UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Jacqueline, Jaime, Michael, and Shena VanLoozenoord,

Charging Party,

v.

Mountain Side Mobile Estates Partnership, and Mr. and Mrs. R. D. Dalke,

Respondents.

AND

The Secretary, United States Department of Housing and Urban Development, on behalf of Michael Brace,

Charging Party,

v.

Mountain Side Mobile Estates Partnership, and Mr. and Mrs. R. D. Dalke,

HUDALJ 08-92-0010-1
HUDALJ 08-92-0011-1
Decided: March 22, 1993

Dorothy Crow-Willard, Esq.
For the Charging Party

Stephen E. Kapnik, Esq.
For the Respondent

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of complaints filed by Jacqueline VanLoozenoord, her three minor children, and Michael Brace ("Complainants"), alleging discrimination based on familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On July 24, 1992, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a charge against Mountain Side Mobile Estates Partnership, Robert Dalke, and Marilyn Dalke ("Respondents"), alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. § 3604. On November 3, 1992, HUD amended its charge to include Respondents' alleged violation of 42 U.S.C. § 3617.

A hearing was held in Denver, Colorado on October 29-30, 1992. The parties' post-hearing and reply briefs were filed timely, the last brief having been received by me on January 21, 1993.

Findings of Fact

1. Mountain Side Mobile Estates ("the Park"), 17190 Mt. Vernon Road, Golden, Colorado, is a trailer park located in unincorporated Jefferson County, Colorado. It lies on the east side of Ulysses Street and south of Mount Vernon Road. Res. Ex. 14, p. 2 and appendix.[1] It also is located in the Lena Gulch Flood Plain, and as such is subject to the Federal Emergency Management Agency ("FEMA") Flood Plain Plan. Tr. 3, pp. 253-54. The Park is owned by Mountain Side Mobile Estates Partnership ("the Partnership"). C. P. Ex. 10, responses 5 and 7; Tr. 1, p. 225. The partners consist of the Estate of Leon

[1]The following reference abbreviations are used in this decision: "C. P. Ex." for the Charging Party's Exhibit; and "Res. Ex." for Respondents' Exhibit and "Tr. 1", "Tr. 2", and "Tr. 3" for Transcript Volumes I, II, and III.

Brooks, Deena Brooks, Lillian Toltz, the Israel Toltz Trust, and Ruby Simmons.

2. Complainants Jacqueline VanLoozenoord and Mr. Michael Brace are an unmarried couple who consider themselves to be married for "all intents and purposes." Tr. 1, pp. 57, 66. Ms. VanLoozenoord has two daughters, Jamie and Shena, who, in the fall of 1991 were, respectively, 10 and 5 years old, and a son, Michael, who was 8 at that time. Mr. Brace has a minor son, Myron. Tr. 1, p. 58. Ms. VanLoozenoord's children lived with her and Mr. Brace in the fall of 1991. Myron has resided with his father and the VanLoozenoords since June 1992. Tr. 1, pp. 72, 113, 116, 143.

3. The Partnership employs Prime Management ("Prime") to manage the Park. Tr. 2, pp. 220, 225; Tr. 3, p. 227. Edward H. Brooks is Prime's President. The Brooks-Toltz family has built and developed mobile home parks since 1955. Mr. Brooks has been involved in the mobile home industry in various capacities since 1970. Tr. 3, pp. 226-28.

4. Michael Noakes, a Prime employee, has been the property manager for the Park since before March of 1989. Tr. 1, pp. 220-21, 226-27. Mr. Noakes also manages eight other mobile home parks for Prime. Tr. 1, pp. 225-26; Tr. 3, p. 227.

5. A married couple, Robert and Marilyn Dalke, have been Prime's resident managers at the Park since December of 1989. C.P. Ex. 10, response 6; Tr. 2, p. 12. Mrs. Dalke is responsible for the bookkeeping and paperwork. She confirms whether applicants are financially qualified for residency at the Park. Tr. 2, p. 6. Mr. Dalke is responsible for Park maintenance. He directs repairs for water leaks, the sewer system, and other problems with the Park's infrastructure. Tr. 2, p. 15; Tr. 3, p. 203. As resident managers, the Dalkes hear various types of complaints from the Park's residents. Tr. 3, pp. 197-99, 202. The Dalkes also perform certain advertising tasks. Mr. Dalke types the Park's newsletters and handouts for distribution to prospective tenants. One such handout, dated December 1990, describes the Park's character as "older," "quiet," "mostly retired," "semi-retired," and "adult/family mix." C. P. Ex. 23; Tr. 2, pp. 16-17. Mrs. Dalke's advertising control sheet for December 1990 describes a mobile home for sale as "OLDER, 12 by 15, one bedroom and in QUIET Golden mountain park, 279-5098." Tr. 3, p. 57. The Dalkes are grandparents. Tr. 3, p. 197.

6. The Park was developed in the early 1960s by Mr. Brooks's father, uncle, and some of their friends. Tr. 1, p. 229; Tr. 3, pp. 129, 227-30. It has 229 mobile home lots, with an average of ten homes per acre. C. P. Ex. 10, response 7; Tr. 1, p. 238. It has an outdoor swimming pool and picnic area. Res. Ex. 14, p. 2. There is also a building that houses the management office, as well as a clubhouse with a pool table. Res. Ex. 14, p. 2.

7. Because it was built in the early 1960s, the Park has smaller lots and fewer recreational amenities than most parks built in the 1970s and 1980s. Tr. 1, p. 238. It can easily accommodate older "single-wide" mobile homes, which measure 8 to 10 feet wide by 30 to 55 feet long, and typically have one or two bedrooms. However, current standard "single-wide" trailers are 16 feet wide by 70 to 80 feet long. Modern "double-wide" homes, as the name connotes, measure 32 by 80 feet, and contain three or four bedrooms. Because of lot and street dimensions as well as the location of the Park's infrastructure, which includes water and gas lines, the Park cannot accommodate modern "single-wide" or "double-wide" homes. Res. Ex. 14, p. 11; Tr. 3, pp. 129, 148, 204, 228-30, 247-48.

8. The Park's "open space" is approximately one percent of the Park's total acreage. "Open space" constitutes common area plots of land. It excludes the lots upon which individual trailers are situated. This space normally surrounds recreational facilities and other amenities. The Park's open space is primarily comprised of small lawn areas in front of the swimming pool and the management office. Tr. 3, p. 126.

9. The Park's roads permit cars to pass in nine-foot lanes. The current standards for mobile home parks provide for passage in 10 to 12 foot lanes. Tr. 3, p. 128; *see* Tr. 1, p. 238. Fewer than half of the Park's lots have off-street parking, whereas newer parks may provide off-street parking for two to three cars for each. Tr. 1, p. 238.

10. Prior to March of 1989, the Park restricted residency to persons 21 years of age and older. However, there was no limit on the number of residents. C. P. Ex. 10, response 26, 16, 17; Tr. 1, pp. 221, 224-25. The Park's Mobile Home Lot Agreements stated that "[a]ll persons living in the COMMUNITY must be an adult. . . ." C. P. Ex. 11A, p.1.

11. By March of 1989, the Partnership became aware of the addition of families with children to the classes protected by the Act, and that it must decide whether the Park should remain an adult park or whether residency should be thrown open to families with children.[2] At that time, there were many Park vacancies because of a limited market for an adult mobile home community. Accordingly, the Partnership decided that the option of becoming a family park was a more "viable opportunity." However, the elimination of the adult restriction meant that there would be an increase in Park population. Therefore,

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[2]The Fair Housing Amendments Act of 1988 became effective on March 12, 1989. On that date families were included among the protected classes. With the exception of statutorily exempted "housing for older persons," adult-only parks were prohibited after the effective date of the Act.

the Partnership, with assistance from Prime, examined instituting occupancy limits. Tr. 1, pp. 236-37; Tr. 3, pp. 231-32.

12. An October 15, 1988, survey of the Park population was used to establish the new policy. According to the study, 318 people resided on 213 lots. Each occupied unit had one or two residents. Mr. Brooks and Mr. Noakes opined that the condition and age of the utilities, the density of homes, and the overall size of the Park would not support more than a three-person per lot limit without negatively affecting the quality of life at the Park. Accordingly, the Partnership determined that a limit of three residents per unit, resulting in a total of 687 residents, was the maximum number that the Park could reasonably accommodate. Tr. 1, pp. 236-46; Tr. 3, pp. 233-34, 248-49.

