

The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*

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I.

INTRODUCTION

Historically, young families in this country, particularly those with low incomes, have maximized the use of space in their homes when they have children. A recent article in *The New York Times* provides an example from the biography of Senator Bob Dole:

Mr. Dole grew up on the north side of Russell, quite literally the wrong side of the tracks, in a little white house with two bedrooms. For years, the four Dole children shared one bedroom until as teen-agers Mr. Dole and his younger brother, Kenny fixed up a room for themselves in the basement. The family had to struggle to make ends meet, but so, it seems did most everyone in Russell during the Depression.¹

Traditionally, few people would have questioned the appropriateness of a low income families' decision to have several children share a bedroom in the family house. Times have changed, however. As household size and birth rates have dropped in the United States, society has increasingly failed to accommodate families with children. Several trends in the housing market reflect this anti-family bias: decreased production of affordable housing units with more than two bedrooms, policy changes promoting a growth in "retirement" communities which exclude children,² and housing providers' use of restrictive occupancy standards.

* This article appeared in an earlier, somewhat different form in "Fair Housing Act Offers Protections Against Arbitrary Housing Occupancy Standards," 17 YOUTH LAW NEWS, January-February 1996, 1.

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1. Elizabeth Kolbert, *On the Kansas Prairie, the Window to Dole*, THE NEW YORK TIMES, May 19, 1996, at 1, 10.

2. The Housing for Older Persons Act, Pub. L. No. 104-76, 109 Stat. 787 (1995), and its

For example, Robert and Betty Ann Sallee encountered firsthand restrictive occupancy standards. They had lived in a cooperative apartment complex for twelve years when Betty Ann became pregnant. The complex then forced the married couple to move out because it did not allow children. Two years later, a change in federal law prohibited housing discrimination against families with children.³ The Sallees and their young child returned to their unit in which they held a proprietary interest. Even though local health and safety laws permitted at least three occupants in the unit, the governing body of the cooperative ordered them out because it permitted only two persons in studios and one bedroom units. This time, the family decided to fight back under the new law. They filed fair housing complaints claiming that the occupancy standard discriminated against families with children.⁴ They showed that the occupancy limitation excluded over 90 percent of the families with children living in the local area, but excluded only 20 percent of the childless households.⁵ A federal court ruled in favor of the Sallees and struck down the restrictive policy. It explained that local housing codes permitted higher occupancy levels and the cooperative had not adequately justified its need for restricting occupancy.⁶

The Sallees are similar to many families who may find themselves in a relatively small unit when they have children. Housing providers frequently impose occupancy restrictions irrespective of the size of the unit and the permissible level of occupancy permitted under health and safety laws. These restrictions may force the family to leave their home when they are least able to undertake the expense and effort of finding a new home.

Since 1988, the Fair Housing Act has provided a remedy against these anti-family policies.⁷ Under this law, families have achieved significant

implementing regulations, 61 Fed. Reg. 14378-14379 (1996) (to be codified at 24 C.F.R. § 100.304), facilitate housing providers' exclusion of families with children in "housing for older persons."

3. The Fair Housing Amendments Act of 1988 prohibits discrimination on the basis of "familial status," which includes households where children under the age of eighteen are "domiciled with a parent or another person having legal custody of such individual or individuals; or the designee of such parent or other person having such custody, with the written permission of such parent or other person". 42 U.S.C. § 3602 (k) (1996). The law mandates that federal or state government prosecute meritorious cases on behalf of families.

4. *United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347 (D. Hawaii 1995).

5. *Id.* at 1360.

6. *Id.* at 1362.

7. Even before federal law prohibited familial status discrimination, some states had invalidated restrictive occupancy standards as violations of state fair housing laws. *See, e.g.*, Jim Morales, *Recent Decision Holds that Occupancy Standard Discriminates Against Families with Children*, 20 CLEARINGHOUSE REV. 152, 153 (June 1986); *see generally*, Jim Morales, *Landlords Find New Ways to Discriminate Against Children*, 7 YOUTH L. NEWS, March-April 1986, at 1.

gains in access to housing. Some representatives of the housing industry, however, question whether this law should prohibit occupancy standards like the one that the Sallees faced. Among other things, they have sponsored federal legislation that would establish a national occupancy policy of two persons per bedroom except where a state gives housing providers potentially greater authority to restrict occupancy.⁸ This article will describe the impact of restrictive occupancy standards, recent caselaw examining occupancy standards under the Fair Housing Act, and recent developments in national policy.

II.

THE APPLICATION AND IMPACT OF OCCUPANCY STANDARDS

A. *Limitations on Occupancy*

Discriminatory occupancy standards exist in a variety of forms, but essentially fall into two categories: 1) limitations that are directed particularly toward children, such as restrictions on the age, number, or sex of children and 2) numerical limitations on occupancy which are facially neutral because they apply to all persons.

The first category of occupancy policies is relatively easy to identify because they apply only to families with children and not to childless households. There is no question that these practices violate fair housing law, but housing providers often argue that the practices are really facially neutral. For example, in *Sams v. U.S. Dept. of Housing & Urban Development*, a housing provider's agent initially refused to rent a house listed for \$375 per month to a married couple and their five children because they had "too many children."⁹ Although the housing provider had no written policy on occupancy, the agent explained that large families were destructive and needed supervision. Subsequently, the landlord adopted an occupancy standard of two adults and two children; in litigation, the landlord claimed that she was merely following a facially neutral policy.¹⁰ The court of appeal upheld a HUD administrative decision finding that the occupancy standard was intentional discrimination on the basis of familial status

8. The State Occupancy Standards Affirmation Act of 1996, H.R. 3385, 104th Cong. (1996). The House of Representatives approved this legislation as a last minute amendment to H.R. 2406, 104th Cong. § 508 (1996), a bill relating to public housing.

9. No. 94-1695, 1996 WL 13810, at *2 (4th Cir. Jan. 16, 1996) (unpublished table decision).

10. *Id.* at *3.

because of the agent's initial reference to the number and behavior of children.¹¹

Another recent case highlights the difficulty sometimes of distinguishing between overtly discriminatory and facially neutral policies. In *Burnett v. Venturi*, a housing provider refused to rent a three bedroom house to a couple with three children because the "family was too big for the house."¹² At the time, it had no written occupancy policy. Eventually, the house was rented to a single person without children. In its defense, the housing provider claimed that the statements about family size were a reasonable occupancy standard limiting occupancy to less than five persons. The court ruled that a jury would have to decide the factual dispute and explained the difference between the two forms of occupancy standards:

One way that the restriction clearly would not be reasonable would be if the actual occupancy limitation was not facially neutral. In other words, [a violation of fair housing law has occurred] if plaintiffs have demonstrated that . . . defendants' policy was not to rent to families with too many children rather than not to rent to families with too many people.¹³

The court also refused to rule on the legitimacy of the housing provider's supposed facially neutral occupancy policy because, among other reasons, it did not have any evidence of the "specific dimensions of the bedrooms and house."¹⁴ The overlap between overtly discriminatory and facially neutral policies is important because it shows that housing providers sometimes attempt to confuse the two policies to avoid liability.

