"PETER PAN" AS PUBLIC POLICY: SHOULD FIFTY-FIVE-PLUS AGE-RESTRICTED COMMUNITIES CONTINUE TO BE EXEMPT FROM CIVIL RIGHTS LAWS AND SUBSTANTIVE FEDERAL REGULATION?

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Although millions of Americans live in fifty-five-plus age-restricted housing, little research has been done to determine whether these communities benefit their residents, or the nation as a whole. This is particularly ironic because these communities exist in contravention to anti-discrimination laws by virtue of a specific exemption granted to real estate developers by an Act of Congress. Ordinarily age discrimination is prohibited by the Fair Housing Act, Title VIII of the Civil Rights Act of 1968. Successful lobbying by special interest groups carved out an exemption for fifty-five-plus housing.

The original provision required developers to offer elders special services and facilities in these communities in return for the exemption. Over time, those requirements were eliminated and now the only requirement is that these communities exclude families and children.

While lifestyles focused on golf and tennis may be attractive to younger retirees, older Americans often find themselves in communities bereft of the services and facilities they need for basic life activities and safety. The very nature of these communities results in elders left with depreciating homes, and many are without the financial means to retrofit their fifty-five-plus home or to move into a community better adapted for their needs. This Article explores a popular form of "senior housing" that is unsuitable for most older Americans.

> Peter Pan: "Forget them, Wendy. Forget them all. Come with me where you'll never, never have to worry about grown up things again."
> Wendy: "Never is an awfully long time."[1]

I. Introduction

In 1979 my parents purchased a condominium in a popular retirement community in Florida for $35,100. In 2009, thirty years later, it sold for $29,400. Therein lies one of the problems.

Age-restricted communities for elders, most typically for those over age fifty-five (55-plus housing communities)[2] are an anomaly under the U.S. Constitution, civil rights laws, and even historic property law. The Constitution enshrines property rights and equal protection, civil rights laws make age and familial discrimination illegal, and the common law expects property to be freely alienable.[3] Fifty-five-plus communities are a big exception to some very important rules and are made possible only through express acts of Congress.[4]

Fifty-five-plus communities are found throughout the United States, especially in areas with sunshine, warm weather, and low taxes.[5] There are approximately 1,700 55-plus communities in the three

1. PETER PAN, (Universal 2003).

South Florida counties of Broward, Palm Beach, and Miami-Dade alone.[6]

The mere name "civil rights laws" suggests the utmost importance for freedom and liberty. Exempting any conduct from a civil rights law is likely fraught with peril, and prudence suggests such an exemption should only be made upon demonstration of extraordinarily compelling need; the exemption should also be narrowly tailored.[7] But most importantly, an exemption from civil rights laws should be premised on some compelling public good. As former Senator (now Vice President) Joe Biden (D-DE) put it during a Senate debate on the subject, "if you're going to be able to discriminate against families [by allowing communities to exclude children], you should be special—and you should be serving the special needs of seniors."[8]

By building restricted housing that would otherwise be forbidden, private real estate developers are certainly receiving benefits from the exemption to civil rights laws.[9] There has been little analysis, however, of what benefits accrue to the nation as a whole in return for this exemption. And perhaps most importantly, the question of whether elders are better off because of this exemption needs to be answered.

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2. *See* D. Trey Jordan, *Continuing Care Communities Versus the Fair Housing Act: Independent Living and Involuntary Transfer*, 9 MARQ. ELDER'S ADVISOR 205, 211 (2007) (describing the provision for age sixty-two housing).

3. *See generally* Carl Coan, *The Fair Housing Act and Seniors' Housing*, 27 URB. LAW 826 (1995) (describing familial status discrimination under the Fair Housing Act Amendment).

4. *See* Jordan, *supra* note 2 (providing the definition of senior housing and describing the conditions under which it is exempted from the FHA).

5. *See generally* Emily Brandon, *10 Fast-Growing Retirement Spots*, U.S. NEWS & WORLD REP., July 5, 2011, http://money.usnews.com/money/retirement/articles/2011/07/05/10-fast-growing-retirement-spots (describing popular retirement spots, many of which are in warm climates).

6. *See* Rebekah Monson, *South Florida Senior Communities Serve Two Generations*, SUN SENTINEL, May 15, 2011, http://articles.sun-sentinel.com/2011-05-15/news/fl-aging-senior-communities-20110515_1_senior-communities-younger-retirees-century-village (noting Broward is home to 684 registered fifty-five and older communities and Palm Beach is home 749).

7. Some commentators have suggested that the exemption may be unconstitutional. *See* John R. Dorocak, *De Facto Disparate Impact Familial Discrimination (Housing For Older Persons Age Fifty-Five and Over) Under the Fair Housing Act: Is it Legal? Is it Constitutional?*, 21 GEO. MASON U. CIV. RTS. L.J. 1, 26–27 (2010); Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families With Children*, 9 ADMIN. L.J. 297, 312 n.104 (1995).

8. S. REP. NO. 104-172, at 15 (1995), *reprinted in* U.S.C.C.A.N. 778, 791.

9. *See infra* Part II.