13. Historically, the Park experienced periods of low water pressure and sewer blockages.[3] With a density of almost ten homes per acre, the Park is almost twice as dense as new parks which average five to six homes per acre. Tr. 1, pp. 237-38. Mr. Brooks and Mr. Noakes believed that a population greater than three residents per home would cause overcrowding resulting in a strain on the utilities and a negative effect on the quality of Park life. Tr. 1, pp. 236-46; Tr. 3, pp. 233-34, 248-49.

14. Neither Mr. Brooks, Mr. Noakes, nor the Partnership considered alternatives other than an occupancy limit to be feasible.[4] Tr. 3, p. 256. Mr. Noakes's notes of one of the meetings in which the occupancy limit was debated reflect his opinion that without a limit the Park would become a "ghetto." C. P. Ex. 19, Tr. 3, pp. 214-18.

15. On March 8, 1989, the Park implemented its residency policy restricting the number of residents per lot to three. The notification to the residents, signed by Mr. Noakes, stated:

> Congress has passed legislation concerning rentals to families. As a result we are making the following change to our Mobile Home Lot Agreement:
>
> > To the Resident: ...All persons living in the COMMUNITY must ~~be an adult~~, register... and sign Rules & Regulations for residents. <u>There will be a</u>

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[3]Sewer blockage repairs were infrequent when compared to the number of repairs to the water pipes, but they did occur. C. P. Ex. 20A; Tr. 3, pp. 175, 143-145.

[4]Mr. Brooks testified that any alternatives "are so off the wall, they're not feasible. Nothing to consider." Tr. 3, p. 256.

> charge of $15.00 per person for any additional person over the first two people per unit with a limit of 3 persons per house.
>
> The old language is marked through, the new language is underlined and will become effective immediately for any "new persons" making application to become a resident of the PARK.
>
> As you know, we are living in a time when things change. We feel sure you will understand and we thank you for your continued support and patronage.

C. P. Ex. 17.[5]

16. The letter was sent to all Park residents as of March 8, 1989, in order to eliminate the "adults only" restriction from the Mobile Home Lot Agreements. This language was not removed from copies of the agreements maintained by Respondents in their tenant files. However, after March 8, 1989, new tenants were and continue to be notified that the Park is no longer an "adults only" Park. Tr. 1, pp. 241, 248-49.

17. Mr. Noakes routinely sends letters to Prime's resident managers which contain the following statement:

> We would like to remind you that our policy is, always was, and always will be, to do business according to the Fair Housing Law, and that it is illegal to discriminate against any person seeking residency in the mobile home park because of race, color, religion, sex, national origin, marital status, physical handicap or creed.

C. P. Ex. 22; Tr. 3, p. 224. The letter does not include "family status" among the identified protected classes. On March 16, 1990, the Dalkes signed a copy of this letter.[6]

18. From March 8, 1989, until the hearing, at least 35 families with minor children have resided in the Park. Res. Ex. 17; Tr. 3, pp. 185-87. Currently, approximately 30 of the 229 lots are rented by families with children 18 years old and younger. Tr. 2, p. 11.

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[5]The $15 charge was subsequently eliminated after HUD objected to it in the context of a different complaint. Tr. 1, pp. 246-47.

[6]I credit Mr. Noakes' testimony that the omission of "familial status" from the enumerated protected classes resulted from his inadvertent reuse of an old letter. Tr. 3, p. 225. In any event, the statement that Respondents intend to comply with the Act, effectively incorporates "familial status" by reference.

19. After the imposition of the occupancy limit, the Partnership's counsel advised Mr. Brooks and Mr. Noakes that their own opinion alone might not be sufficient to support the three-person limit and that an independent expert would be able to assist in evaluating the legitimacy of the policy. Tr. 3, pp. 235, 239. In early 1991, the Partnership retained QCI Development Services Group, Inc. ("QCI") and its president and principal engineer, Roger Walker, to perform a study to assist the Partnership in evaluating the three-person occupancy limit. Mr. Walker was not provided with any target population limit or instructions concerning methodology. Neither was he requested to provide alternatives or suggestions for improvements or repairs to increase any recommended population limit. Tr. 3, pp. 122, 160.

20. Roger Walker is a civil engineering expert in the development, design, and marketing of mobile home parks. Tr. 3, pp. 119-21. Mr. Walker holds a B.S. in civil engineering and is professionally licensed in Colorado, New Mexico, and Nevada. His experience includes performing mobile home community site studies, and planning and designing mobile home communities. Since 1988 he has been president and principal Engineer for QCI which provides civil engineering design services, such as planning, zoning, and marketing strategies for real estate and development. Mr. Walker is the President of the Colorado Manufactured Housing Association and is a recognized specialist in manufactured housing. Res. Ex. 15; Tr. 3, p. 173.

21. In March of 1991, QCI completed its study entitled "Community Guidelines Report, Mountainside Mobile Home Park" ("QCI Study"). It evaluates two sets of concerns which affect Park residents: 1) their health and safety based on an objective evaluation of the infrastructure of the Park (i.e., the adequacy of the Park's water and sewerage pipes), and 2) their comfort based on the size of homes and lots, recreational facilities, and the adequacy of parking. Res. Ex. 14, p. 12; Tr. 3, pp. 122-23.

22. Mr. Walker estimated the adequacy of the Park's sewer system based on repair records and interviews with David Ramstetter, who performed maintenance for the Park. Res. Ex. 14, p. 9; Tr. 3, p. 143. Based on these sources, the Study concluded that sewer pipes were adequate to support a maximum of 916 persons. This figure was arrived at after an estimation of the sufficiency of the sewer system during "peak hours," defined as prior to 8:00 a.m., before people leave for work, and later than 5:00 p.m., after people return home from work. Tr. 3, pp. 130-36. The Study concluded that four people per unit, or a maximum of 916 persons, "puts the sewer system at its capacity. . . ." Res. Ex. 14, p. 10. Because the 916 population limit is a recommended maximum, Mr. Walker opined that if an additional 30 guests are at the Park at peak time, "some portion of the [sewer] system will be overloaded." Tr. 3, p. 147.

23. Mr. Walker described his figure of 916 as a "brick wall," or an absolute maximum. Tr. 3, p. 236. If the Park had 916 residents, he asserted that the sewer system would not be able to accommodate additional visitors. Tr. 3, p. 147. The Park is located in a resort area near the Rocky Mountains. Accordingly, Park residents have numerous seasonal visitors that increase the population during the summer and holiday seasons. Tr. 3, pp. 197, 236.

24. Because the recommendation that the Park be limited to 916 individuals was based on interviews with Park personnel rather than actual excavation and examination of the sewerage system, the Study further recommended that the Park conduct a "survey of field conditions" which would cost approximately $4,000. Res. Ex. 14, p. 10; Tr. 3, pp. 150, 172. Respondents did not perform this survey. Tr. 3, p. 251.[7]

25. The QCI Study examined the Park's water pressure based on actual data from Prime, interviews with Mr. Ramstetter, and repair records. Res. Ex. 14, pp. 6-7; Tr. 3, p. 129. The QCI Study did not consider water pressure to be a problem. Res. Ex. pp. 7, 9; Tr. 3, pp. 162-63, 181.

26. The QCI Study also made recommendations based on its evaluation of the Park in terms of human comfort. Mr. Walker opined that the Park has "very small lots . . . [and is] crowded." Tr. 3, p. 148. Based on the assumption that most of the homes currently in the Park have two bedrooms, the Study recommends a population limit of two people per bedroom in addition to the previously discussed absolute maximum population of 916. Res. Ex. 14, pp. 11-12; Tr. 3, pp. 148, 164. The QCI Study also recommended a limit of two vehicles per trailer for traffic flow and pedestrian safety. Res. Ex. 14, numbered p. 6; Tr. 3, p. 128.