Facially neutral standards limit the number of persons in a unit. They include restrictions on the number of persons per unit, room, or bedroom and restrictions based on the square footage of rooms. These standards are facially-neutral because they do not overtly discriminate against families with children. This does not mean that they are outside the coverage of fair housing law. As will be described below, occupancy standards

11. *Id.* See also *Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F. Supp 301 (S.D.N.Y. 1990) (refusal to rent one bedroom units to a parent with one child even though landlord would rent these apartments to childless households of the same size); *HUD v. Wagner*, No. HUDALJ 05-90-0775-1, Fair Housing-Fair Lending (Prentice-Hall) ¶ 25,032 (HUD Office of Admin. Law Judges, June 22, 1992) (refusal to rent a two bedroom apartment to single parent with two children where landlord would rent the same unit to a couple with one child.)

12. 903 F. Supp. 304, 307 (N.D.N.Y. 1995).

13. *Id.* at 312-13.

14. *Id.* at 314.

disproportionately affect some groups, like families with children, and thus raise fair housing concerns.¹⁵ In general, an overly-restrictive numerical limitation allows less persons than the number of occupants permitted under an objective measurement of overcrowding in state or local law.

B. *Overcrowding Standards*

Official determinations of overcrowding generally fall into two categories: health and safety standards and crowding indicators. The former is a proscriptive standard protecting residents from unsafe occupancy levels; the latter is a normative measurement of housing conditions. Government officials use both standards, but for different purposes: to fulfill the duty of protecting the public, and to establish a subjective expression of societal desires. There is a danger in confusing the two categories because the use of the more restrictive crowding indicator may unnecessarily limit housing opportunities, particularly in areas where a shortage of affordable housing exists.

Most states and local governments have health and safety standards in housing codes to prevent overcrowding. These proscriptive standards provide minimal protections for the welfare of a particular dwelling's residents, apply uniformly to all housing, and use the size of the unit to determine occupancy levels. Housing experts have adopted several model codes, which form the basis for most of these health and safety laws.

The International Conference of Building Officials (ICBO) publishes the *Uniform Housing Code*, which it reviews on a regular basis and updates every three years. It measures occupancy by the square footage of rooms used for sleeping purposes. It permits habitable rooms (except kitchens) to be used for sleeping purposes if they have a minimum of 70 square feet for the first two occupants and 50 square feet for each additional occupant.¹⁶ The Building Officials and Administrators Code (BOCA) permits certain rooms to be used for sleeping purposes if they have a minimum of 70 square feet for one occupant and an additional 50 square feet for each additional occupant.¹⁷ BOCA further limits occupancy by limiting the type of rooms that can be used for sleeping purposes and by requiring living rooms, dining rooms, and

15. Moreover, some housing providers have found that very restrictive standards are an effective means of perpetuating anti-family policies. They may intentionally use these standards to limit the number of families with children in housing. See, e.g., *U.S. v. Badgett*, 976 F.2d 1176 (8th Cir. 1992) (apartment complex policy of one-person standard in one bedroom apartment violates Fair Housing Act).

16. UNIFORM HOUSING CODE § 503.2 (International Conference of Building Officials 1994).

17. NATIONAL PROPERTY MANAGEMENT CODE § 405.3 (Building Officials and Administrators 1993).

kitchens to have certain dimensions based on overall occupancy levels.¹⁸ The American Public Health Association suggests limiting occupancy on the basis of the overall size of habitable space in the unit as well as the size of rooms occupied for sleeping purposes. It requires at least 150 square feet for the first occupant and 100 square feet for each additional occupant; rooms occupied for sleeping purposes must have 70 square feet for the first occupant and 50 square feet for each additional occupant.¹⁹ All of these model standards provide guidance to local officials about appropriate occupancy levels to protect residents' health and safety.

Crowding indicators are distinct from the above-described health and safety standards. They express an aspiration for ideal living conditions based, in part, on majority trends in living arrangements, but they are not designed solely to protect health and safety. As the average household size has decreased in this country, so has the crowding indicator. The current standard is one person per room; officials use it in a variety of housing programs to measure housing need.²⁰ This crowding indicator "expresses a normative judgment" that "applies a standard by which society declares crowding beyond a particular density unacceptable."²¹ In part, it reflects a highly subjective concern for privacy. "Because they are subjective, overcrowding standards have changed over time, and the process by which they are established is rarely explicitly described."²² Under the current indicator, a unit is overcrowded if there is more than one person per room; in 1940, a unit was overcrowded if there were more than two persons per room. This subjective and changing crowding indicator is distinct from "[h]ealth standards [which] use the alternative indicator of square feet per person."²³

The two different measurements of crowding sometimes create confusion and controversy because they provide divergent determinations of overcrowding. This inconsistency is sometimes used by those who argue for greater housing provider discretion in setting occupancy policies.²⁴ This argument ignores the fundamental difference in the purposes underlying the

18. *Id.* at § 405.5.

19. HOUSING AND HEALTH: RECOMMENDED MINIMUM HOUSING STANDARDS, § 9.02 (American Public Health Association-Center for Disease Control 1986).

20. Dowell Myers, et al., *The Changing Problem of Overcrowded Housing*, J. OF AMER. PLANNING ASSOC., Winter 1996 66, 67 (Winter 1996).

21. *Id.* at 68 [emphasis in original omitted].

22. *Id.* at 68.

23. *Id.* at 82, n.1.

24. See, e.g., WILLIAM C. BAER, RENTAL CROWDING AND OCCUPANCY STANDARDS: A LITERATURE REVIEW AND POLICY ANALYSIS (1996) (on file with author).

two measurements of crowding. It diminishes residents' choices in the housing market. It also undercuts the government's role in protecting the general welfare and ensuring the fair allocation of housing resources.

C. *The Impact of Overly-Restrictive Occupancy Standards*

Census data on the size of households shows that overly-restrictive numerical limitations adversely affect families with children and certain racial groups more than other groups. Families with children are more likely than other households to have three or more persons in the household unit.²⁵ As household size increases, this percentage of households with children increases dramatically.²⁶ Moreover, Latino and Asian households are much more likely than other households to have a large number of family members living together. For example, Latino households in California constitute 17.7 percent of all households, but 43.6 percent of all households with five persons or more. Asians are 8 percent of all households, but 13.7 percent of households with five or more persons.²⁷

A recent study measured the extent and nature of high occupancy levels among renter households in the United States.²⁸ The study analyzed census data from 335 metropolitan areas to determine which groups and geographical areas experienced high occupancy levels. The importance of this information is that it indicates which groups would be harmed the most by additional restrictions on occupancy.

As a preliminary matter, the study found that only a very small percentage of the total renter households live in crowded dwellings.²⁹ Crowding, as measured by persons per room, has dramatically decreased over the past fifty

25. *E.g.*, *United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991) (families with children constituted 80 percent of households with three persons or more in local area); *United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347 (D. Hawaii 1995) (families with children were 92 to 95 percent of all local households with three or more persons; childless households were 19 to 21 percent); *United States v. Hover*, No. C 93-20061 JW, 1995 WL 55379 (N.D. Cal. Feb. 16, 1995) (families with children were 90 percent of households consisting of four or more persons); *Fair Housing Council v. Ayres*, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (refusing to rent to households with three or more persons "excludes a large percentage of families with children"); *Mountain Side Mobile Home Estates v. HUD*, 56 F.3d 1243 (10th Cir. 1995) (over seventy percent of all U.S. households with four or more persons contain one or more children).

