such as, utility service, security, and fire protection); N.Y. CITY RENT GUIDELINES BD., *HOUSING NYC: RENTS, MARKETS & TRENDS '97* 74 (1997) (noting that the monthly costs of mortgages and taxes are, in many cases, more expensive than the common charges found within the cooperatives and condominiums); see also James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1136-37 (1998) (describing the economic revolution which led to the increase in common-interest communities).

In a survey of 293 condominium owners, 43% bought a condominium because it was a good investment, 19% bought a condo as a tax shelter, 13% believed they were getting a better place to live, 12% liked the fact that there was no maintenance, and a final 12% believed a condo was less expensive than renting. See John R. Dinkelspiel et al., *Condominiums: The Effects of Conversion on a Community* 15 tbl.2.3 (1981) (pointing out that the percentages were based upon the total number of responses). The AARP noted that, in 1989, 65% of older Americans anticipated needing help with maintaining the outside of their homes, compared to 40% in 1986. See Golant, *supra* note 7, at 15.

\(^{180}\) See Golant, *supra* note 7, at 69-72 (discussing the characteristics of residents of retirement communities and why these communities are so appealing).

\(^{181}\) See Fischer, *supra* note 178, at 150. Studies conducted by gerontologists illustrate that most elderly people are still active, albeit in different ways than the younger generations. See id. at 149-50.

\(^{182}\) See Jennie-Keith Ross, *Old People, New Lives: Community Creation in a Retirement Residence* 193 (1977); see also Robert Nolin, 'No Kids' and Staying That Way; Some Seniors Find Security in Isolation, SUN-SENTINEL (Ft. Lauderdale), July 12, 1998, at 1G, available in 1998 WL 12821664 (quoting retired gerontologist, Gordon Streib, who does not believe that the desire to live away from children is due
may actually improve an older person's relationship with children. The increased sense of security, regarding physical and financial needs, allows older persons to relax, thus permitting a more rewarding relationship with those children with whom they have contact.

There is an inherent sense in all of us to protect children from being excluded from any aspect of life. Restrictive covenants cannot be justified simply because it is believed that they would combat the social pressure to bear children and, as a result, aid in controlling the problem of overpopulation. Instead, housing communities that exclude children should be openly received when the health and welfare of another group of persons are in the balance.

For a substantial period of time, courts have recognized the importance of restrictive covenants in condominiums and cooperatives. Judicial enforcement of residential covenants that exclude children may be desirable because it maintains the stability of the environment. In Ritchey v. Villa Nueva Condominium Ass'n, an amended by-law excluding persons eighteen years of age or younger from occupying a high-rise portion of a condominium complex, was deemed reasonable because its purpose was to eliminate the noise and rowdiness associated with children.

Age restrictions have been upheld in condominiums where it has been deemed reasonable to exclude children due to their "independence, mischievousness, boisterousness, and rowdy-

to any hostility towards them); 141 CONG. REC. H14967 (daily ed. Dec. 18, 1995) (statement of Rep. Frank) (noting that "where you are dealing predominantly with older people, where there is a common interest in an atmosphere that may be acquired or wanted, et cetera, then it is reasonable to say no [to] younger people, not just children").

See id.

See id.

See Larry D. Barnett, Children Exclusion Policies in Housing, 67 Ky. L.J. 967, 970 (1979) (describing the theory of "voluntary childlessness," which bases itself on the assumption that some potential parents will choose not to have children because of the obstacles raised by their existence when attempting to obtain housing in desirable condominiums or apartments).

See Judicial Review, supra note 1, at 652.

146 Cal. Rptr. 695 (Ct. App. 1978).

163 See id. at 698-99; see also Flowers v. John Burnham & Co., 98 Cal. Rptr. 644 (Ct. App. 1971) (holding that arbitrary discrimination by a landlord was prohibited but because "boisterousness and rowdism" vary by age and sex, a landlord seeking to limit children is not unreasonably arbitrary).
This raises the question as to whether a purely adult condominium or cooperative is synonymous with a peaceful and serene environment. A residential association is not completely powerless to abate the problems caused by noisy children. Furthermore, if it is reasonable to exclude children from housing based upon these "generalized traits," then, arguably, every place of public accommodation would have the right to exclude children. However, the close proximity of housing units in condominiums and cooperatives provides additional support to the idea of living without rowdy children. One of the major dissatisfactions among older people in condo or coop housing is the increased noise level. It seems that the desire to protect the well-being of older persons will prevail over the argument of unfairness to families with children.

Excluding children also allows the condominium or cooperative to provide only those types of common areas and recreational facilities that adults would prefer. In White Egret Condominium, Inc. v. Franklin, the court acknowledged that

Flowers, 98 Cal. Rptr. at 645.