27. Notwithstanding Mr. Walker's recommendation of a maximum of 916 residents, or four residents per home, the Partnership has continued to maintain the limit of three, rather than four, residents per unit. Because of the parking problems, density of the homes, and overall size of the Park, the Partnership decided that the quality of life at the Park would be severely diminished if the Park had a maximum of 916 residents. Furthermore, if the Park reached maximum capacity, it could not accommodate guests, including visiting children. Tr. 3, pp. 235-38.

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[7]While there is no evidence one way or the other that Mr. Ramstetter's repairs involved digging up the pipes and ascertaining their size, Mr. Walker was confident that he could rely on Mr. Ramstetter's knowledge of the Park sewer system. His notes of his conversations with Mr. Ramstetter reflect that Mr. Ramstetter told him the size and composition of the pipes. Tr. 3, p. 154.

28. In the late Summer of 1990, Complainants lived in a one-bedroom, 525 square foot apartment in Arvada, Colorado. Tr. 1, pp. 58, 123, 143. Conditions in the apartment were crowded, with the children sleeping in the bedroom and the adults in the living room. Tr. 1, p. 153. Accordingly, they sought larger accommodations, preferably a house with three or more bedrooms. They also wanted to provide the children with a suburban lifestyle, and they believed that areas outside of Denver and closer to the mountains would offer a better education for the children than Arvada's school system. Tr. 1, pp. 59, 150. Complainants, however, were unable to qualify financially to buy or rent a single-family home suitable to their needs. Tr. 1, pp. 59, 151. Therefore, they decided to consider purchasing a mobile home. Tr. 1, p. 60.

29. In mid-August 1991, Ms. VanLoozenoord and Mr. Brace read a newspaper advertisement for the sale of a mobile home located in the Park and owned by Carmel Reavey and her son, James Neely. Tr. 1, p. 60.

30. The Reavey/Neely trailer was over 1000 square feet and included an addition. The original trailer had two bedrooms. The addition included an extra bedroom, as well as a utility room. Tr. 1, pp. 64, 118. The mobile home also had an enclosed front porch. Tr. 1, pp. 72, 121. Complainants found the Reavey/Neely trailer's overall appearance appealing and well maintained. Tr. 1, pp. 152-53.

31. Complainants had seen no other trailers in the area that were as spacious and inexpensive. Tr. 1, pp. 152-53. They considered the Park to be well preserved, and they liked the country setting. Tr. 1, p. 65. In addition to offering the children the benefits of a suburban community, the Park was within a mile of both schools Mr. Brace attended. Tr. 1, pp. 139, 153. The rent for the trailer lot was $248 a month, the same amount as the rent for their one-bedroom apartment. Tr. 1, p. 152.

32. On August 17, 1991, Ms. VanLoozenoord purchased the home from Ms. Reavey and Mr. Neely for $5,000. She paid them $4,000 down, and the remaining $1,000 upon taking possession of the home on September 15, 1991. C. P. Ex. 12; Tr. 1, p. 153. Complainants were "ecstatic" about their new living arrangements. Tr. 1, p. 153.

33. At least as early as December of 1989, there has been a sign, approximately 20 inches by 20 inches, in the window at the front entrance to the building that contains the management office and clubhouse. The sign states:

NOTICE

IF YOU SELL MOBILE HOME,

BUYER & SELLER MUST COME
TO OFFICE - AS BUYER HAS
TO BE APPROVED ... DO NOT
CLOSE DEAL UNTIL BUYER
HAS BEEN APPROVED

*

IF MOBILE HOME IS SOLD,TO
BE MOVED OUT OF PARK,
SELLER & BUYER COME TO
OFFICE TO CHECK IF ALL
RENT IS PAID

The sign is visible upon entering the clubhouse/management office building. Res. Ex. 16, at 2; Tr. 3, at pp. 194, 196, 200-01, 206-07.

34. Shortly before Ms. VanLoozenoord purchased the Reavey/Neely trailer, Mr. Dalke had informed Ms. Reavey that any prospective buyers must apply for tenancy at the Park. C. P. Ex. 6, p. 22; Tr. 3, p. 201. Mr. Brace knew from his conversation with Ms. Reavey and from his own prior experiences that he would need to communicate with the Park owners at some point.[8] Despite this knowledge, neither Mr. Brace nor Ms. VanLoozenoord contacted Park management prior to purchasing the home. Tr. 1, pp. 62, 111, 113-14.

35. Approximately a week after Complainants moved into the trailer, Mr. Dalke contacted Mr. Brace and inquired as to the number of residents in the trailer. Mr. Brace informed him that there were five occupants. Mr. Dalke notified Complainant of the three-person limit and told him that he and his family would have to vacate. Tr. 1, p. 66.

36. A day after his conversation with Mr. Dalke, Mr. Brace picked up an application for tenancy at the Park's management office. C. P. Ex. 6, pp. 34-36. While Mr. Brace was at the management office, he noticed that another gentleman was given an application and other unspecified documents. Tr. 1, pp. 67-68. Complainants never

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8Ms. Reavey told Mr. Brace that he would have to sign a lease. Mr. Brace acknowledged that he knew before he moved in that they were not buying real property and that they would have to communicate with Respondents. Tr. 1, pp. 62, 113-114.

Since December of 1989, there have been approximately six instances when individuals have purchased a home at the Park prior to being approved as tenants. However, with the exception of Complainants, no one has ever purchased a home without first obtaining an application for tenancy or without some prior contact with Park management. Tr. 2, pp. 12-13.

completed or submitted the application because they thought it pointless in light of Mr. Dalke's conversation with Mr. Brace. Tr. 1, pp. 67, 71, 136.

37. Complainants received a letter dated October 4, 1991, from Mr. Dalke informing them that they violated park regulations by purchasing a home without first applying for residency and by exceeding the three-person limit. The letter notified Complainants that unless they could negotiate a refund of their purchase money, they would have to remove the trailer from the Park. C. P. Ex. 1; Tr. 1, p. 99.

38. On October 7, 1991, Complainants filed complaints of housing discrimination with HUD based on familial status. C. P. Exs. 2, 25.

39. Complainants were served with a notice to vacate dated October 14, 1992, that demanded that they move by November 14, 1992. C. P. Ex. 3. In addition, a summons dated November 8, 1992, was posted on Complainants' door ordering them to appear in Jefferson County district court to answer the eviction complaint. C. P. Ex. 4; Tr. 1, p. 166. A notice of the eviction hearing was served on Complainants on November 26, 1992. C. P. Ex. 5; Tr. 1, p. 166.

40. The eviction hearing was held on January 6, 1992, before a Jefferson County district court judge. The Partnership, as plaintiff, and Ms. VanLoozenoord and Mr. Brace, as defendants, were represented by counsel. Ms. Reavey and Mr. Neely were *pro se* defendants. C. P. Ex. 6. The judge ruled in favor of the Partnership because Complainants never applied for residency at the Park. He concluded that the case before him was one "of an individual moving out onto somebody else's land, and . . . unreasonably refusing to provide basic information for a period of many months." C. P. Ex. 6, pp. 48-50.

41. On February 3, 1992, Ms. VanLoozenoord and Mr. Brace were served with a Notice of Court Decision and Entry of Judgment ordering that they remove their home from the Park within 48 hours. C. P. Ex. 6, p. 52; C. P. Ex. 8.

42. HUD negotiated an interim agreement with Respondents permitting Complainants to remain in the Park until at least the Summer of 1992. C. P. Ex. 9; Tr. 1, p. 206. As of the hearing date, Complainants still resided at the Park. Tr. 1, p. 149.

43. James Coil has been an economist with HUD for over 20 years. For approximately ten of those years, he has held a supervisory position. His work primarily involves the analysis of census data. Tr. 2, p. 25.

44. A publication entitled "Current Population Reports, Population

Characteristics" contains figures published by the Bureau of the Census, U.S. Department of Commerce ("Census Bureau"). The figures are based on an annual national sample survey of household characteristics. Tr. 2, p. 32. Based on one such Report, "Household and Family Characteristics: March 1991," Mr. Coil determined that as of March 1991, at least 71.2% of all U.S. households with four or more persons contain one or more children under the age of 18 years. C. P. Ex. 29, handwritten notes; Tr. 2, pp. 32-38. Furthermore, at least 50.5% of U.S. families with minor children have four or more individuals, while at most, 11.7% of households without minor children have four or more persons. C. P. Ex. 29, Table 16. No comparable statistics were introduced for Jefferson County.