It is not clear, at least to me, that elders are truly benefiting from the exemption from civil rights laws for age-restricted communities. At the very least, it is a mixed bag. There seem some benefits, particularly for the younger retirees, but that is greatly outweighed by the personal and societal costs for the extreme elders trying to "age in place."[10] In fact, the only group that seems to achieve a full benefit from the exemption bestowed by Congress are the real estate developers that built and sold these communities.[11]

In some respects much of the nation's 55-plus housing appears to be guilty of the moniker "Peter Pan housing," that some commentators have given it.[12] "Peter Pan housing" refers to a type of home construction that presumes the owners will never grow old—housing that includes inside and outside stairways and steps, bathrooms with obstacles, corridors and doorways too narrow for wheelchairs and walkers, and other barriers to elders and people with disabilities.[13] Peter Pan housing also includes homes in far-flung suburbs and gated communities without access to public transportation or other means of mobility for elders who have given up driving.[14]

This is ironic for several reasons. First, 55-plus housing is, by definition, constructed for elders; if Americans desire to age in place, then why build homes with no provisions for the disabilities that often accompany aging—where's the sense in that?[15] Second, Congress originally required 55-plus housing to offer facilities and services for elders as a condition for permitting an exemption to the civil rights laws, but later removed such requirements under pressure from special interest groups.[16] And third, due to changing tastes between different generations, many 55-plus communities quickly go out of style,

10. *See infra* note 52.
11. *See infra* Part II.
12. *See e.g.*, RACHEL G. BRATT ET AL., A RIGHT TO HOUSING 283 (2006); Jon Pynoos et al., *Aging in Place, Housing and the Law*, 16 Elder L.J. 77, 80–81 (2008).
13. *Id.*
14. *See* KEVIN DEGOOD, TRANS. FOR AM., AGING IN PLACE, STUCK WITHOUT OPTIONS: FIXING THE MOBILITY CRISIS THREATENING THE BABY BOOM GENERATION, 11 (2011), http://t4america.org/docs/SeniorsMobilityCrisis.pdf. In fact, older adults today are less likely to move after they retire than seniors were thirty years ago. *See* Sandra Rosenbloom, *The Mobility Needs of Older Americans: Implications for Transportation Reauthorization*, BROOKINGS INSTITUTION SERIES ON TRANS. REFORM, July 2003.
15. With apologies to Judge Frank Easterbrook for using his famous line in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997).
16. *See infra* note 41.

and the homes lose much of their resale value.[17] This locks many elders into homes ill-equipped to allow them to live safely and independently as they age, often shifting much of the costs for their care to the local, state, and federal governments.[18]

This Article considers whether age-restricted communities should continue to receive an exemption from civil rights laws, and even if communities are deserving of some exemption, whether there should be some additional protection, particularly for the most vulnerable elders.

Part II of this Article reviews the phenomenon of age-restricted housing. It traces the development of the relevant civil rights laws, amendments, and related litigation. Part III of this Article looks at some of the largest 55-plus communities in the United States, and specifically in the four Century Villages in South Florida. Part IV of this Article is a personal story; it details my parents' experience with 55-plus housing, particularly the advantages and disadvantages for my mother. Her experience is illustrative of the best and worst of 55-plus housing. Part V provides some conclusions and suggestions for additional study.

II. Age-Restricted Housing

A. The Fair Housing Act

Undoubtedly, at least by happenstance, it is likely that there have always been some communities comprised mostly of older residents, and some with no children at all. But retirement communities segregated by covenant, deed, or practice became more controversial in the aftermath of the Civil Rights Act of 1968. A section of Title VIII of the Civil Rights Act is called the Fair Housing Act (FHA).[19] The FHA prohibits discrimination on the basis of race, color, religion, or national origin for any sale, rental, or financing of housing.[20] The Act is intended to promote open, integrated residential housing patterns, and to prevent segregation.[21]

17. *See generally* Diane Lade, *Low Prices Keep the Market Moving*, SUN SENTINEL Apr. 27, 1997, http://articles.sun-sentinel.com/1997-04-27/features/9705060279_1_apartments-prices-estate.

18. Jon Pynoos & Christy M. Nishita, *The Elderly and a Right to Housing*, *in* A RIGHT TO HOUSING 279, 282 (Rachel G. Bratt et al. eds., 2006).

19. Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012).

20. Prohibitions against sex discrimination were added in 1974. § 3604.

21. Otero v. New York City Housing Auth., 484 F.2d 1122, 1134 (1973).

The 1968 version of the FHA, however, did not prohibit discrimination against families, although information presented to Congress at the time suggested widespread discrimination against families with children.[22] Nor did the FHA specifically allow or authorize housing for elders.

According to one Department of Housing and Urban Development (HUD) study reviewed by Congress in 1988, 25% of all rental units prohibited children, 50% imposed restrictive policies which made it difficult for families with children to live in those units, and as many as 20% of all families were living in housing they considered undesirable because of these restrictive practices.[23] Protecting families is inextricably linked to providing an exemption to anti-discrimination laws for age-restricted housing for elders. If discrimination against families is prohibited, without any carve-out for elders, it will be impossible (or at least unlawful) for elders to live exclusively among their peers.