26. *See Hover* at *3 (evidence that families with children are 98.7 percent of all households with six or more persons).

27. CENTER FOR THE CONTINUING STUDY OF THE CALIFORNIA ECONOMY, CALIFORNIA POPULATION CHARACTERISTICS 29, 31 (1992).

28. Myers, et al., *supra* note 21, at 66.

29. *Id.* at 66.

years.³⁰ A slight increase, however, has occurred in the last ten years. When cross-tabulated by various factors, the study identified four household types that have high levels of occupancy: recent immigrants, Asians, Hispanics, and lower-income households. Although low income is a significant factor, controlling for income indicates that some groups remain in large households as income increases.

Overcrowding levels are very high for Asians and Hispanics, not dropping markedly until incomes exceed 80 percent of the median level. . . . Even at income levels twice the median, 8 percent of Asian and Hispanic households remain overcrowded, which is a percentage well above the national level.³¹

This study supports other reports that cultural values emphasizing the sharing of dwellings with extended families members may lead to high occupancy levels.³² Nonetheless, “overcrowding may be self-correcting” because all groups tend to “move out of overcrowded conditions as their financial circumstances improve or they become more culturally assimilated.”³³

In analyzing high occupancy levels by geographical area, the study found that the three most important variables in identifying these areas were the presence of Latino households, the presence of low income families with children, and the presence of immigrants.³⁴ The top six states having high levels of occupancy in renter households are California, Hawaii, Texas, Arizona, New York, and Florida.³⁵ Looking at metropolitan areas, the study found the highest occupancy levels in the Rio Grande Valley of Texas along the border with Mexico; 13 of the top twenty areas are in California.³⁶

This data establishes that restricting occupancy in housing—whether by government policy or by individual housing providers—will have its greatest impact on households that may have very few options in finding larger housing. In particular, renters have few options. Most rental units

30. *Id.*

31. *Id.* at 72.

32. Ellen J. Pader, Spatial Relations and Housing Policy: Regulations that Discriminate Against Mexican-origin Households, 13 J. OF PLANNING ED. & RESEARCH 119 (1994).

33. Myers, et al., *supra* note 21, at 81.

34. *Id.* at 80-81.

35. *Id.* at 94.

36. *Id.* at 93.

have two or less bedrooms, while most owner-occupied units have three bedrooms or more.³⁷ This impact raises troubling questions about renewed efforts to limit occupancy levels:

If the nation implicitly made its crowding standard more stringent as living standards increased in the first half of the century, should we consider relaxing the standard now that real incomes have fallen and overcrowding is growing again? A related question is, should we recognize diversity of place, and relax our standards (at least during the present surge in overcrowding) in those places where overcrowding is worst? Applying a high standard to the living conditions of those too poor to achieve it offers them small relief if society is unwilling to make up the difference between what we say people should have, and what we are willing to provide to help them achieve it.³⁸

III.

JUDICIAL RESPONSES TO OCCUPANCY STANDARDS

A. *Fair Housing Act and Numerical Limitations on Occupancy*

The Fair Housing Amendments Act of 1988 refers to numerical limitations on occupancy for purposes of defining permissible standards that are exempt from discrimination claims. It exempts: "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."³⁹ The United States Supreme Court recently explained that this provision covers objective standards that limit the number of persons in a dwelling and that "protect health and safety by preventing dwelling overcrowding."⁴⁰ The Act therefore covers those standards that do not meet this definition. Whether particular numerical limitations violate the law has been the subject of much controversy.

37. BAER, *supra* note 24, at 14.

38. Myers, et al., *supra* note 21, at 80 [emphasis in original omitted].

39. 42 U.S.C. § 3607 (b)(1) (1996).

40. *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776, 1781 (1995).

The exemption in the Fair Housing Act shows, at a minimum, that Congress intended to prohibit *unreasonable* occupancy standards irrespective of whether a governmental entity or a housing provider establishes them. The Act's legislative history provides some guidance about what occupancy standards are unreasonable. For example, one congressional member proclaimed:

I think it is an outrage that apartment owners exclude especially kids from two-bedroom apartments. One might say that there is a question on a one-bedroom apartment, but even there the parents can use the living room as their bedroom and the regular bedroom for the kids, but in a two-bedroom apartment, there is not the slightest iota of an excuse to exclude kids.⁴¹

This statement raises questions about the legitimacy of a standard of two-persons-per-bedroom as applied to families with children.

More significantly, the House Judiciary Committee explained that "[r]easonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status."⁴² The Judiciary Committee's explanation of reasonable occupancy standards emphasized uniformity and the operation—or effect—of the occupancy standard as the keys to evaluating occupancy standards. Its disapproval of those standards that "operate to discriminate" indicate that reasonableness is determined by the effect on the protected classes.⁴³ Civil rights law has long prohibited practices having an unjustified discriminatory effect on a protected class.

B. *The Supreme Court's Guidance on Permissible Occupancy Standards*

The most important case addressing occupancy standards under the Fair Housing Act did not involve families with children, but rather persons with disabilities. In *City of Edmonds v. Oxford House, Inc.*, the United States Supreme Court held that the Fair Housing Act's exemption of reasonable governmental occupancy standards, did not include a restrictive zoning

41. 134 Cong. Rec. H4682 (daily ed. June 23, 1988) (statement of Rep. Scheuer).

42. H.R. Report No. 100-711, 100 Cong., 2d Sess. at 31.

43. Operate means to "perform a function, or operation, or produce an *effect*." [emphasis added] Black's Law Dictionary (5th ed. 1979).

definition of family.⁴⁴ The Court's reasoning hinged on the distinction between land use restrictions—which the Act did not exempt—and maximum occupancy restrictions—which the Act exempted if the government had adopted them and they were reasonable. Accordingly, the Court permitted a group home for persons with disabilities to challenge the zoning law as a violation of the Fair Housing Act and remanded the case to lower courts. In arriving at this conclusion, the Court made important observations about the meaning of occupancy standards in fair housing cases.

The Court explained that the purpose of the exemption was to protect commonly-used overcrowding standards from attack under the Fair Housing Act. The Court noted that, although the exemption applied to all claims of discrimination, it was directed specifically at concerns that the familial status protections would force landlords “to allow large families to crowd into small housing units.”⁴⁵ The exemption “makes it plain that, *pursuant to local prescriptions on maximum occupancy*, landlords legitimately may refuse to stuff large families into small quarters.”⁴⁶ The Court thus established that these “local prescriptions” provided the bright line between permissible and suspect occupancy standards. To complete the analysis, the Court defined the reasonable prescriptions protected under the Act.