45. On or about June 1, 1992, Myron Brace moved in with Complainants, using the utility room as a fourth bedroom. Tr. 1, pp. 72, 113, 116, 143. Sometime after Myron moved in with Complainants, Mr. Dalke approached them to inquire whether Myron would be staying with them. Although the Complainants did not identify Myron as Mr. Brace's son, they informed Mr. Dalke that he would be staying at their home. It was not until around September of 1992 that Mr. Dalke learned Myron's identity and relationship to the Complainants. Tr. 2, pp. 19-20.

46. Mr. Dalke confronted Myron one day while he was riding a motorized bike and told him that he could not ride the bicycle without a license. C. P. Ex. 26; Tr. 1, p. 112. On another occasion, Mr. Dalke informed Myron, who was 13 at the time, that he could not use the swimming pool without an adult present. The Park requires any child under 12 to be accompanied by an adult. R. Ex. 13, p. 2; Tr. 1, p. 176. Other than this incident, neither Respondents nor anyone else prohibited Complainants from using the swimming pool. Tr. 1, pp. 111-12; 212. Finally, on another occasion, Mr. Dalke prevented Myron from using the pool table in the clubhouse. During this encounter, Mr. Dalke asked Myron which space he was from and his identity. Mr. Dalke then told Myron that, because he was not a resident, he could not play pool. Tr. 1, pp. 176, 195; Tr. 2, p. 18.

47. On July 17, 1992, Complainants amended their complaints to include allegations that Mr. Dalke's encounters with Myron interfered with their rights granted under the Act. C. P. Ex. 26.

Discussion

I. Res Judicata

At the hearing, Respondents moved to dismiss the Charge, asserting for the first

time that because Complainants failed to raise their Fair Housing claim as a defense in the prior state eviction proceeding, this action is barred by application of *res judicata*. Under this doctrine "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). *Res judicata* bars both the relitigation of claims that were the subject of a prior proceeding, and the litigation of those claims that could have been raised in the prior proceeding. 18 Charles A. Wright, Arthur Miller, & Edward H. Cooper, *Federal Practice and Procedure; Jurisdiction* § 4402 (1981); *Brown v. Felson*, 442 U.S. 127, 131 (1979).

Before discussing the merits of this contention, it is necessary to dispose of the Charging Party's contention that Respondents may not resort to *res judicata* as a defense to these proceedings because they failed to plead it affirmatively in their answer. The Federal Rules of Civil Procedure cite *res judicata* as an affirmative defense that must be specially pleaded. Fed. R. Civ. P. 8(c).[9] Respondents first raised *res judicata* as a defense during the actual hearing. As a general rule, Respondents' failure to assert the doctrine in their answer constitutes a waiver of their right to raise it as a defense. *See Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 66 (1991); *Harvey v. United Transportation Union,* 878 F.2d 1235, 1243 (10th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). However, there are exceptions to the general rule. "Many courts permit affirmative defenses to be asserted by motion . . . . This is especially true as to those defenses that seem likely to dispose of the entire case or a significant portion of the case. . . . [or w]hen there is no disputed issue of fact raised by the affirmative defense." 5 Charles A. Wright & Arthur Miller, *Federal Practice and Procedure: Civil 2d* § 1277 (1990). A primary consideration is whether Complainants would suffer prejudice by this delayed assertion of the defense. *See* 2A Jermey C. Moore, et al., *Moore's Federal Practice* ¶ 8.28 (1989). Under the circumstances of this case, Respondents' belated assertion of the doctrine warrants an exception to the general rule of waiver. The defense of *res judicata* would dispose of the entire matter. Because the facts of the state eviction hearing are not contested, there are no disputed issues of fact. Finally, and most significantly, Complainants and the Charging Party are not prejudiced by Respondents' untimely assertion. The Charging Party has had the opportunity to brief the issue fully. Nonetheless, Respondents' defense fails because the elements of *res judicata* are not present.

Res judicata is applicable only when there exists an identity of: 1) parties, 2)

9The Federal Rules of Civil Procedure may provide guidance in these proceedings. *See HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, at 25,086 (HUDALJ Sept. 28, 1990); *HUD v. Wagner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,032, at 25,336 n.8 (HUDALJ June 22, 1992).

subject matter, 3) cause of action, and 4) capacity in the person against whom the claim is made. *Weibert v. Rothe Bros., Inc.*, 618 P.2d 1367, 1372 (Colo. 1980). In addition to satisfying these four elements, *res judicata* is only applicable when the parties against whom the doctrine is invoked have had a "full and fair opportunity to litigate their claims before a court with the authority to adjudicate the merits of those claims." *Carter v. City of Emporia, Kan.*, 815 F.2d 617, 621 (10th Cir. 1987); *Aspen Plaza Co. v. Garcia*, 691 P.2d 763, 765 (Colo. App. 1984).

Because neither the Charging Party nor Complainants had their "full and fair opportunity," the doctrine cannot be applied. The jurisdiction of the Jefferson County court in a forcible entry and detainer action "is limited to the question of possession. . . ." *Aasgaard v. Spar Consol. Mining & Dev. Co.*, 522 P.2d 726, 727 (Colo. 1974). Thus, the court would not have been able to decide the Fair Housing cause of action. Nor was the county court able to afford Complainants the full panoply of remedies sought by them. The jurisdiction "to enter judgment for rent, or damages or both and to render judgment on a counterclaim in forcible entry and detainer is limited to $10,000."[10] Colo. Rev. Stat. Ann. § 13-40-109 (West 1993); *see also* Colo. Rev. Stat. Ann. § 13-6-104 (1) (West 1993); Colo. Rev. Stat. Ann. § 38-12-202.5 (West 1993).

Even if the county court had jurisdiction to resolve this matter, Respondents' have not demonstrated that there is an identity of parties or their privies. *See Public Service Co. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 787 (Colo. App. 1991); *see also Brown*, 442 U.S. at 131. "Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is `virtually represented' in litigation." *Osmose Wood*, 813 P.2d at 787 (citation omitted). Further, "[a] privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties. . . ." *Murphy v. Northern Colorado Grain Co., Inc.*, 488 P.2d 103, 104 (Colo. App. 1971). HUD was neither a party, nor in privity with Complainants in the eviction proceeding. The Charging Party did not participate in the proceedings. Neither was it represented by the Complainants in the eviction action. There was no identity of interests between Complainants and HUD at the eviction hearing. Complainants' interest was solely in maintaining their residency at the Partnership's mobile home park. HUD's broader interests encompass the vindication of public rights in discrimination cases brought under the Fair Housing Act. *See* H.R. Rep. No. 711, 100th Cong., 2d Sess., 16-17 (1988). Further, HUD acquired no interest in

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10The Charging Party seeks over $100,000 in compensatory damages for Complainants, as well as over $11,000 in civil penalties.

the subject matter, the lot at the mobile home park.[11]

II. Governing Legal Framework

Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968 to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds,* 661 F.2d 562 (6th Cir.), *cert. denied,* 465 U.S. 926 (1982); *see also United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.,* 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974).

On September 13, 1988, the Act was amended effective March 12, 1989, to prohibit housing practices that discriminate on the basis of familial status. 42 U.S.C. §§ 3601-19. In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it." House Report 711, at 19. Congress cited a survey finding that 25 percent of all rental units exclude children and 50 percent of all rental units have policies restricting families with children in one way or another. Id.(citing *Marans, Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey,* Office of Policy Planning and Research, HUD (1980)). Nearly 20 percent of families with children lived in undesirable housing due to restrictive policies. *Id.* Congress intended the 1988 amendments to remedy these problems for families with children.

The Charging Party alleges familial status[12] discrimination based on violations of

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11Because Respondents have neither demonstrated that the county court had jurisdiction over the Fair Housing claim, nor that there is an identity of parties, I do not decide whether the other elements necessary for the application of *res judicata* are present.