This was one of the major arguments made on behalf of the elderly in opposition to the FHAA. See Allen, supra note 51, at 301-02 (arguing that a child-free housing complex provided seniors with freedom of choice to live in a serene environment); see also Riley v. Stoves, 526 P.2d 747, 752 (Ariz. Ct. App. 1978) ("The obvious purpose [of a covenant restricting occupancy to persons 21 or older] is to create a quiet, peaceful neighborhood by eliminating noise associated with children at play or otherwise ...."); Dubreuil v. West Winds Mobile Lodge, 213 Cal. Rptr. 12, 17-18 (Ct. App. 1985); see also Nolin, supra note 182, at 1G (interviewing older persons who live in condominiums out of a desire for peace and quiet). See generally Di LORENZO, supra note 7, at § 7.04[2][a] (noting that courts will recognize the validity of restrictive covenants in a condominium-setting when founded on a desire to create a peaceful environment).


Id.

See Marina Point, Ltd. v. Wolfson, 640 P.2d 115 (Cal. 1982) (in banc). A "no children" policy in an apartment complex was promulgated in an effort to provide tenants with peaceful housing and further the landlord's business interests. See id. at 117. The policy was struck down because the court refused to sacrifice the rights of children for a loss of profits or convenience. See id. at 129.

See Lewis A. Schiller, Limitations on the Enforceability of Condominium Rules, 22 STETSON L. REV. 1133, 1157 (1993) (noting that restrictions upon transfer of condominium units is reasonable because of the unit owners' financial dependence upon one another and the close proximity of living quarters).

See GOLANT, supra note 7, at 30.

See Di LORENZO, supra note 7, at § 7.04[2][a].

379 So. 2d 346 (Fla. 1980).
children and senior citizens have different needs. Children and their families desire tennis courts and playgrounds but, in a complex housed by a majority of older persons, these facilities would produce economic waste because they would go unused.

Arguments for a child-free environment can also be based upon an economic analysis. The absence of children means that residents can avoid providing schools, which implies lower taxes. It is also indisputable that children cause damage. As a consequence, a housing community that allows occupancy by children is far more susceptible to tort liability and increased insurance rates. Therefore, their exclusion from a condominium and cooperative allows a residential association to maintain control over repairs and common fees.

Courts also recognize that older persons' psychological and sociological needs might be better served by living in a condominium or cooperative away from children. They need to identify

---

198 See id. at 351; see also Pomerantz v. Woodlands Section 8 Ass'n, 479 So. 2d 794, 795 (Fla. Dist. Ct. App. 1985) (extending the rationale of Franklin to all forms of housing).

199 See Franklin, 379 So. 2d at 351; see also Pomerantz, 479 So. 2d at 795.

200 See Brooke, supra note 173 (noting that in Youngstown, Arizona the presence of children would create school taxes that would double the average current tax bill).

201 See Di Lorenzo, supra note 7, at § 7.04[2][a]. See, e.g., Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 119 (Cal. 1982) (discussing the testimony of an expert who stated that, as a class, children cause more wear and tear on property than adults, resulting in higher maintenance costs for landlords).

One court refused to uphold the exclusion of children on the ground that they cause damages. See Gilman v. City of Newark, 180 A.2d 365, 380 (N.J. Super. Ct. Law Div. 1962) (discussing a rooming house ordinance that excluded persons under the age of eighteen except for emancipated minors or minors attending college). The Gilman court asserted that society fears children will cause damage by starting fires. See id. at 381. In contrast with this argument, the court pointed out that one of the most common causes of fire is that of smoking. See id. The court reasoned that because college students and children over the age of eighteen are more likely to smoke, it was illogical to exclude those under the age of eighteen. See id. This court's logic, however, completely overlooks the traditional and well-founded fear that children play with matches and, in so doing, start fires. As an aside, the court should have acknowledged that 18% of those students graduating high school, who are under eighteen years old, are already smokers. See Harrison's Principles of Internal Medicine 27 (Kurt J. Isselbacher et al. eds., 13th ed. 1994).

202 See Allen, supra note 51, at 302. The median income of a 65 year old or older male is $14,983, which is $6,000 more than the median female income for the same age group. See Cashmore et al., supra note 142, at 213. This income decreases as persons become older or live alone. See id. at 213-14.

203 See Di Lorenzo, supra note 7, at § 7.04[2][a].

204 See, e.g., Pomerantz v. Woodlands Section 8 Ass'n, Inc., 479 So. 2d 794, 795
with a housing community to avoid isolation, depression, and loneliness.\textsuperscript{205} It is a general belief among gerontologists that as one becomes older, one's sense of satisfaction in life depends quite heavily upon one's living environment.\textsuperscript{206} In addition to being in the same age group, it is common for residents in age-restricted communities to share such similar characteristics as social class, ethnicity, marital status, sex, or political affiliation, which help to contribute to a resident's identification and satisfaction within the community.\textsuperscript{207}

Residents in these communities tend to have higher morale and are healthier than those in an integrated community, because of the proximity of many peers and the large number of friendships that formed.\textsuperscript{208} The nature of age-segregated housing

(\textit{Fla. Dist. Ct. App. 1985}) (upholding age restriction in condominium due in part to testimony that as people age their psychological needs change, and asserting that age-restricted communities increase morale); see also \textit{Jane Porcino, Living Longer, Living Better: Adventures in Community Housing for Those in the Second Half of Life}\textsuperscript{126} (arguing that adult communities provide for healthier, longer lives). \textit{See generally} Di Lorenzo, supra note 7, at \S 7.04[2][a]. \textit{But see} Gilman, 180 A.2d at 381 (noting that the exclusion of children under the age of 18 does not contribute in anyway to the physical health of residents of an "adults only" community).