Advocates for older Americans wanted to preserve certain communities for those past their child rearing years.[24] They argued that it was elders' right to be free from the noise of children if they so desired, and elders did families no favor by sharing a community but complaining about the ordinary sounds of children at play.[25] Elders argued to preserve their ability to live with people of common affinity, those at the same stage of life, with similar interests and activities.[26]

To reconcile these competing concerns, Congress prohibited discrimination on the basis of familial status in housing, and at the same time created three exemptions for housing for older persons.[27] The

22. Fair Housing Act, 42 U.S.C. §§ 3601–3619 (1968).

23. Carl A.S. Coan, Jr. & Sheila C. Salmon, *The Fair Housing Act and Seniors' Housing*, 27 URB. LAW. 826, 826–27 (1995) (citing H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180 (relying on ROBERT W. MARANS ET AL., OFF. POL'Y PLANNING & RES., DEP'T HOUSING & URB. DEV., MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980)). Many of these apartment complexes were predominantly white as well. Jonathan I. Edelstein, *Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995*, 52 U. MIAMI L. REV. 947, 948 (1998). Prior to federal intervention, some states had tried unsuccessfully to prohibit familial discrimination. *See* H.R. REP. NO. 100-711 at 20.

24. *See* 134 Cong. Rec. H6499–6500 (daily ed. Aug. 8, 1988) (statement of Rep. Fish); Christopher Boyd, *Housing Law Stirs Florida Retirees*, CHI. TRIB., Sept. 24, 1989, at M2; Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992).

25. *See* Seniors Civil Liberties Ass'n, 965 F.2d 1030.

26. *See generally id*.

27. The new FHA provided additional enforcement mechanisms unavailable in the 1968 Act. Aggrieved persons were permitted to file complaints with HUD,

first exemption was for housing "provided under any State or Federal housing program that the [HUD] Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program)."[28] The second exemption was for housing "intended for, and solely occupied by, persons 62 years of age or older."[29] The exemption has proved to be of limited utility, since it does not permit occupancy by a spouse under sixty-two, or by the occupant's children if they are under age.[30] The third and final exemption was the most contentious and is the subject of this Article. The exemption was for housing "intended and operated for occupancy by persons fifty-five years of age or older."[31] Congress added three requirements to qualify for this exemption: 1) the housing must include "significant facilities and services specifically designed to meet the physical or social needs of older persons"; 2) 80% or more of the units needed to be occupied by at least one person fifty-five years or older; and 3) the owner or manager was required to publish and adhere to policies and procedures which demonstrated an intent to provide housing to those aged fifty-five and older.[32]

HUD promulgated and published a final rule to implement the third exemption. The rule stated that:

> "[S]ignificant facilities and services specifically designed to meet the physical or social needs of older persons" include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, home-maker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them.[33]

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and a procedure for administrative adjudication was established. 42 U.S.C. §§ 3610, 3614. Administrative Law Judges were enabled to fine violators as much as $50,000. 42 U.S.C. § 3612(g)(3). The new FHA also permitted the Attorney General to enforce the law in federal court and aggrieved persons to bring suit in state or federal court. 42 U.S.C. § 3613, 3614.

28. 42 U.S.C. § 3607(b)(2)(A). As of 2010, no housing has been so designated. Dorocak, *supra* note 7, at 8.

29. 42 U.S.C. § 3607(b)(2)(B).

30. Even those facilities that intend to qualify for this exception will generally try to qualify for the 55-plus exemption, if only to increase managerial flexibility in the future. Dorocak, *supra* note 7, at 8. *See also* Allen, *supra* note 7, at 312 n.104.

31. 42 U.S.C. § 3607(b)(2)(C).

32. 42 U.S.C. § 3607(b)(2)(C)(i), (ii), (iii) (amended 1995).

33. 24 C.F.R. § 100.304(b)(1) (1989).

Despite containing the language "include, but are not limited to,"[34] the rule proved highly controversial. Commentators to the rule suggested that the types of required facilities were more appropriate for the severely disabled; other commentators wanted a more detailed and specific list of the types of required services and facilities that would qualify.[35]

HUD responded that the list of facilities and services was drawn directly from a federal statute creating a housing program for elders.[36] But HUD also reordered the list in an attempt to remove any implication that exempt housing needed to serve elders unable to live independently.[37] HUD's inability (or refusal) to better define "significant facilities" led to considerable litigation.[38]

Because of the continuing controversy and litigation,[39] in 1992 Congress directed HUD to specifically promulgate rules defining "significant facilities and services especially designed to meet the physical or social needs of older persons" required for an exemption under the Act.[40] After several unsuccessful and controversial attempts,[41] in 1994, HUD proposed a rule that purported to more clearly

34. *Id.*

35. *See* 54 Fed. Reg. 3,232, 3,256 (1989); Coan & Salmon, *supra* note 23, at 826–27.

36. 54 Fed. Reg. 3,232, 3,256 (1989) (citing 12 U.S.C. § 1701q).

37. 54 Fed. Reg. 3,232, 3,256 (1989).