12"Familial status" is defined as:

> one or more individuals (who have not attained the age of 18 years) being domiciled with -
>
> (a) A parent or another person having legal custody of such individual or individuals; or
>
> (b) The designee of such parent or other person having such custody,

42 U.S.C. § 3604 (a), (b), and (c). These sections of the Act make it unlawful:

> (a) To refuse to . . . rent after the making of a bona fide offer, or to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . familial status . . . .
>
> (b) To discriminate against any person in the terms, conditions, or privileges of . . . rental . . . or in the provision of services or facilities in connection therewith, because of . . . familial status . . . .
>
> (c) To make, print, or publish . . . any notice, statement, or advertisement, with respect to . . . rental . . . that indicates any preference, limitation, or discrimination based on . . . familial status . . . .

42 U.S.C. §§ 3604(a), (b), and (c). The Charging Party also charges a violation of 42 U.S.C. § 3617, which makes it "unlawful to coerce, intimidate, threaten, or interfere with any person . . . on account of his having exercised . . . any right granted or protected" by the Act. The Charging Party offers both "disparate treatment" and "disparate impact" analyses to prove its case. A disparate treatment case "is the most easily understood type of discrimination." An individual is treated "less favorably than others because of . . . race, color, religion, sex, or national origin. Proof of discriminatory motive is crucial. . . ." On the other hand, a disparate impact case involves practices "that are facially neutral in the treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required. . . ." *Intern'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). For the reasons stated below, I find that Respondents have not engaged in discrimination under either analysis.

Title VIII cases have adhered to the analytical framework of employment discrimination cases brought under Title VII of the Civil Rights Act of 1968. *See, e.g., HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). In employment discrimination cases there are two methods of proving discrimination: "disparate treatment" and "disparate impact." *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 666 n.10; *see also*

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with the written permission of such parent or other person.

42 U.S.C. § 3602(k); 24 C.F.R. § 100.20 (b)

Familystyle of St. Paul, Inc. v. City of St. Paul, 728 F. Supp. 1396, 1401 (D. Minn. 1990), *aff'd,* 923 F.2d 91 (8th Cir. 1991). While the first method is uniformly applied to and adopted by Title VIII cases, the second method has yet to be definitively and universally embraced in the housing discrimination area.

III. Disparate Treatment

A Title VIII disparate treatment case may be established by either direct or indirect evidence. Direct evidence, if it constitutes a preponderance of the evidence as a whole, will support a finding of discrimination. *See Pinchback v. Armistead Homes Corp.,* 907 F.2d 1447, 1452 (4th Cir. 1990), *cert. denied,* 111 S. Ct. 515 (1990). Absent direct evidence, indirect evidence may be employed to prove a prima facie case of discrimination. HUD has failed to prove by either direct or indirect evidence that Respondents discriminated against Complainants.

A. Direct Evidence of Discrimination

Direct evidence establishes a proposition directly rather than inferentially.[13] The Charging Party alleges the following actions and statements are direct evidence of discriminatory animus: 1) advertising drafted by Mrs. Dalke which uses the terms, "older" and "quiet" to describe the Park; 2) Mr. Dalke's informational handout which describes the Park as "older," "mostly retired," "semi-retired;" 3) Mr. Noakes's written comment expressing concern that a "ghetto" would result without imposition of a population limit; 4) Mr. Noakes's policy letter sent to resident managers that does not list familial status as a protected class; 5) the retention of the phrase "adults only" in copies of the Mobile Home Lot Agreements maintained in the tenant files; and 6) a statement purportedly made by an unknown Park employee to Ms. VanLoozenoord that Park policy precluded single parents with two children. All but the last two of these items are inferential. Because these inferential items constitute indirect evidence of discrimination and may tend to cast doubt on the legitimacy of the establishment of Respondents' occupancy limitation, they are discussed in that connection, *infra*.[14] The remaining two

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13For examples of direct evidence of discriminatory intent, see *Pinchback*, 907 F.2d 1447 (Applicant was told that blacks were not allowed in the housing development and the development's Board considered strategies to exclude blacks.); *Cato v. Jilek*, 779 F. Supp. 937 (N.D. Ill. 1991) (Apartment owner stated that he "would like to kill [a white woman] for bringing a black man" to his property.).

14The Charging Party also contends that the imposition of the three person occupancy limit together with its impact constitutes direct evidence of discrimination. I do not agree with the Charging Party that a facially neutral policy can constitute direct evidence of discrimination. Because it is facially neutral, an inference would have to be drawn that it was imposed with an intention to discriminate.

items are properly analyzed as direct evidence of discrimination because they tend to prove discriminatory intent directly rather than inferentially.

The record establishes that although Respondents effectively expunged the "adults only" reference from copies of the Mobile Home Lot Agreement provided to current and prospective tenants, they failed to delete this language from the copies maintained in the tenant files. However, the record also establishes that all existing tenants were notified of the elimination of the "adults only" reference and that Respondents allowed children to become Park residents after March 1989. This evidence establishes that Respondents' failure to expunge this language was nothing more than an unintentional failure on their part to correct their records to reflect accurately their present policy.

After she learned of the occupancy limitation, Ms. VanLoozenoord claims to have called the Park's management office to ask if there was an occupancy policy. She states that she was informed about the three-person policy. Ms. VanLoozenoord then claims to have inquired whether the policy would permit residency by a single mother with two children. She testified that she was informed that only a family with two adults and one child would be acceptable. The parties entered into a stipulation based on this statement. They stipulated that the Dalkes, Mr. Brooks, and Mr. Noakes would testify that the Park's policy never addressed the familial composition of the three-person limit and that neither the Respondents, Mr. Brooks, nor Mr. Noakes made the statement or authorized anyone to make the statement. Finally, they stipulated that there may have been other people authorized to answer the phone who might have made the statement to Ms. VanLoozenoord. Tr. 3, pp. 270-72.

I do not credit Ms. VanLoozenoord's testimony regarding this statement. Because she already knew about the policy, her purpose for making this call must have been to gather evidence. However, if she had actually placed a call for this purpose, she would have attempted to ascertain the identity of the speaker, when the call was placed, and have someone else place the call. The fact that she could not identify the speaker or even the time and date of the call, and that she, rather than someone else, placed the call, conveniently eliminates the possibility of cross-examination or corroboration and warrants the conclusion that the phone call was not placed. Based on the stipulation and the lack of corroboration for this call, I find that this statement was not made.

B. Indirect Evidence of Discrimination

Absent direct evidence of discrimination, the analytical framework to be applied in a fair housing case is the same as the three-part test used in Title VII employment discrimination cases, as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S.

792 (1973). *Blackwell*, 908 F.2d at 870; *Pinchback*, 907 F.2d at 1451. Under that test:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence....
> Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. . . . Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance [of the evidence] that the legitimate reasons asserted by the defendant are in fact mere pretext. . . .

Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987), (*citing McDonnell Douglas*, 411 U.S. at 802, 804). The shifting burdens analysis in *McDonnell Douglas* is designed to ensure that a complainant has his or her day in court despite the unavailability of direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984) (*citing Teamsters*, 431 U.S. at 358 n.44).

Because the Complainants did not apply to become tenants and because they claim that to do so would have been futile based on Mr. Dalke's statement, I agree with the Charging Party that, under the circumstances of this case, a "futile gesture" analysis is appropriate to determine whether the Charging Party has established a prima facie case of discrimination. *See Pinchback*, 907 F.2d at 1451-52; *Darby v. Heather Ridge and Dart Properties, Inc.*, 806 F. Supp. 170 (E.D. Mich. 1992); *Horizon House v. Township of Upper Southampton*, 804 F. Supp. 683, 692 (E.D. Pa. 1992).

To prove a prima facie case under the futile gesture theory, the Charging Party must show that: 1) Complainants are a family entitled to familial status protection under the Act and they were financially qualified for tenancy; 2) Respondents' occupancy policy prevented Complainants from becoming residents; 3) Complainants were reliably informed of the policy and would have applied for residency but for the policy; and 4) Respondents would not have approved Complainants' application for residency had they applied.[15] See Pinchback, 907 F.2d at 1452.