Maximum occupancy restrictions . . . cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. [citing the Uniform Housing Code, the BOCA National Property Maintenance Code, the Standard Housing Code, and the American Public Health Association standards] These restrictions ordinarily apply uniformly to *all* residents of *all* dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding.⁴⁷

All of the examples cited by the Court are model codes relying on the square footage of rooms used for sleeping purposes or the overall habitable space in a dwelling to determine occupancy. In the Court's view, the cornerstones of a permissible occupancy standard are uniform application to all housing stock and protection of residents' health and safety.

44. See 115 S. Ct. at 1777 (1995) (interpreting 42 U.S.C. § 3607 (b)(1)).

45. *Id.* at 1782, n. 9.

46. *Id.* (emphasis added).

47. *Id.* at 1781 (citations omitted) (emphasis in original).

City of Edmonds indicates that occupancy standards are suspect under the Fair Housing Act if they are more restrictive than the maximum occupancy restrictions as described above. Indeed, several federal decisions on occupancy standards compare the challenged restriction with local overcrowding codes.⁴⁸ *City of Edmonds* essentially endorses this approach as the first step in evaluating an allegedly restrictive occupancy standard.

C. *The Burden on Housing Providers to Justify Occupancy Standards*

The federal courts have long held that litigants in fair housing cases do not have to prove intentional discrimination, but may rely on evidence of discriminatory effect.⁴⁹ Nonetheless, in numerous cases, families have shown that facially neutral occupancy standards are intentionally designed to exclude them. A common occurrence is for housing providers that previously excluded children to turn to severe limitations on the number of occupants. Usually, there is evidence in these cases of the housing provider's discriminatory preference, such as discouragement of families from renting, adults-only advertising, and an absence of families with children. In this context, a restrictive occupancy standard perpetuates the adults-only policy and thus violates prohibitions against intentional discrimination on the basis of familial status. Several cases have found that facially-neutral occupancy standards perpetuate or reinforce an underlying policy of intentional discrimination.⁵⁰

All of the federal decisions addressing restrictive occupancy standards have found that statistical data showing adverse impact is relevant to establishing a prima facie case of discrimination. The courts do not automatically invalidate every housing practice with a discriminatory effect.

48. *United States v. Badgett*, 976 F.2d 1176, 1177 (8th Cir. 1992) (comparing a one-person-per-bedroom standard with local code permitting one occupant for the first 150 square feet and an additional occupant for each additional 100 square feet in the unit); *United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347, 1362 (D. Hawaii 1995) (comparing two-persons-per-bedroom standard with city housing codes based on square footage of units); *United States v. Lepore*, 816 F. Supp. 1011, 1015 (M.D. Pa. 1991) (comparing a two-person-per-unit standard with township's occupancy requirements).

49. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd* 488 U.S. 15 (1988); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). *But see* *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1534 (7th Cir. 1990) (Evidence of discriminatory effect in steering case is merely "probative of intent" and is not sufficient by itself to establish violation of Title VIII.).

50. *See, e.g., Badgett*, 976 F.2d at 1177; *Lepore*, 816 F. Supp. 1011; *Human Rights Commission v. La Brie*, 668 A.2d 659 (Vt. Sup. Ct. 1995); *Dept. of Fair Employment and Housing v. Merrbrook Apartments, Fair Housing-Fair Lending* (Prentice-Hall) ¶19,095 (Calif. Fair Employment & Housing Comm. Nov. 11, 1988).

Under civil rights principles, proof of discriminatory effect forces the person using the policy to provide an explanation. In legal parlance, this is called rebutting the prima facie case of discrimination. In fair housing cases generally, the courts have adopted a number of standards by which they review a defendant's rebuttal evidence.⁵¹

In occupancy standard cases, the courts have imposed fairly strict standards of review on housing providers, but, reflecting the unsettled nature of the law, have used different tests.⁵² In *Pfaff v. U.S. Dept. of Housing and Urban Development*, the court relied on preamble language in HUD's 1989 regulations to require a careful examination of the reasonableness of a particular occupancy standard.⁵³ In applying this standard, the *Pfaff* court reviewed substantive evidence supporting the occupancy limitation rather than mere assertions about its legitimacy. It referred to expert testimony supporting the occupancy standard and reviewed the physical characteristics of the dwelling to determine reasonableness.⁵⁴ In *Fair Housing Council v. Ayres*, the housing provider justified a two-persons-per-unit standard on that grounds that it prevented excessive wear and tear and thus reduced maintenance costs.⁵⁵ The court held that this did not satisfy the burden of showing "the least restrictive means to achieve a compelling business

51. See, e.g., *Betsey*, 736 F.2d 983 (business necessity test); *United States v. Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (compelling governmental interest); *Rizzo*, 564 F.2d 126 (defendant must show that a discriminatory policy serves a legitimate interest and that no alternative course of action satisfies the interest with a less discriminatory impact). See also *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 156 (S.D.N.Y. 1989) wherein the court rejected the landlord's "general conclusory assertions" as insufficient to justify the discriminatory policies of refusing Section 8 tenants and requiring applicants to have an income that was three times the monthly rent. The court noted that "defendants have not offered any evidence to show that the challenged policies are reasonably necessary to insure payment of rent". *Id.*

52. The fair housing cases have borrowed heavily from employment discrimination litigation in which the primary issue is whether the discriminatory policy is related to a person's ability to perform a job. Obviously, the issue in housing cases is different. The housing provider's primary interests are in choosing tenants who will pay the rent, who have a good tenant history, and who will not violate lease provisions. Some commentators have suggested that a housing provider's decision in selecting good tenants is easier than the employer's decision in selecting qualified employees for a particular job. Moreover, housing is a basic necessity. Accordingly, the courts should give less deference to housing providers than to employers when they evaluate their justifications for using a discriminatory policy. See Christopher P. McCormack, Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 *FORDHAM L. REV.* 563, 565 (1986) ("For Title VIII, the limits of the analogy with Title VII are becoming more important as employers' discretion receives greater deference in Title VII doctrine. These limits become critical in disparate effect analysis because fewer business considerations will suffice to support the defense of business necessity in housing than in employment.")

53. 88 F.3d 739, 748 (9th Cir. 1996).

54. *Id.* at 749.

55. 855 F. Supp. 315, 318-19 (C.D. Cal. 1994).

standard.”⁵⁶ The court pointedly questioned whether subjective “economic judgments constitute a compelling necessity.”⁵⁷ In placing a heavy burden on the housing provider, both *Ayres* and *Hover* relied on an administrative decision that a court of appeal subsequently reversed. Nonetheless, even that appellate decision requires a rigorous inquiry of the housing provider’s justifications.

D. *The Role of Experts in Justifying an Occupancy Standard*

In *Mountain Side Mobile Estates v. Secretary of HUD*, the federal court of appeal imposed a heavy burden on the housing provider, although it rejected a stricter test that HUD had used.⁵⁸ In administrative proceedings, the Secretary of HUD had invalidated the mobile home park’s occupancy standard of three persons per dwelling because the park owner had not shown, through objective evidence, that the standard served a compelling business necessity.⁵⁹ In rejecting that standard of review, the court stated:

[W]e hold that for the purposes of Title VIII FHA housing discrimination cases, the defendant must demonstrate that the discriminatory practice has a manifest relationship to the housing in question. A mere insubstantial justification in this regard will not suffice, because such a low standard would permit discrimination to be practiced through the use of spurious, seemingly neutral practices. At the same time, there is no requirement that the defendant establish a “compelling need or necessity” for the challenged practice to pass muster since this degree of scrutiny would be almost impossible to satisfy.⁶⁰

The court then proceeded to find that the mobile home park had met this test.