38. *See*, *e.g.*, Sec'y v. Murphy, HUDALJ 02-89-0202-1 (D.N.J. July 13, 1990) (ALJ found Congress did not establish an unqualified right for older persons to live in childless surroundings); U.S. v. Keck, No. C89-1664-C, 1990 WL 357064 (W.D. Wash. Nov. 15, 1990) (mobile home park failed to provide significant facilities or services to elders); Sec'y v. TEMS Ass'n, Inc., HUDALJ 04-91-0064 (D. Fla. Apr. 9, 1992) (community offering few services or facilities for elders did not qualify for exemption); Sec'y v. Nelson Mobile Home Park, HUDALJ 04-91-0040-1 (D. Fla. Dec. 2, 1993) (tenants must be offered "many" of the facilities on the HUD list); Senior Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992) (FHA did not violate the plaintiffs' right to freedom of association, privacy or due process, and did not violate the Tenth Amendment); Sec'y v. Ocean Park Jupiter Condo Ass'n, Inc., HUDALJ 04-90-0589-1, 1993 WL 316543 (Aug. 20, 1993) (condominium did not provide enough services or facilities to qualify for exemption); Lanier v. Fairfield Communities, Inc., 776 F. Supp. 1533 (M.D. Fla. 1990) (same).

39. During the first two years after the FHA was implemented, half of all HUD complaints alleged discrimination on the basis of familial status; in 1992 and 1993 26% of all HUD cases alleged familial discrimination. *See* Allen, *supra* note 7, at 302–03.

40. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992).

41. *See* 59 Fed. Reg. 34,902 (1994); 59 Fed. Reg. 64,104 (1994); 60 Fed. Reg. 13,840 (1995).

define the standard, but would have allowed HUD to evaluate each housing complex separately under standards that remained somewhat ambiguous.[42]

Opposition to the proposals grew, and finally opposition coalesced against any rulemaking by HUD at all. HUD's regulations were intended to distinguish between communities offering seniors critical services versus communities merely trying to exclude children. Nonetheless, opponents characterized HUD's efforts as "federal bingo mandates."[43] An advocate for real estate developers argued in a Senate hearing that elders "don't want or need to be told by the federal government how to live."[44] Even AARP (then "American Association of Retired Persons") urged Congress to strip HUD of its rulemaking authority on 55-plus housing.[45]

In 1995, Congress preempted HUD by passing the Housing for Older Americans Act of 1995, which eliminated the requirement for 55-plus housing to include significant facilities and services for elders.[46] Today, the FHA permits a community to be restricted to those age fifty-five and older, so long as the housing is intended and operated for individuals in this age group, and at least eighty percent of the units are occupied by at least one person who is fifty-five years of age or older.[47]

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42. *See* 59 Fed. Reg. 34,902 (1994) (Proposed July 31, 1995).

43. S. Rep. No. 104-172, at 9 (1995), *reprinted in* U.S.C.C.A.N. 778, 785. Senator Hank Brown (R-CO) said that passing the Housing for Older Americans Act (HOAA) would allow "normal seniors," as opposed to only the very rich, to enjoy senior-only housing. 141 Cong. Rec. S18063, December 6, 1995. Senator Brown also noted that a large number of real estate developers had contacted him to support HOAA. *Id.* Then Senator Joe Biden (D-DE), arguing against HOAA, said that the significant services and facilities requirement made possible a distinction between "true senior communities and those that just think children are a pain in the neck. We recognized [in the FHA] that something other than an animus against children must set these communities apart in order to meet an exemption from the Fair Housing Act." *Id.*

44. *Id.* (Statement of David S. Schless, executive director of the American Seniors Housing Association).

45. *Id.* at 11 (Testimony of Martin Corry, AARP Director, Federal Affairs).

46. Housing for Older Persons Act of 1995, Pub. L. No. 104-76, § 3, 109 Stat. 787, 787–88 (codified as amended at 42 U.S.C. § 3607(b)(5) (Supp. I 1996).

47. 42 U.S.C. § 3607(2)(C) (2006); *see also* S. REP. NO. 104-172, at 12–13. Some states are also involved in the regulation of 55-plus communities. For example, Florida requires that:

(1) At least eighty percent of the occupied units are occupied by at least one person fifty-five years of age or older;

(2) The facility or community publishes and adheres to policies and procedures that demonstrate its intent to in fact be a provider of housing for older persons;

B. Aging in Place

The elimination of the requirement for significant facilities and services permitted 55-plus communities to discriminate against families without requiring the real estate developers to offer elders anything more than a child-free environment.[48] Developers could build new elder communities offering services no greater than a "mobile home park."[49] Even today, a race to the bottom continues in building many 55-plus communities that offer little beyond a restriction against children. Despite being advertised as congenial places for persons at the same stage in life to grow old together, most 55-plus communities today cater to the younger and more active retiree. In fact, most housing for elders is "designed for people who are never going to age nor grow old"—Peter Pan housing.[50]

While a fifty-five-year-old couple may find they enjoy their new home's recreational amenities, which might include access to a swimming pool or golf course, the couple may find their new home fails to meet their changing needs. Specifically, they may find after it is too late that their new home has steps, barriers, and other impediments to aging in place. And they may also find that their community includes no life safety devices (such as defibrillators, automatic sprinklers, or fire extinguishers), no trained medical or health personnel, no emergency equipment (such as generators to run elevators, lights, or

(3) The facility or community complies with rules established by the U.S. Department of Housing and Urban Development (HUD) for verification of occupancy.

FLA. STAT. ANN. § 760.29(4)(b)(3) (West 2012). Florida's regulations, however, merely require registration with the state; substantively the rules do not differ from federal law. *See e.g*. CAL. CIV. §§ 51.2–51.4 (West 2012) (California); HAW. REV. STAT. § 356D-1 (West 2012) (Hawaii); N.J. STAT. ANN. §§ 13:15–1.2–1.5 (West 2012) (New Jersey); WIS. STAT. ANN. §106.50 (West 2011) (Wisconsin).