15Absent the futile gesture theory, the Charging Party would need to prove that Complainants applied for residency and were rejected as tenants to establish a prima facie case of familial status discrimination. *See, e.g., Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982); *Williams v. Matthews Co.*, 499 F.2d at 826. The futile gesture approach allows the Charging Party to carry its initial

Because Mr. Brace and Ms. VanLoozenoord are not married to each other, Respondents allege that Complainants are not a "family" and are, therefore, not entitled to protection under the Act. The definition of familial status, however, relies on the whether children are domiciled with their parents or guardians, rather than on the marital status of those parents or guardians. *See* House Report 711, at 23. (The definition of "familial status" does not "include marital status.").[16] Once the criterion of children residing with their parent or guardian has been satisfied, the Act's protections are not forfeited because unrelated individuals are included in the domicile. Accordingly, Complainants constitute a "family," meet the definition of "familial status," and are entitled the protection of the Act.

Complainants were financially qualified to rent the mobile home lot. Ms. VanLoozenoord paid cash for the trailer. Furthermore, the rent at the Park was equivalent to the rent that Complainants had been paying previously for the one-bedroom apartment.

The Charging Party has also proved the three remaining elements. First, Respondents' policy precluded more than three residents per lot. Thus, it prevented Complainants, a five-member family, from becoming residents. Second, Complainants were reliably informed of the policy and most certainly would have applied for residency but for the policy. Approximately a week after Complainants moved into the Park, Mr. Dalke informed Mr. Brace of the occupancy limit and told him that he and his family would have to vacate. Because Mr. Dalke was the resident manager at the Park, Complainants reasonably relied on his admonition. They were pleased with their new living arrangements and the Park more than adequately fulfilled their housing needs. Third, Respondents would not have approved Complainants' application for tenancy had they applied. Respondents intended to maintain and exercise the policy for all 229 lots. They have consistently maintained this position and testified that they resolved to preserve the policy if permitted to do so by this tribunal.

The Charging Party having established a prima facie case, the burden of production shifts to Respondents to articulate a legitimate, nondiscriminatory reason for their policy. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248,

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burden notwithstanding Complainants' failure to apply for residency.

16Respondents' reading would impose a unduly restrictive definition of "family" and "familial status." That Congress intended an expansive reading of the Act is illustrated by provisions which afford familial status protection to women who are pregnant and to any person in the process of obtaining legal custody of a child. 42 U.S.C. § 3602(c) and (k).

253 (1981); *McDonnell Douglas*, 411 U.S. at 802. To meet this burden, the evidence offered by Respondents must raise a "genuine issue of fact" as to whether they discriminated against Complainants. *See Burdine*, 450 U.S. at 254-55. Furthermore, the evidence must be admissible and enable the trier of fact "rationally to conclude" that Respondents' actions were not motivated by "discriminatory animus." *Id*. at 257.

To rebut the presumption of unlawful discrimination created by the establishment of the prima facie case, Respondents allege that the occupancy policy was established because of: 1) sewer system limitations, and 2) concern over the quality of Park life.[17] The Park had experienced sewer blockages prior to the establishment of the occupancy policy. This is verified by the QCI Study which concluded that overcrowding at the Park would burden the Park's sewer system. Messrs. Noakes and Brooks testified that their concern for the sewer system was a consideration in their decision to establish the occupancy policy. Respondents' regard for the quality of life in the Park is also legitimate. There are limited recreational facilities and parking. The Park has a high density with an average of ten homes per acre, as compared to newer parks with an average of five to six homes per acre. Its open space is very small compared to newer parks. A large increase in population in an already dense Park would lead to overcrowding and congestion in the existing limited space. Respondents' opinion that the sewer system, facilities, and space are unable to accommodate an unlimited resident population without negatively affecting the health and quality of life of Park residents is both legitimate and reasonable. Thus, Respondents have raised a genuine issue of fact allowing this tribunal rationally to conclude that Respondents' actions were motivated by legitimate concerns.

Because Respondents have met their burden by articulating two legitimate nondiscriminatory reasons for their actions, the Charging Party has the burden to demonstrate that the reasons for Respondents' policy are pretextual and that familial status did in fact play a part in Respondents' decisional process. The Charging Party need not prove that familial status was the sole motivating factor; it need only show by a preponderance of the evidence that familial status is one of the factors that motivated Respondents in their dealings with Complainants. *See, e.g., Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Pollitt v. Bramel*, 669 F. Supp. at 176.

The Charging Party urges that the reasons articulated by Respondent for institution

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17The Respondents also claimed that the Park's inadequate water pressure was an additional reason for the decision. The QCI Study does not support that claim.

of a three person per unit occupancy limit are pretextual based upon the following contentions: 1) that the timing of the limitation immediately following the effective date of the Act establishes that Respondents merely intended to perpetuate their prior "adults only" policy; 2) that Respondents falsely claimed to have relied upon a 1988 population survey as demonstrated by their failure to mention this reliance during the course of the investigation and preparation of this case; 3) that no objective evidence supported the initial decision in 1989 to institute the occupancy limitation; and 4) that the QCI Report did not support the imposition of a three-person per unit restriction, because a) it was erroneous and b) it was misused as evidenced by the existence of viable alternatives to the three-person per unit occupancy limitation.

In addition, I have considered as evidence of possible pretext for discrimination, those contentions which the Charging Party erroneously asserts establish direct evidence of discrimination. The Charging Party would infer the existence of discrimination from the following : 1) advertising drafted by the Dalkes which use the terms, "older" and "quiet" to describe the Park; 2) an informational handout which describes the Park as "older," "mostly retired," and "semi-retired;" 3) Mr. Noakes's written expression of concern that a "ghetto" would result without the imposition of a population limit; and 4) Mr. Noakes's policy letter that fails to enumerate family status as a protected class.

1. The Bases of Respondents' Decision to Impose the Occupancy Limitation

The Charging Party argues that pretext is established by the "highly suspect" timing of Respondents' policy. In support of this contention it points out that there was no occupancy limit while the Park was an adult park and that the limit was instituted only after the Act's inclusion of familial status as a protected class. Respondents, however, offer a credible explanation for the timing of the policy's enactment. Prior to March 1989, Respondents considered remaining an adult park by complying with the statutory requirements of the Act's "housing for older persons" exception.[18] Because the residency rate at the Park was low, Respondents thought that they could only increase revenues by allowing families with children into the Park. However, Respondents were concerned about the overcrowding which might result from this change in policy. Therefore Respondents conducted a population survey to determine the maximum number of individuals that could be accommodated without overloading the sewers or adversely affecting the quality of life. Based upon this population survey and the familiarity of the Park managers with the Park, they decided upon a limit of three persons per unit. The

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18*See* 42 U.S.C. § 3607(b) and 24 C.F.R. Subpart E.

credibility of Respondents' explanation depends on whether Respondents conducted and relied upon this study sometime before March 1989.

The Charging Party asserts that Respondents only belatedly claimed that the original basis for their decision was the 1988 population survey. Support for this assertion consists of Respondents' purported sole reliance on the March 1991 QCI Study, throughout the investigative and discovery processes.

The Charging Party's contention is unpersuasive. The unrebutted testimony of Mr. Noakes establishes that a population survey was conducted, still exists, and was relied upon by Respondents prior to instituting the policy. Tr. 1, pp. 234-36. Mr. Noakes's testimony also establishes that the population survey was made available to the Charging Party during the discovery process. *See* Tr. 1, pp. 250-53.[19] In addition, a letter of March 3, 1989, from Mr. Brooks to his attorney refers to "operating data from the park and other information," upon which Respondents relied. Res. Ex. 1.

The Charging Party asserts that pretext is demonstrated by the lack of objective support for Respondents' original 1989 determination. The record establishes that the decision was made by Messrs. Brooks and Noakes based on the population survey and other operating data. Both individuals have extensive experience in the mobile home business and are intimately familiar with the particular features of the Park. Based on this experience and knowledge, I cannot conclude that their determination was an unreasonable one.

Respondents contend that the QCI Study supports their original determination to impose the three-person occupancy limit. The Charging Party attacks both the accuracy of the QCI Study and Respondents' good faith reliance on the Study. It questions the Study's accuracy because QCI performed no excavation and examination of the sewer pipes to determine their location and size and the number of outlets from the Park into the district sewer lines. Instead QCI relied solely on Mr. Ramstetter who supposedly lacked this knowledge. While there is no evidence one way or the other that the repairs conducted by Mr. Ramstetter involved digging up the pipes and ascertaining their size, Mr. Walker's notes of his conversation with Mr. Ramstetter reflect that Mr. Ramstetter told him the size and composition of the pipes. Tr. 3, p. 154. Based on Mr. Walker's

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19Q: Isn't it also true, Mr. Noakes, that you never mentioned a population study that you made in 1988 until today to the Government?