56. *Id.* at 318 (citing *HUD v. Mountain Side Mobile Estates*, Fair Housing-Fair Lending ¶ 25,064 at 25,615 (HUD Secretary, Oct. 20, 1993)).

57. *Id.* at 319. See also *United States v. Hover*, No. C 93-20061 JW, 1995 WL 55379 (N.D. Cal. Feb. 16, 1995) (a standard of one person per bedroom plus one was not supported by objective evidence showing a sufficiently compelling business necessity).

58. 56 F.3d 1243 (10th Cir. 1995).

59. *Mountain Side*, Fair Housing-Fair Lending (Prentice-Hall) at 25,620.

60. *Mountain Side*, 56 F.3d at 1254-55.

The park had retained an expert, albeit after adoption of the occupancy standard, to determine the appropriate occupancy level. The expert confirmed that the capacity of the park's sewage system was limited and that the park's location in a resort area attracted numerous guests of the residents. The court concluded that the occupancy standard therefore had a "manifest relationship to housing in the Park."⁶¹

A missing element in the *Mountain Side* analysis was an evaluation of alternative practices that would serve the housing provider's interests and not unduly limit occupancy. In *United States v. Lepore*, the court confronted a housing provider's justifications for occupancy restrictions that were similar to those in *Mountain Side*.⁶² In *Lepore*, a mobile home park relied on experts to show that an outdated septic tank system justified a two-persons-per-unit standard and that the alternative of replacing the system was too expensive.⁶³ Experts for the plaintiffs, however, showed that the park could inexpensively adopt alternative practices that would avoid the discriminatory impact of the restrictive occupancy standard and yet serve the park's interests. These practices included increased pumping of the septic tank, use of water meters to regulate and charge residents for excess water use, and installation of water-saving devices in units.⁶⁴

Consideration of alternatives to a restrictive occupancy policy does not always lead to an invalidation of the standard. In *United States v. Weiss*, the court accepted an expert's opinion that a hot water system limited occupancy in each building of an apartment complex and that the only alternative was to retrofit the water system and install larger hot water tanks.⁶⁵ The expert estimated the cost of this alternative at \$1.63 million. The court held that the housing provider had shown "a bona fide compelling business justification for their policy."⁶⁶

As in *Mountain Side*, the housing provider in *Weiss* retained the expert after adopting the occupancy standard. Plaintiffs questioned the validity of

61. *Id.* at 1257. In several respects, the court's reliance on the expert's analysis was unwarranted. The expert study occurred after adoption of the policy, it determined the sewage system's capacity on the basis of interviews with park personnel rather than on an actual survey, it recommended a higher level of occupancy than the park had imposed, and it based, in part, its recommended occupancy level on subjective factors about the quality of life in the park. Nonetheless, the *Mountain Side* case stands for the proposition that expert analysis is a critical, if not overriding, factor in justifying a restrictive occupancy standard.

62. 816 F. Supp. 1011 (M.D. Pa. 1991).

63. *Id.* at 1022.

64. *Id.*

65. 847 F. Supp. 819, 822-23 (D. Nev. 1994).

66. *Id.* at 830.

such expert opinion, but the court noted that the plaintiffs had not used their own experts to refute the housing provider's justifications.⁶⁷ Moreover, the court found that the expert analysis provided an acceptable objective justification for the policy.

This case does not present subjective justifications which depend on the operation of a defendant's mind for either validity or veracity. Rather the defendants have submitted under penalty of perjury an analysis of the hot water system in place at the housing complex, made by a duly qualified professional engineer who opined (and gave his reasons) that the housing limitations imposed upon occupancy by defendants had a direct correlation to hot water capacity.⁶⁸

The *Weiss* opinion reiterates the importance of expert support for a restrictive occupancy standard and its use in showing that alternatives are not feasible.

The most striking aspect of all of these cases is the rejection of subjective factors as the sole justification for occupancy standards. *Mountain Side* is the only case that allowed subjective factors to play a role in justifying a restrictive standard. Even there, concerns about "quality of life" were not the predominant justification because expert analysis showed that other objective factors supported the restriction on occupancy.

IV.

ADMINISTRATIVE AND LEGISLATIVE RESPONSES TO OCCUPANCY STANDARDS

A. HUD's Early Policies on Occupancy Standards

In promulgating final regulations for the Fair Housing Amendments Act of 1988, HUD refused to adopt "a national occupancy code."⁶⁹ Instead, it stated that it would "carefully examine [an occupancy standard] to determine whether it operates unreasonably to limit or exclude families with children."⁷⁰ As a result of this careful examination, both HUD and the

67. *Id.*

68. *Id.*

69. 54 Fed. Reg. 3237 (1989).

70. *Id.*

Department of Justice prosecuted numerous cases challenging restrictive occupancy standards. As described above, these cases have been instrumental in establishing the legal doctrine governing occupancy standards.

In spite of its initial reluctance to provide guidance, the HUD General Counsel issued two policy memoranda in 1991 to guide HUD investigators in reviewing administrative complaints about occupancy standards. The first memorandum stated that occupancy levels of one person per bedroom plus one were presumed reasonable.⁷¹ After protests from civil rights groups, HUD rescinded this policy and stated that a standard of two persons per bedroom was presumptively reasonable.⁷² The new policy, however, added that HUD would not determine compliance solely on the number of persons permitted in each bedroom, but would consider factors, such as the size and configuration of the bedroom and unit, in making its reasonable cause determination. The policy's flexibility recognized that larger units could accommodate more than two persons per bedroom.

The main problem with the Keating Memorandum was that it adopted an arbitrary standard of two persons per bedroom instead of a standard based on the size of the dwelling. The policy attempted to mitigate this arbitrariness by providing a number of exceptions. Paradoxically, most of these exceptions directed HUD staff to look at the size of the unit and its bedrooms as the basis for determining whether "special circumstances are present" to the ignore the two person per bedroom standard.⁷³ The Keating Memorandum's reliance on numerous exceptions based on a unit's size demonstrated that a two-persons-per-bedroom standard is inherently flawed.⁷⁴ Instead of persons per bedroom, the size of the unit should be the primary determinant of an occupancy standard's reasonableness.

71. Memorandum from Frank Keating to All Regional Counsel (Feb. 21, 1991) (on file with author).

72. Memorandum from Frank Keating to All Regional Counsel 2 (March 20, 1991) (on file with author).

73. *Id.* at 5.