48. *See The Housing for Older Persons Act of 1995: Hearing on H.R. 660 Before the Subcomm. On the Constitution, Federalism, & Pro. Rights of the S. Comm. on the Judiciary*, 104th Cong. 26 (1995) (statement of Stuart Ishimaru, Assistant Att'y Gen. of the United States) (passing the Housing for Older Persons Act "would weaken antidiscrimination protections based on family status and would allow the very proliferation of all-adult housing facilities [that the Fair Housing Act] sought to proscribe"). The Housing for Older Persons Act of 1995 also created for elder communities a "good faith" defense to the FHA, which when successfully argued, eliminated the possibility of monetary damages for the plaintiff. 42 U.S.C. § 3607(b)(5) (Supp. I 1996).

49. Edelstein, *supra* note 23, at 967.

50. *All Things Considered*, NATIONAL PUBLIC RADIO (Sept. 29, 2011), http://www.npr.org/2011/09/29/140932807/pynoos-discusses-senior-housing (Jon Pynoos, professor of gerontology policy and planning at the University of Southern California).

even oxygen equipment for those requiring it), no age-appropriate social programming, and no program to assist those with disabilities or who cannot leave their residence.[51] And in the worst cases, described in Part III, *infra*, they may find that the shifting preferences of new generations of those older than fifty-five may render their home almost valueless.

It is the desire of most Americans to stay where they are, for as long as they are able to do so.[52] This phenomenon is increasingly called "aging in place."[53] Barriers to aging in place include homes constructed without accessibility, safety, security and usability measures required for many elders.[54] As people age, these barriers present serious threats to independence and increase caregiver burden.[55] These obstacles force elders into less desirable, more expensive, and more restrictive housing options, such as assisted living facilities and nursing homes.[56] Indeed, there is often an all-or-nothing choice between a cost-prohibitive retrofit of a current home, versus a move into an expensive supervised facility that may offer more restrictions and services than the elder actually needs.[57] Of course, many elders

51. During the debate on HOAA, Senator Jon Kyl (R-AZ) referred to "significant facilities and services" as "in a sense too frivolous." 141 CONG. REC. S. 18065 (daily ed. Dec. 6, 1995). *See also infra* notes 251–54 and accompanying text. In fact, 66% of older Americans will need help with one or more daily essential activities, but do not get the assistance they need. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-237, OLDER AMERICANS ACT: MORE SHOULD BE DONE TO MEASURE THE EXTENT OF UNMET NEED FOR SERVICES 18–19 (2011); *see also* ADMIN. ON AGING, U.S. DEP'T HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2011, at 15 (2011), http://www.aoa.gov/aoaroot/aging_statistics/Profile/2011/docs/2011profile.pdf (stating that 16% of elder Americans needed assistance; 29% of elder Americans over age eighty needed assistance).

52. Pynoos et al., *supra* note 2, at 78; DEGOOD, *supra* note 14, at 9; *see* KIRSTEN J. COLELLO, CONG. RESEARCH SERV., RL 34289, SUPPORTIVE SERVICES PROGRAMS TO NATURALLY OCCURRING RETIREMENT COMMUNITIES, (2007).

53. Pynoos et al., *supra* note 12, at 78.

54. *Id.*

55. *Id.*

56. *Id.*

57. Annual assisted care living fees average $39,600 annually. GENWORTH FIN., NAT'L DATA FROM THE GENWORTH 2012 COST OF CARE SURVEY, (2012), http://www.genworth.com/content/etc/medialib/genworth_v2/pdf/ltc_cost_of_care.Par.20922.File.dat/USA_gnw.pdf. Annual fees at Century Village are approximately $5,000, not including taxes or insurance. Kelly Greene & Jennifer Levitz, *Retiree Havens Turn Younger to Combat the Housing Bust*, WALL ST. J., Dec. 1, 2008.

cannot afford to retrofit their homes or move into housing offering the services they need.[58]

To age in place requires a community where: 1) age is not a significant barrier to participation in life-long interests and activities; 2) there is support for elders with age-related infirmities to meet critical health and social needs; and 3) there are opportunities for elders to engage in fulfilling activities.[59] Real estate developers could construct many of these when a community is built for far less than the cost of retrofitting later on.[60] A home with no obstacles to aging in place may be priced similarly to a home with more attractive kitchen countertops, bathrooms, and appliances, but these features often do not appeal to younger retirees who have yet to experience their own disabilities.[61]

An important aging in place initiative is the phenomenon known as naturally occurring retirement communities (NORC). "Officially, the NORC designation now connotes a community that is bringing in necessary social services, and receives government funding to better address the needs of older residents," although the term is used casually to refer to many informal communities comprised largely of elders.[62] Studies consistently show that the majority of elders today

58. According to the 2010 Census, the poverty rate for those sixty-five and older is approximately 9%. *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 13, 2011), http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html. More than 15% of elders live at or near poverty levels, ranging from 8.1% in Nevada to 28.5% in Mississippi. Patricia E. Salkin, *A Quiet Crisis In America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 GEO. J. ON POVERTY L. & POL'Y 285, 291–92 (2009).