\textit{See Harold Cox, Later Life: The Realities of Aging}\textsuperscript{234} (1984). Psychologist Richard Golant recognizes that older persons in an age-restricted condominium may not want to live near children because they would be constantly reminded of their own mortality. \textit{See Nolin, supra note 182, at 1G}. Golant defines such behavior as a 'deviant pattern' or 'distance to death.' \textit{See id.}; \textit{Golant, supra note 7}, at 72 (citations omitted) (noting that "it is easier [for a resident of a retirement community] to deny his age and flatter himself in accordance with the norm of youth"). There are a few gerontologists, however, who believe that age-restricted communities promote depression because an older person interacting only with other older persons is constantly reminded of age and death. \textit{See Cox, supra, at 234}. They believe that integrated communities provide for a higher morale and stimulation. \textit{See id.}; see, e.g., Porcino, supra note 204, at 129 (describing the story of a 73-year old woman whose experiences at an age-restricted community led to depression and no feeling of self-worth).

\textit{See Cox, supra note 205, at 235-36} (charting the environmental changes that occur between the ages of 50-65, 65-75, and over 75).

\textit{See Ross, supra note 182, at 178} (basing this conclusion on a study of four age-restricted communities that included a condominium, a mobile home park, an apartment building, and a life-care home).

\textit{See Cox, supra note 205, at 234-38; Porcino, supra note 204, at 126} (suggesting that the move to a retirement community may seem like a sacrifice of independence but is really a decision that can result in a longer and healthier life). The friendships formed later in life are important to those older persons who are living alone. Individuals living alone now constitute a major portion of the population over the age of 65. \textit{See Cashmore et al., supra note 142, at 213} (noting that 25% of persons between the ages of 65 and 74 live alone and that figure nearly doubles at
provides residents with the opportunity to pursue these friendships because all residents are in similar situations. Even those residents who do not seek social contact have an increased sense of morale in an age-restricted community with the development of an age identity, emergence of a social norm, and the security of knowing there is help in case of emergency. It has also been suggested that these communities spark creativity among their members. Studies show that the most creative persons are independent and introverts. Residents of “adults only” communities often possess these characteristics, which could indicate that they are more creative than others in their age group.

It is important to recognize the situation of older persons, as well as children. The FHAA is only one of several federal statues designed to protect children from discrimination. The elderly are not part of a strong political force and it is important that federal legislation recognizes their psychological and sociological needs as well.

See Allen & Adams, supra note 179, at 59. Adult friendships affect women more than men because they are more likely to live in an age-restricted community and to live alone. See id.; Ross, supra note 182, at 176-77 (noting that the group most strongly affected by having other seniors near them are older women who never married or lost a spouse). Only 42% of women aged 65 and older are married, compared to 72% of men in the same age category. See Cashmore et al., supra note 142, at 213. Most friendships find a basis in similar social characteristics, however, studies showed that while marital status was not a factor in friendships formed in age-restricted communities, it was a significant factor in other communities. See Allen & Adams, supra note 179, at 58-59.

See Ross, supra note 182, at 177.

See id.

See id.

See id.


See Douglas Dobson, The Elderly as a Political Force, in Aging and Public Policy: The Politics of Growing Old in America 129, 133-141 (William P. Browne & Laura Katz Olson eds., 1983) (suggesting that there is no unified political force among the contemporary elderly because there is no “age-based identification,” which is the essential element behind any age-based political movement).
People move to both condominiums and cooperatives for a variety of reasons, one of which is the ability to determine future residents and neighbors. Prior to the 1988 FHAA, this could be accomplished through age-restrictive covenants. Families with children would be excluded from residency, even if they were financially capable of living in the community.

The enactment of the FHAA rendered these covenants invalid unless a community satisfied the “housing for older persons” exemption. Both the statute and the “housing for older persons” exemption are interpreted very broadly by the courts. They reach condominiums, cooperatives, residential associations, and allow standing by those without children under the age of eighteen. In some circumstances, the prima facie case for age discrimination can be proven without any showing of discriminatory intent.

The exemption of “housing for older persons” is an acknowledgment by Congress of the needs of older persons. It does not reflect any animosity towards children but, rather, the desire to protect older Americans, in addition to children. It simply allows older persons the right to choose to live with persons their own age.

Nicole Napolitano*

---

* Candidate for Juris Doctorate, 2000. I thank my parents and sisters for their tremendous support in all of my endeavors.