74. Some aspects of the Keating policy were clearly inconsistent with the Act. For example, it suggested that the legality of an occupancy standard may turn on the age of children who occupy a unit. This suggestion is only correct to the extent that a housing provider waives an otherwise non-discriminatory occupancy standard for the benefit of families with children. In general, the age of children is not a legitimate basis on which to vary a occupancy standard. The policy also stated that "[a]n occupancy policy which limits the number of *children* per unit is less likely to be reasonable than one which limits the number of *people* per unit." March 20, 1991, Memorandum, *supra* note 72, at 4. This statement misinterprets the Fair Housing Act's protection of familial status, which absolutely prohibits a limitation based solely on the number of children. See Fair Housing Amendments Act of 1988, 42 U.S.C. §3602 (k) (1994).

Perhaps the most important aspect of the Keating policy was its limited legal effect. It was an internal HUD policy for determining whether the agency should issue a reasonable cause determination of discrimination in occupancy standard cases. It was not binding in civil actions, although some courts used it as a benchmark in fair housing cases.⁷⁵

B. *Recent Changes in Federal Policy*

HUD did not make any formal changes in its occupancy standard policy under the Fair Housing Act until 1995.⁷⁶ As described above, however, the federal courts and administrative law judges issued numerous opinions providing guidance on occupancy standards. In July 1995, the HUD General Counsel rescinded the 1991 Keating Memorandum, stating that it had "created more problems than it resolved."⁷⁷ He characterized the policy as flexible, but subject to the misinterpretation that it had established a rigid standard of two persons per bedroom. In its place, the General Counsel directed HUD investigators to "carefully examine[] under the disparate impact theory of discrimination" any occupancy standard that permitted fewer persons than the Building Officials and Code Administrators, Inc. (BOCA) Code.⁷⁸ He described the BOCA code as requiring:

Every dwelling unit must contain a minimum gross floor area not less than 150 square feet for the first occupant and 100 square feet for each additional occupant. Every room occupied for sleeping purposes by one occupant shall contain at least 70 square feet of floor area, and every room occupied for sleeping purposes by more than one person shall contain at least 50 square feet of floor area for each occupant.⁷⁹

75. *See, e.g.*, *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992).

76. In 1992, HUD Secretary Jack Kemp appointed a diverse group of housing providers, civil rights groups, and housing advocates to consider, among other things, occupancy standards in public and assisted housing. After months of meetings and deliberations, the group issued its final report and recommended that "HUD establish (by regulation) either maximum occupancy standards based on the square footage of the habitable area in the entire unit or in each of the dwelling unit's bedrooms" PUBLIC AND ASSISTED HOUSING OCCUPANCY TASK FORCE, REPORT TO CONGRESS AND TO THE DEPT. OF HOUSING AND URBAN DEVELOPMENT 1-14 (1994).

77. Memorandum from Nelson A. Diaz to All Field Assistant General Counsel (July 12, 1995) (on file with author).

78. *Id.* at 2.

79. *Id.* This description of the BOCA Code is actually a hybrid of the current standard for rooms used for sleeping purposes, NATIONAL PROPERTY MAINTENANCE CODE, § PM-405.3, and a previous standard for overall unit size. In 1983, the BOCA membership deleted the formula for overall unit size

The hallmark of BOCA and similar model codes is the use of square footage of the unit. If an occupancy standard was more restrictive than BOCA, Diaz instructed HUD staff "to determine whether or not [the standard] constitute[s] a business necessity and whether there are less discriminatory, alternative means to accomplish the business necessity justifications."⁸⁰ In addition, Diaz noted that HUD would use the BOCA Code to evaluate the reasonableness of governmental occupancy standards, but did not specify the nature of that evaluation.

The Diaz policy closely tracked civil rights law and followed the Supreme Court's guidance in *City of Edmonds*.⁸¹ Nonetheless, representatives of the housing industry protested the use of the BOCA code as a benchmark. They complained that it permitted too many occupants per unit and that HUD had issued the policy without prior public comment. They raised a number of issues, such as the use of living rooms as rooms occupied for sleeping purposes and the definition of habitable space that would be included in the formula for occupancy. Although BOCA directly answered some of these questions, the complaints persisted.⁸²

As a result of the housing industry's dissatisfaction with the Diaz policy, members of Congress intervened and called for the reinstatement of the Keating Memorandum. In September 1995, the HUD Office of Fair Housing and Equal Opportunity announced that it would not rely on the Diaz policy and would instead evaluate all occupancy standard cases on a case by case basis.⁸³ Eventually, Congress codified the Keating policy in the 1996 Appropriations Act, which prohibits HUD fair housing enforcement in familial status cases challenging occupancy standards unless "there has been discrimination in contravention of the standards provided [in the Keating policy]."⁸⁴ Notably, this provision pertains only to administrative enforcement of familial status cases. It does not affect civil actions; it does

because "the provisions for specific minimum room sizes . . . are simpler to enforce and provide ample protection against overcrowding." Letter from Kenneth Schoonover, BOCA, to Clarine Nardi Riddle, National Multi Housing Council 2 (August 2, 1995) (on file with author). HUD's use of an outdated BOCA standard gave the housing industry an additional argument that the new policy was inappropriate. The older BOCA standard, however, is similar to the current occupancy provision in the APHA-CDC RECOMMENDED MINIMUM HOUSING STANDARDS, § 9.02.

80. Memorandum from Nelson A. Diaz, *supra* note 77, at 2.

81. *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1777 (1995).

82. See Letter from Kenneth Schoonover, *supra* note 79.

83. Memorandum from Elizabeth K. Julian, Acting Deputy Assistant Secretary for Policy and Initiatives, to Fair Housing Enforcement Directors (Sep. 25, 1995) (on file with author).

84. Omnibus Appropriations Act, Pub. L. No. 104-134, § 224 (1996).

not affect any complaints challenging occupancy standards as race discrimination.

C. *Backlash by the Housing Industry*

Both the language of the Fair Housing Act and caselaw demonstrate that state and local overcrowding codes are the single, most important factor in evaluating occupancy standards. The Act absolutely protects these codes and those private standards that follow them. Furthermore, the greater the standard diverges from a code, the more likely that it violates the Act. Although these overcrowding standards provide a well-established and clear means of measuring occupancy, some housing providers argue that they are not appropriate for measuring occupancy standards under fair housing law.

Representatives of the housing industry recently commissioned a report that is critical of overcrowding standards as a benchmark in fair housing analysis.⁸⁵ The report faults overcrowding standards because they are only concerned with the protection of residents' health and safety.

Public policy still carries lingering biases from an earlier day, a bias toward the consumers of space to the neglect of those who supply it. Consider building codes as they apply to occupancy. They are aimed solely at protecting the health and safety of the *present* occupants. This is an admirable concern, but it does not get at other parts of the situation.⁸⁶

Besides protection of the occupants, the report argues that public policy on occupancy standards should consider landlords who will neglect their property if they have to rent to large families, neighbors who do not want to live in close proximity to units with large households, and the government's expenditure on services for communities with high levels of occupancy.⁸⁷

This report does not argue in favor of uniform restrictions on occupancy. Instead, it proposes new restrictions only on renter families. The report completely ignores the harm to families who are evicted or left homeless. The greater harm, in the author's view, is the deterioration of the housing stock,

85. BAER, *supra* note 37. The National Multi Housing Council and National Apartment Association, among others, commissioned this report.

86. *Id.* at 11 (emphasis in original).