59. A. Lehning et al., *Structural Barriers to Developing 'Aging-Friendly' Communities*, 17 PUB. POL'Y & AGING REP., 15, 15–20. *See generally* COLELLO, *supra* note 52.

60. And regardless of the cost of a retrofit, it is still less expensive than a forced move into assisted living, which may cost $3,000 to $6,000 each month. *See generally All Things Considered*, *supra* note 50; *Fairfax County Looks at "Peter Pan" Housing*, FAIRFAX COUNTY OFFICE OF PUBLIC AFFAIRS (Jan. 9, 2007), http://www.fairfaxcounty.gov/news/2007/010.htm.

61. Home "features specifically designed to address a disability remain stigmatized and unpopular, and do not increase a new home's market value." *E.g.*, Lehning et al., *supra* note 57, at 17.

62. Rebecca Darcy Mulhare, *The NORCs are Coming!*, COOPERATOR, http://cooperator.com/articles/729/1/The-NORCs-Are-Coming/Page1.html (last visited Apr. 21, 2013). The federal government defines a NORC as

> a community with a concentrated population of older individuals, which may include a residential building, a housing complex, an area (including a rural area) of single family residences, or a neighborhood composed of age-integrated housing . . . where 40 percent of the heads of households are older individuals; or a critical mass of older

wish to stay in their own homes as they age.[63] The challenge is to bring medical and social services, age-appropriate activities, and transportation to these elders, where they currently live, rather than necessitating their move elsewhere in order to receive these benefits.[64]

NORCs do more than provide medical services or help elders with housekeeping. A NORC can "also foster a sense of community by engaging volunteers to help seniors and encouraging seniors to become involved in community activities."[65] An intergenerational community is fostered by NORCs because elders volunteer to assist with various neighborhood activities, such as childcare or gardening.[66] These public and private benefits are often more cost-effective than the alternatives.[67] In addition, some communities have been successful in getting private and federal grants to support the NORC; in some instances condominium and cooperative boards of directors have agreed to provide funding as well.[68] Ironically, to some degree now and certainly in the future, old neighborhoods in cold northern cities with plentiful NORCs may offer a better lifestyle for elders than do Sunbelt communities developed specifically for those older than fifty-five.

> individuals exists, based on local factors that, taken in total, allow an organization to achieve efficiencies in the provision of health and social services to older individuals living in the community; and that is not an institutional care or assisted living setting.

Community Innovations for Aging in Place, Pub. L. No. 109-365, 422 Stat. 2522 (2006).

63. Mulhare, *supra* note 62.

64. *See* COLELLO, *supra* note 52, at 1–2.

65. Donald Bertrand, *These Houses Are a Home Program Cares for Co-op's Seniors*, DAILY NEWS, Mar. 19, 1995.

66. Mulhare, *supra* note 62.

67. Bertrand, *supra* note 65; *see also* Philip Moeller, *Is a Naturally Occurring Retirement Community Right for You?*, U.S. NEWS & WORLD REP., Mar. 25, 2009, http://money.usnews.com/money/blogs/the-best-life/2009/03/25/is-a-naturally-occurring-retirement-community-right-for-you; COLELLO, *supra* note 52, at 1. *All Things Considered*, *supra* note 50.

68. Mulhare, *supra* note 62; *see* COLELLO, *supra* note 52, at 2, 4; *see also Naturally Occurring Retirement Communities*, ADMIN. ON AGING, U.S. DEP'T HEALTH & HUMAN SERVS., http://www.aoa.gov/AOARoot/AoA_Programs/HCLTC/NORC/index.aspx (last visited Apr. 21, 2013) (explaining that "congressionally earmarked grants" have been awarded to NORCs).

III. Century Village and Its Peter Pan Kin

A. The Dream of Retirement in South Florida

Century Village (Boca Raton, Deerfield Beach, Pembroke Pines, and West Palm Beach).[69] Kings Point.[70] Lakes of Delray.[71] Wynmoor Village.[72] Sunrise Lakes.[73] Huntington Lakes.[74] To many Americans, these communities (and many others) are the punch line to a joke, the subject of a satirical book,[75] or even a recurring story line on the *Seinfeld* television show.[76] To many Americans, especially the Greatest Generation, and particularly Jews from New York, these South Florida

69. CENTURY VILLAGE, http://www.centuryvillage.com (last visited Apr. 21, 2013).

70. KINGS POINT, http://www.kingspointdelray.com (last visited Apr. 21, 2013).

71. LAKES OF DELRAY, http://lakesofdelray.org (last visited Apr. 21, 2013).

72. WYNMOOR VILLAGE, http://www.wynmoor.com (last visited Apr. 21, 2013).

73. SUNRISE LAKES, http://www.sunriselakes.org (last visited Apr. 21, 2013).

74. HUNTINGTON LAKES, http://www.huntingtonlakesdelraybeach.com (last visited Apr. 21, 2013).

75. *See e.g.*, John-Thor Dahlburg, *The Race to the White House*, L.A. TIMES, Apr. 11, 2004, at A26; RODNEY ROTHMAN, EARLY BIRD: A MEMOIR OF PREMATURE RETIREMENT (2005); PAUL MARANTZ COHEN, JANE AUSTEN IN BOCA (2003); STEVEN M. FORMAN, BOCA KNIGHTS (2009) (also by same author, BOCA DAZE and BOCA MOURNING).