A: No. I don't know if that's true or not. That's not true. You went through my files. It's in my files. . . . It's in a file marked Fair Housing. Tr. 3, pp. 250.

expertise in this area[20] and the lack of contradictory evidence, Respondents could have reasonably concluded that the report was accurate.

The Charging Party's attack on Respondents' good faith reliance on the Study is based upon the purported existence of other alternatives to the three-person occupancy limit. The first alternative suggested by the Charging Party is included in the Study. Based on the limited off-street parking, and the size of the lots and units, the Study recommends a population guideline of two-persons per bedroom in addition to the cap of 916 resulting from the inadequacy of the sewerage system. The two-person per bedroom limit would permit a maximum of four persons per unit in a two-bedroom home, and six persons in a three-bedroom home. At the time, 341 individuals resided in the Park. The Charging Party asserts that the two-person per bedroom standard could have been adopted "without being in imminent danger of exceeding the engineer's recommended limit." C. P. Post-hearing Brief, p. 67.

I agree with the Charging Party that it would have been possible to follow the two-person per bedroom guideline until the Park reached its maximum capacity. However, there are legitimate reasons for not doing so. According to the QCI Study and the testimony of Mr. Walker, the limitation of 916 Park occupants is an absolute limit based on the capacity of the sewer system. The Park is situated in a resort area near Golden, Colorado. The record establishes that during the summer months, vacationing families (including numerous children) visit and reside in the units. If the limitation of 916 permanent residents were reached, there would be no additional capacity and the summer visitors could not be accepted. Accordingly, some cut-off below 916 is justified. Respondents set the cap at 687 based on three-persons per unit in order apply the policy equitably. Without such a rule, tenants could increase the number of residents simply by adding bedrooms. Respondents believed it to be unfair to permit an unrestricted increase in the number of residents in some homes but not others. Tr. 3, pp. 236-37. The Charging Party has failed to demonstrate that this rationale is unreasonable.[21]

The Charging Party also suggests various alternative solutions for the sewer and quality of life problems addressed in the Study. It identified three solutions to address the inadequacy of the sewer system. None are practical.

20See Finding of Fact No. 20.

21If the two-bedroom limitation were used until this lower cut-off number were reached, it is possible that some units would be filled to their capacity while other units remained vacant or became unmarketable because the cut-off had been reached and could not be exceeded. The vacant units would generate no income and Respondents' profits would be reduced.

First, the Charging Party proposes that, rather than limiting the number of occupants, Respondents deal with the sewer system's limitations by restricting the number of fixtures per unit. Respondents reject this option because of the potential health problems associated with many residents using few fixtures. They also consider it intrusive. The evidence supports Respondents.

A sewerage system must have an adequate "scour velocity," i.e., the water flow in the system must be sufficiently rapid to transport solid waste through the sewer pipes. If too many toilets are flushed at the same time, the "scour velocity" will be slowed. If the water flows too slowly through the system, solid matter may accumulate resulting in blockages. Tr. 3, pp. 144-45, 160-61. One solution to this problem is a limitation on the number of toilets per unit. However, an insufficient number of toilets in each unit would obviously inconvenience Park residents and, if toilets were overused, sanitation might ultimately be affected. Respondents also considered a limit on the number of toilets to be intrusive because effective enforcement would require inspection of residents' homes. Respondents point out that a family of twenty could live in a mobile home with one toilet and shower. They also point out that "anyone handy enough with a wrench and brave enough to try can add fixtures." Res. Reply Brief, p. 4; Tr. 3, pp. 250, 254.[22] I agree with Respondents and conclude that this suggested alternative is impracticable and poses a potential health hazard.

A second proposed option, installing new underground piping, would entail ripping up the existing sewer pipes and rebuilding the Park to conform to present design standards, as well as the FEMA Flood Plain Plan. Respondents estimated that this option would cost a minimum of $300,000, as well as the loss of many mobile home spaces.

A third alternative would involve replacing one piece of pipe along Mt. Vernon Road, purportedly the most likely place where blockages could occur. However, unless Respondents received a waiver, they would have to obtain a permit from FEMA which would first require elevating portions of the Park above the flood plain. Tr. 3, pp. 236-63. In any event, replacing the one piece of pipe would not necessarily solve the sewerage problems. Tr. 3, p. 175.

The Charging Party suggests that the quality of life issue addressed in the Study would be eliminated by permitting only one home on two combined lots. It is not clear

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22Respondents note that the difficulty of enforcing this limitation is illustrated by Complainant's sub-code conversion of a laundry room into a bedroom for children.

how this suggestion would be implemented. Presumably, the Charging Party does not seriously contend that Respondents must order occupied homes to be vacated and removed. If Respondents ordered homes to be removed only after they become vacant, there could be a loss of revenue since the remaining home situated on a larger lot might not support the double lot rental required for Respondents to maintain income at the same level.

Finally, the Charging Party infers pretext from Respondents' failure to request that Mr. Walker consider alternatives other than an occupancy limit. The facts of this case do not suggest that Respondents' preference for an occupancy limitation as a remedy for potential overcrowding was unreasonable. Accordingly, it was not necessary for Respondents to expend their resources to seek alternative solutions.

For the reasons discussed above I conclude that Respondents' decision to adopt the three-person occupancy limit has not been demonstrated to be pretextual.

2. Respondents' Purported Pretextual Statements

Mrs. Dalke's advertising control sheet described a mobile home as "OLDER, 12 by 15, one bedroom and in QUIET Golden mountain park. . . ." Because "older" immediately precedes the dimensions, number of bedrooms, and location of the trailer, it would normally be read as one of a series of descriptions of the home. It does not appear to refer to the Park's residents. The description of the Park as, "quiet" does not impose a restriction or limitation against children.

Mr. Dalke's informational handout describes the Park as "older," "mostly retired," "semi-retired," and "adult/family mix." It is unclear from the actual document whether "older" refers to the age of the Park or the age of its residents. While the handout mentions "mostly retired" and "semi-retired," it also includes the term, "adult/family mix". In order to draw the inference that the Park discouraged children, one would have to ignore the last phrase.

The Charging Party cites Mr. Noakes's written comment concerning the creation of a "ghetto" as evidence of discrimination. The Charging Party does not explain why the use of this word constitutes evidence of discrimination against families with children. The primary definition of "ghetto" is "a quarter of a city...in which Jews were formerly required to live." The second, more contemporary definition is "a quarter of a city in which members of a minority racial or cultural group live especially because of social, legal, or economic pressure." *Websters 3rd New International Dictionary* (1971 ed., unabridged). Neither definition, as commonly understood, describes families with children.

Finally, I credit Mr. Noakes's testimony that the omission of "familial status" from the enumerated protected classes in the policy letter sent to resident managers resulted from his inadvertent reuse of an old letter. Tr. 3, p. 225. In any event, the statement that Respondents intend to comply with the Act, effectively incorporates "familial status" by reference.

Neither the Dalkes' or Mr. Noakes's statements suggest to the ordinary reader that Respondents discriminate against families with children. *See Soules v. HUD,* 967 F.2d 817, 824 (2d Cir. 1992). Accordingly, the use of these terms under the circumstances of this case does not establish that the imposition of the three person per unit occupancy limit was pretextual.