87. *Id.*

landlords' negative reactions to large families, and neighbors' sense of overcrowding.⁸⁸

The report makes a number of unwarranted assumptions about occupancy levels, tenants' behavior, and landlord behavior. First, it assumes that adoption of maximum occupancy policies will actually result in all or most units having a large number of occupants. Yet, the report acknowledges that "even for renters only, who often live at higher densities than owners, there has been a decided trend over the last 50 years to reduce their degree of crowding."⁸⁹ Moreover, the report admits "that few people want overcrowding."⁹⁰ This indicates that the widespread use of maximum occupancy standards does not lead to high levels of occupancy.

Second, the report states that the "scientific literature on household wear and tear on housing units, on their physical deterioration and decline, is sparse."⁹¹ Yet, it concludes that large families will "overgraze" the housing stock and will necessarily cause a deterioration in units over time.⁹² Third, even where large households do contribute to higher rates of wear and tear on a unit, the report dismisses housing providers' alternatives to restrictive occupancy standards to cure physical deterioration.⁹³ Regular maintenance, charging tenants for unusual wear and tear or damage to the unit, and rent increases are actions that landlords typically take to mitigate impacts on units.

Finally, the report recognizes the shortage of rental units for large families, but provides no feasible solution to this problem.

[L]arge renter families are at a particular disadvantage with respect to the stock that is generally available to their needs. *It does not mean, however, that the appropriate solution to that problem is to pack in large families in generally smaller units.* Selectively renting larger single-

88. *Id.* at 29. The report makes a telling analogy between large families' use of dwelling units and overgrazing by cattle. It suggests that in both instances public policy should prevent the overconsumption of the underlying resource—whether it is housing stock or land—in order to preserve its use for future generations. "[T]he immediate problem faced by large families will be seemingly solved by the legal interpretation of the Fair Housing Amendments Act of 1988, while future generations will have to contend with a more rapidly depleted older housing stock." *Id.* at 12. The report recommends that housing providers have increased discretion to limit occupancy so that they are better able to manage and conserve their property. See generally *id.* at 20-29.

89. *Id.* at 14.

90. *Id.* at 20.

91. *Id.* at 3.

92. *Id.* at 12.

93. *Id.* at 20.

family units for these families would be a better public policy approach.⁹⁴

Most families would not hesitate to rent these larger units if they were actually available. The report's bottom line is that public policy should permit the reduction in housing opportunities for large families because of the speculative harm to the housing stock, housing providers and neighbors.

D. The Emerging State Efforts to Restrict Occupancy

In reaction to housing industry complaints, some jurisdictions have adopted new occupancy laws in the hope of giving housing providers increased discretion to restrict occupancy and protecting them from a fair housing challenge. Several states have recently enacted such laws.

In 1994, Arizona adopted a law establishing that a standard of two persons per bedroom "shall be presumed reasonable" for rental units.⁹⁵ Oklahoma has a similar law, but contains the exception that the "two-person limitation shall not apply to a child or children born to tenants during the course of the lease."⁹⁶ Oregon law prohibits landlords from adopting occupancy standards more restrictive than two persons per bedroom, but also requires the standards to be reasonable.⁹⁷ Reasonableness is a case-by-case determination considering factors such as bedroom size, dwelling size, and "any discriminatory impact on [protected classes]."⁹⁸

These recently-adopted state laws are not overcrowding codes. They are not uniformly applied to all housing stock, but rather only set occupancy standards for rental units. With the exception of Oregon law, they also are not based on the size of a dwelling unit and therefore ignore the most important factor underlying an objective assessment of permissible occupancy levels. The effect of these laws is permit the differential treatment of similarly-situated households living in units that are identical in size and character. The

94. *Id.* at 14 (emphasis added).

95. ARIZ. REV. STAT. ANN. § 33-1317 (West Supp. 1996). Prior to Arizona's adoption of the law, HUD warned: "[W]e are concerned that the rule's language indicating a presumption of reasonableness would be interpreted to allow across the board adoption of a two person per bedroom standard. Adoption of such a presumption where it would operate more restrictively than a local or state occupancy standard or where in the particular facts of a case the two person per bedroom standard would be unreasonable would result in outcomes which are inconsistent with outcomes under the Act." Memorandum from Harry L. Carey, HUD Asst. Gen. Counsel, to Leonoria Guarraia, HUD Gen. Deputy Asst. Secretary 2 (April 16, 1993) (on file with author).

96. OKLA. STAT. ANN., tit. 41, § 117 C (West Supp. 1997).

97. OR. REV. STAT., § 90.262 (3) (1995).

98. *Id.*

only difference is that one unit is rented; the other is owner-occupied. Certainly, laws may treat renters and home owners differently in a number of contexts. When the differential treatment touches on race, familial status or other protected class status, it raises serious fair housing questions.

Placing more stringent occupancy levels in rental units than in owner-occupied units violates the *City of Edmonds* principle that reasonable occupancy standards should be uniformly applied to all dwelling units.⁹⁹ It may also raise other legal problems. A recent state case invalidated an occupancy restriction that applied only to rental units. In *College Renters Ass'n v. San Diego*, a city had passed a zoning law imposing burdensome conditions on rental units in an area zoned for single family units.¹⁰⁰ The effect of these conditions was to limit occupancy. Owner-occupied units were not subject to the same requirements, which were designed to address "overcrowding and inadequate living space, lack of . . . parking, excessive noise, litter, and inadequate property maintenance."¹⁰¹ The court ruled that the ordinance violated the equal protection clause of the state constitution because it created an irrational classification between renters and home owners.

Here, the purpose of the law is to address problems associated with excessive occupancy of detached homes in single-family residence zone. Owners and tenants are similarly situated with respect to the overcrowding problem—i.e., both groups can overcrowd a neighborhood.¹⁰²

The *College Renters* case indicates that something more than a person's status as a renter is necessary to justify a restrictive occupancy standard on rental units. Although this case does not rely on fair housing law, it shows the arbitrariness of a renters-only occupancy standards. To survive a fair housing challenge, government officials and housing providers will have to provide a better justification than those given in *College Renters*.

99. See *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1777, 1781.

100. 50 Cal. Rptr. 2d 515 (Cal. Ct. Ap. 1996). The ordinance prohibited landlords from renting these units unless the occupancy level corresponded to certain ratios between occupants and bathrooms or occupants and off-street parking spaces. CITY OF SAN DIEGO, CA., CODE § 101.0463 (1991).

101. *College Renters*, 50 Cal. Rptr. 2d at 517.

102. *Id.* at 521.

E. *Congressional Efforts to Limit Fair Housing Protections*

In the past several years, Congress has considered several proposals to limit fair housing challenges against occupancy standards. In November 1995, Senator Kyl (Arizona) introduced S. 1397 which would have made a "state law regarding the number of occupants permitted to occupy a dwelling . . . presumptively reasonable for the purposes of determining familial status discrimination."¹⁰³ The bill did not specify what factors would rebut the presumption of reasonableness. It also prohibited HUD from establishing a "national occupancy code."¹⁰⁴

In May 1996, Representative McCollum introduced the State Occupancy Standards Affirmation Act of 1996.¹⁰⁵ In introducing the bill, Rep. McCollum stated that it was designed to limit fair housing enforcement against occupancy standards.¹⁰⁶ In May 1996, the House of Representatives approved a slight variation of this bill in the United States Housing Act of 1996.¹⁰⁷ Although H.R. 2406 addressed reforms in public housing, the McCollum legislation affected all housing. The House accepted it as an amendment on the floor of the House without prior hearing.