76. *Seinfeld: The Wizard* (NBC television broadcast Feb. 26, 1998). On *Seinfeld*, Jerry Seinfeld's parents lived in the fictional "Del Boca Vista" condominium, based on Century Village, Kings Point, and other large 55-plus communities near Boca Raton. Terence Shine, *The Senior Shtick*, SUN SENTINEL, Feb. 17, 1996. In an early episode featuring Jerry's fictional parents, Jerry's father Morty was impeached as president of his 55-plus condo board somewhere in Broward County. *Id.* To find greener pastures free from disgrace, they fled to Del Boca Vista in Boca Raton (and read their news in the "Boca Breeze"). *Id.*. Because affluent Boca Raton has long-been considered a prestigious address, a large number of condominiums (and shopping centers) include the word "Boca" somewhere in their names, *e.g.* Boca Del Mar, Boca Pointe, Boca West, Boca Teeca. *See generally* Stella M. Chavez, *'Boca Style' in West Boynton Raises Ire*, SUN SENTINEL, Apr. 18, 2001. This happens regardless of whether the community is actually within the city limits of Boca Raton; in reality the unincorporated area west of the city of Boca Raton is home to a great many of these gated communities. *Id.* Interestingly, Alex Greenspan, whose son Jason Alexander played George Constanza on *Seinfield*, actually worked in Century Village Boca Raton; Jerry Seinfeld's mother lived in the Pines of Delray before her son became famous. *See generally* Shine, *supra*.

communities represent fulfillment of life's dreams.[77] And in the end, for too many, it can become a prison from which there is no escape.[78]

Not every 55-plus community is as large or as densely populated as the Century Villages and its kin. But the unique lifestyle and demographics of these enormous communities make them worthy of study and analysis, and their size makes them particularly noteworthy, even to presidential elections.[79] Today, over one-third of Palm Beach County residents are over fifty-five, with 749 55-plus communities. In Broward County, which includes Ft. Lauderdale, over one-quarter of the residents are over fifty-five, and the county hosts 684 55-plus communities.[80] In 2005, Palm Beach County alone had 107,000 residents over age seventy-five and 35,000 residents over age eighty-five.[81]

Fifty-five-plus communities became popular in the early 1960s when real estate developers like Del Webb promoted the idea of an active community focused on retired adults—free from children—in Sun City, Arizona.[82] In the Sunbelt states of Arizona, California, and

77. *See* Julia Lawlor, *Snowbirds Flock Together for Winter*, N.Y. TIMES, Feb. 2, 2007, http://www.nytimes.com/2007/02/02/realestate/greathomes/02florida.html?pagewanted=all&_r=0 (describing that since the 1980s and 1990s, Boca Raton, Delray Beach and Boynton Beach have all acquired large populations of Jewish New Yorkers).

78. *See generally* Steve Liewer, *Upstairs, Downstairs; Condo Biased On Elevators, HUD Says*, SUN SENTINEL, Apr. 30, 1994.

79. Century Village Boca Raton, for example, may very well have accidentally supplied the extra margin President George Bush needed to beat Vice President Al Gore. *See* Dahlburg, *supra* note 75; Nathaniel Popper, *Campaign Confidential*, JEWISH DAILY FORWARD, Nov. 5, 2004; David Gonzalez & Dexter Filkins, *Counting the Votes: Step by Step*, N.Y. TIMES, Nov. 13, 2000. A large number of Century Village residents were confused by the so-called "butterfly" punch card ballot and may have mistakenly voted for third-party Pat Buchanan instead of Democratic candidate Al Gore. *See id*. Most residents of Century Village Boca Raton were Jewish and Democrats, and many considered Pat Buchanan to be Anti-Semitic. *See generally id.*; Jonathan S. Tobin, *The Party's Over for the Last of His Kind*, JERUSALEM POST, Dec. 28, 2007. Even Pat Buchanan said "[i]t's not very likely that a bunch of Jews in Boca Raton would vote for me to be President." Doug Lyons, *Rush Limbaugh Yields to Temptation and Gets it All Wrong*, SUN SENTINEL, Oct. 8, 2010. For other examples of the political clout of fifty-five-plus communities, see Jon Garrido, *The Clash of Two Civilizations: Sun City Residents and Arizona Hispanics*, N.M. NEWS, January 22, 2010, http://newmx.us/the_clash_of_two_civilizations,_sun_city_residents_and_arizona_hispanics.htm; Mike Schneider, *Senior Power*, LAKELAND LEDGER, Oct. 12, 2000, http://news.google.com/newspapers?nid=1346&dat=20001012&id=FfEvAAAAIBAJ&sjid=qP0DAAAAIBAJ&pg=3733,861884 (last visited Nov. 5, 2012).

80. Monson, *supra* note 6.

81. Antigone Barton & Lona O'Connor, *Forlorn Seniors Find Champions in Caring Neighbors, Strangers*, PALM BEACH POST, Nov. 1, 2005, at A1.

82. *See* Greene & Levitz, *supra* note 57.