IV. Disparate Impact

The Charging Party asserts that the Partnership's imposition of an occupancy limit of three persons per unit violates the Act even without a showing of prohibited intent to discriminate against families with minor children. Whether a discriminatory effect is, by itself, sufficient to establish a violation of the Act is not completely settled.[23] However, I need not decide this issue because the Charging Party has failed to establish a prima facie case of disparate impact. Furthermore, even assuming *arguendo*, that a prima facie case were demonstrated, Respondents have established the existence of a business justification for the occupancy limitation. For the reasons discussed *supra* pp. 22-24, the alternatives suggested by the Charging Party are impracticable and would not satisfy Respondent's legitimate business interests while lessening the impact on families with children. *See,*

23However, most of the United States circuit courts of appeal have held that evidence of discriminatory effect is sufficient to establish a prima facie case. *See generally* Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, Sec. 10.4 (1991); *Robinson v. 12 Lofts Realty*, 610 F.2d 1032; *Huntington Branch, NAACP*, 844 F.2d 926 (2nd Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. den*. 435 U.S. 908 (1978); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055 (4th Cir. 1982); *Betsy v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977), *cert. den*ied. 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Badget*, 976 F.2d 1176 (8th Cir. 1992); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989). To date the Tenth Circuit has not ruled whether facially neutral policies which have a disparate impact on a protected class violate the Act. However, it has applied a disparate impact analysis under Title VII. *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989).

e.g., Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989);[24] *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

To prove its prima facie case the Charging Party relies upon statistics and the testimony of HUD economist James Coil which establish that at least 71.2% of all U.S. households with four or more persons contain a least one child under the age of 18, that at least 50.5 % of U.S. families with minor children have four or more individuals, and at most, 11.7% of households without minor children have four or more persons. There is no evidence that statistics which establish the percentage of families with minor children nationwide are the same in Jefferson County or even the Denver metropolitan area. Mr. Coil attempted to address this deficiency by pointing out that the percentage of households with four or more individuals that are families in Jefferson County (for which statistics are available) is almost identical to the nationwide percentage. Tr. 2, p. 38. I am unwilling to speculate that the same correlation exists as to the percentage of households with minor children. Accordingly, the Charging Party has failed to establish a prima facie case of disparate impact.

Even if these statistics established a prima case, Respondents have produced evidence of a business justification for the occupancy limitation. They were legitimately concerned with sewer problems, as well as the negative effect that overcrowding would have on the quality of Park life. Neither of these concerns is a "mere insubstantial justification." *See Wards Cove*, 490 U.S. at 659. The Park had experienced sewer blockages in the past. Further, the QCI Study confirmed that overcrowding would place a burden on the sewer system. Moreover, the Park's high density and limited lot size, parking spaces, road width and space for facilities warrant Respondents' establishment of a population limit both to preserve the quality of life in the Park and to ensure the Park's economic viability.

For the reasons discussed in connection with the Charging Party's claim of pretext, the suggested alternatives are either impractical or are prohibitively expensive. Accordingly they would not serve Respondents' legitimate goals. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). *See also Rizzo*, 564 F.2d at 149;

24*Wards Cove* is an employment discrimination case under Title VII of the Civil Rights Act of 1964. However, the Title VII analytical framework applies in Title VIII cases. Congress subsequently eliminated the *Wards Cove* analysis for purposes of Title VII in the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). This Act, however, did not amend Title VIII. Accordingly, it would appear that the *Wards Cove* analytical framework would continue to apply to cases arising under Title VIII despite the passage of the 1991 Civil Rights Act.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998-99 (1988).

For the above reasons the Charging Party has not demonstrated that Respondents violated 42 U.S.C. §§ 3604 (a) and (b) and 24 C.F.R. §§ 100.60 and 100.65 by its imposition of a three-person occupancy limit.

V. Other Alleged Violations

The Charging Party alleges that Respondents violated 42 U.S.C. § 3604 (b) by not providing Mr. Brace with an "entire application packet" while providing an unidentified individual with unidentified documents. Because the state of the record is insufficient to determine what was given to this individual or that his circumstances were similar to those of Mr. Brace, the allegation has not been proved.

Respondents are alleged to have violated 42 U.S.C.§ 3604 (c) by maintaining in its tenant files, a written provision that all residents must be adults by publishing the information sheet which identifies the character of the park as "semi-retired" and "mostly retired," and by telling Ms. VanLoozenoord that only one child and two parents were permitted to be residents of the Park. As previously discussed, the failure to remove the written provision was inadvertent. In addition, the record fails to demonstrate that it was published or distributed. The information sheet describing the Park also included the description "adult-family" mix. Finally, for the reasons discussed above I conclude that Respondents' agent did not make the alleged statement restricting families to one child. Accordingly, the record fails to establish that the statements indicate or intend a preference, limitation, or discrimination based on familial status.

The Charging Party amended its Complaint to allege violations of 42 U.S.C. § 3617, which prohibits coercion, intimidation, threats, or interference with any person "on account of" that person's exercise of any right under the Act. *See also* 24 C.F.R. § 100.400. In order to establish a prima facie violation of this section of the Act, the Charging Party must demonstrate that: 1) Complainants engaged in an activity protected by the Act, 2) Respondents took some adverse action against Complainants, and 3) a causal connection exists between the protected activity and the adverse action. *See HUD v. Murphy*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002, at 25,051 (HUDALJ July 13, 1990). Other than a demonstration that each of these actions followed the filing of the complaint, the Charging Party has failed to demonstrate a causal connection between Respondents' actions discussed below and Complainants' exercise of their rights under the Act. Even assuming that a prima facie case of reprisal has been demonstrated, each of these actions has a legitimate explanation which the Charging Party has not shown to be false.

Many of these alleged violations relate to the timing and frequency, of the eviction notices and Respondents' unwillingness to forego taking legal action to evict Complainants after they received the complaint of discrimination. The Charging Party asserts that more eviction notices were delivered than were necessary, and that a notice to vacate was delivered to Complainants two days after Respondents' receipt of the complaint. The record fails to establish that Respondents were doing anything more than exercising their legal rights under state law, that the number of notices exceeded what was appropriate to exercise those rights, or that Respondents were required to delay their attempt to evict Complainant pending the outcome of this litigation.

The Charging Party also contends that actions taken against Myron Brace evidence violations of 42 U.S.C. § 3617. Mr. Dalke prohibited Myron from using the swimming pool and pool table, and from riding a motorized bike in the Park. However, the record establishes that Complainants failed to inform the Dalkes of Myron's identity, his relationship to Mr. Brace, his age (13), or that Myron had moved into the trailer on an indefinite basis. Mr. Dalke knew from having observed Myron on the premises and talking to Mr. Brace and Ms. VanLoozenoord that Myron was staying with the Brace-VanLoozenoord family. However, he did not learn Myron's identity, relationship to Mr. Brace, or the duration of his stay until approximately a month before the hearing.[25] Myron was unaccompanied by an adult. Because the Park rules required adult supervision for any child under 12 years using the pool, and because Mr. Dalke did not know Myron's age, he was justified in denying Myron access to the pool. Res. Ex. 13, p. 2; Tr. 1, p. 176, Tr. 2, pp. 17-20.

Mr. Dalke informed Myron that he could not use the pool table because he was not a resident. Although he knew that Myron was staying with Complainants, Mr. Dalke did not know anything more about him. It was not, therefore, unreasonable for Mr. Dalke to deny access to the pool table, one of the Park's few recreational facilities, until he learned who he was. Tr. 1, pp. 176-195; Tr. 2, p. 18.

Finally, the Charging Party contends that Mr. Dalke engaged in retaliatory conduct by preventing Myron from riding his unlicensed motorized bike in the Park. The Charging Party bases this allegation on the fact that Mr. Dalke drove an unlicensed motorized golf cart around the Park. However, the differences between a resident manager operating a golf cart at the Park and a minor riding a motorized bike are self evident. Based on its exposure to liability, Park management was justified in preventing

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25The amended complaint also fails to mention Myron by name.

a child from using a motorized vehicle on the premises. I find no violations of 42 U.S.C. § 3617.

CONCLUSION AND ORDER

In its post-hearing brief, the Charging Party has made other contentions which do not affect the disposition of this case. For the reasons discussed above, the Charging Party has failed to prove by a preponderance of the evidence that Respondents violated 42 U.S.C. §§ 3604 (a), (b), and (c), or 24 C.F.R. §§ 100.50, 100.60, 100.65, and 100.75. The Charging Party has also failed to prove by a preponderance of the evidence any violations of 42 U.S.C. § 3617, or 24 C.F.R. § 100.400. Accordingly, it is

ORDERED, that the charge of discrimination is *dismissed*.

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

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WILLIAM C. CREGAR
Administrative Law Judge