The McCollum legislation, like S. 1397, prohibited HUD from establishing a national occupancy standard and creates a presumption of reasonableness in favor of state laws addressing "occupancy standards."¹⁰⁸ However, it conferred this presumption only on laws allowing a housing provider to "properly manage residents in a dwelling."¹⁰⁹ The purpose of the state law must be one of the following: to provide a decent home and services for residents, to enhance the livability of dwellings, *or* to avoid physical deterioration of the property. This definition permitted subjective factors, such as livability, to control the determination of permissible occupancy levels. Indeed, it emphasized a housing provider's management concerns over objective health and safety factors about overcrowding.

Most significantly, the legislation did not confer a presumption of reasonableness on any "Federal, State, or local restriction regarding the maximum number of persons permitted to occupy a dwelling for the sole

103. S. 1397, 104th Cong. § 1 (1995).

104. *Id.*

105. H.R. 3385, 104th Cong. (1996).

106. 142 CONG. REC. E688-01 (daily ed. May 1, 1996)).

107. H.R. 2406, 104th Cong. § 508 (1996).

108. H.R. 3385, § 2.

109. *Id.* § 3.

purpose of protecting the health and safety of the residents of a dwelling.”¹¹⁰ The bill thus made objective overcrowding standards irrelevant for purposes of determining a permissible occupancy restriction under the Fair Housing Act. Ironically, these standards are the most widely-used occupancy policies.

Most states do not have occupancy standard laws that met the McCollum legislation’s definition of reasonableness. Under the bill, the absence of such a state law meant that “an occupancy standard of 2 persons per bedroom established by a housing provider shall be presumed reasonable for the purposes of any laws administered by [HUD].”¹¹¹ In effect, the legislation established a national occupancy standard of two persons per bedroom even though its ostensible purpose is to protect state laws on occupancy.¹¹²

Although H.R. 2406 and its occupancy standard provision did not survive a House-Senate conference committee in the Summer of 1996, Rep. Lazio (New York) introduced a similar provision in January 1997 as part of the overall housing reform bill, the Housing Opportunity and Responsibility Act of 1997.¹¹³ More recently, Sen. Faircloth (Arizona) introduced a bill to specifically presume reasonable any State occupancy standard; in the absence of any state standard, an occupancy standard established by a housing provider of 2 person per bedroom would also be presumed reasonable.¹¹⁴ A similar bill was introduced in the House.¹¹⁵

V. CONCLUSION

Recent efforts by representatives of the housing industry and some members of Congress would restrict occupancy levels under the guise of giving states greater authority in this area. There is nothing wrong with

110. *Id.*

111. *Id.*

112. In introducing the original version, Rep. McCollum stated: “It is imperative that we ensure that States retain the right to set reasonable occupancy standards; my bill does just this. ¶ There is a national consensus that the appropriate level for most apartment properties is two-people-per-bedroom. Most states have adopted a two-per-bedroom policy.” 142 CONG. REC. E688-01 (daily ed. May 1, 1996). In fact, very few states have enacted occupancy standards of two persons per bedroom. Arizona, Oklahoma, and Oregon may be the only states using this standard.

113. H.R. 2, 105th Cong., § 702 (1997).

114. S. 458, 105th Cong. (1997).

115. *State Occupancy Standards Affirmation Act*, H.R. 1108, 105th Cong. (1997).

deferring to state overcrowding standards. Indeed, the Fair Housing Act already exempts reasonable state and local occupancy restrictions from fair housing claims. As the Supreme Court in *City of Edmonds* suggested, these standards share certain characteristics: they protect the health and safety of the residents and apply uniformly to all segments of the housing stock. Federal law should continue to protect these objective standards, which have wide acceptance.

Accepting the legitimacy of existing overcrowding laws does not necessarily answer the question of whether a particular occupancy standard violates the Fair Housing Act if it is more restrictive than these laws. As the courts have already determined, housing providers may legally impose restrictive standards under certain circumstances. These determinations should continue on a case by case basis. This does not mean that the law does not provide guidance about permissible occupancy standards. The following model occupancy standard legislation complies with fair housing caselaw and provides the housing industry with guidance in establishing an occupancy standard.

APPENDIX: MODEL OCCUPANCY STANDARD LAW

(a) It shall not be unlawful discrimination under fair housing law for a housing provider to limit the number of persons who may occupy a dwelling unit if the number of persons permitted is consistent with Section 503 of the Uniform Housing Code [or other housing code that is uniformly applied to all dwellings, based on the size of the unit, and designed to protect the health and safety of residents].¹¹⁶

(b) A housing provider may adopt an occupancy standard that is more restrictive than the standard permitted under subsection (a) if all of the following conditions are met:

116. The UNIFORM HOUSING CODE provides:

Dwelling units and congregate residences shall have at least one room which shall have not less than 120 square feet (11.2m²) floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet (6.5m²). Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet (4.65 m²) for each occupant in excess of two.

UNIFORM HOUSING CODE, Section 503.2 (International Conf. of Building Officials 1994). The UNIFORM HOUSING CODE provides a slightly different standard for efficiency units.

(1) the occupancy level is equal to, or greater than, two persons per habitable room used for sleeping purposes plus two additional persons for the entire dwelling unit;

(2) the housing provider establishes by credible and objective evidence that the occupancy level per unit is necessary because of the size, configuration, or infrastructure of the habitable rooms, unit, or building and that restricting occupancy per unit is the only feasible alternative to address these physical limitations of the rooms, unit, or building;

(3) the housing provider relied on the evidence described in subsection (2) prior to adopting the occupancy level;

(4) the occupancy level does not constitute or promote intentional discrimination under this article; and

(5) the occupancy level does not exceed the Uniform Housing Code [or other housing code that is uniformly applied to all dwellings, based on the size of the unit, and designed to protect the health and safety of residents].

(c) For purposes of adopting a standard under subsection (b), a housing provider may not restrict occupancy on the basis of parking limitations at the site of the dwelling unit; however, nothing in this section shall preclude a housing provider from limiting the number of motor vehicles that residents of a dwelling unit use at the site of the dwelling unit.

(d) Restrictions on the number of unrelated adults living in a unit do not violate fair housing law on the basis of familial status.

(e) Nothing in this section shall be construed as allowing an occupancy level that is lower than two persons per habitable room used for sleeping purposes plus two additional persons for the entire dwelling unit.

(f) Nothing in this section shall be construed as limiting the authority of local government to require increased occupancy above the levels authorized under this section.

(g) Any person who resides in a dwelling unit subject to this section on the date the legislature enacted this section shall not be deprived of the right to

continue residency, occupancy, or use of that unit as a result of the enactment of this section.