Florida, retirees began buying houses or condominiums in communities bordering golf courses.[83]

Century Village is one of the best known retirement communities in the United States.[84] Each of the four Century Villages is built on a herculean scale; the four gated communities combined have a population of over 50,000.[85] The smallest Century Village has 5,700 condominiums in over 115 buildings.[86] The largest has 8,000 condominiums spread over 141 buildings—14,000 residents total.[87] No Century Village residential building is lower than two-stories or higher than four stories.[88] The apartments range from 600 to 1,200 square feet.[89] The smallest one-bedroom apartment sold for $7,000 in 1968.[90]

The centerpiece of each Century Village is the clubhouse, the smallest in West Palm Beach at 92,000 square feet, and the largest in Deerfield Beach at 145,000 square feet.[91] The newest clubhouse located at Century Village Pembroke Pines cost over $10 million when it was completed in 1998.[92] The theaters in each Century Village clubhouse seat between 1,000 and 1,600 people, and feature over 200 Broadway-style shows each year.[93]

Each complex has multiple swimming pools (Pembroke Pines has twenty-three), golf courses (inside the community's walls at each Century Village except in Boca Raton), enormous party rooms, bil-

83. *Id.*

84. Christopher Boyd, *20 Years Young Retirement Living Revisited*, MIAMI HERALD, Jan. 15, 1989, at 1H [hereinafter *Retirement Living Revisited*]; *see also* Kevin Murphy, *Century Village Unveiling 4 New Apartment Designs*, SUN SENTINEL, May 30, 1987, http://articles.sun-sentinel.com/1987-05-30/classified/8702190014_1_bedroom-apartment-bath; Leonard Sloane, *Seeking Out a Florida Retirement Home*, N.Y. TIMES, Jan. 20, 1990, *available at* http://www.nytimes.com/1990/01/20/style/consumer-s-world-seeking-out-a-florida-retirement-home.html?pagewanted=all&src=pm.

85. *Info*, CENTURY VILLAGE, *available at* http://www.centuryvillage.com/pages/cv_info.html (last visited Apr. 21, 2013); Kevin Murphy, *Century Village Hits a Milestone*, SUN SENTINEL, Dec. 17, 1988, http://articles.sun-sentinel.com/1988-12-17/classified/8803120573_1_clubhouse-antique-cars-pembroke-pines [hereinafter *Milestone*].

86. Joel Hood, *Desperate Times*, SUN SENTINEL, Nov. 3, 2005, at 1A.

87. Ana Veciana-Suarez, *The New Voices of Century Village*, MIAMI HERALD, Sept. 16, 2007, http://www.miamiherald.com/2007/09/16/237437_p2/the-new-voices-of-century-village.html.

88. *Info*, *supra* note 85.

89. *Id.* A few apartments in the Pembroke Pines Century Village, the last one built, are as large as 1,400 square feet. *See Milestone*, *supra* note 85.

90. *Retirement Living Revisited*, *supra* note 84.

91. *Info*, *supra* note 85.

92. *Milestone*, *supra* note 85.

93. *Info*, *supra* note 85.

liards rooms, craft rooms, dedicated card rooms, health clubs, tennis courts, and fishing, sailing, and other recreational facilities.[94] One of the signature elements of the Century Villages are their over five hundred clubs and organizations, which provide a very active social life for residents.[95] Indeed, Century Village is reputed to have perhaps the widest range of activities in Florida:[96] "It turned the idea that retirement is stagnation on its ear."[97]

The first Century Village, in West Palm Beach, began construction in 1968.[98] After World War II, when people from the Northeast considered Sunbelt retirement, they thought of Miami Beach.[99] Attorney and real estate developer Irwin Levy helped change all that by building the four Century Villages, as well as Wynmoor and several other large 55-plus communities.[100] He "understood the deeper need for middle-class retirement destinations."[101] Levy said "[t]he concept is really a takeoff on the old Catskills Mountain resort idea. But instead of going there on vacation, you live there."[102] "Up North, they would get entertainment and rent a room at a resort. Here they would buy an apartment and get the entertainment kicked in."[103]

At the time, according to Levy, Miami Beach was filled with elderly people who had retired there and had nothing to do but sit on balconies.[104] Getting these people interested in West Palm Beach, then largely undeveloped and seventy-three miles north of Miami Beach, as well as new retirees from the Northeast, required putting them on a bus to take them there and buying them lunch.[105] Once they saw Cen-

94. *See id.*

95. *Recreation & Athletics*, CENTURY VILLAGE, http://www.centuryvillage.com/pages/recreation_athletics.html (last visited Apr. 21, 2013).

96. Leonard Sloane, *Consumer's World*, N.Y. TIMES, Jan. 20, 1990 [hereinafter *Consumer's World*].

97. *Retirement Living Revisited*, *supra* note 84.

98. Michele Cohen, *At Century Village, a City of the Old, Aging Shows...*, SUN SENTINEL, Nov. 4, 1985, http://articles.sun-sentinel.com/1985-11-04/news/8502190293_1_levy-retirement-population-ages.

99. John Nelander, *In Building Century Village, Lawyer Levy Changed the Retirement Community*, PALM BEACH DAILY NEWS, Dec. 20, 2010, at 1A.

100. *See* Carolyn Mooney, *Disputes Over Condo Defects Multiplying*, MIAMI HERALD, Jan. 27, 1985, at H1. Levy and his companies built 30,000 condominiums in south Florida. Patricia Horn & Diane Lade, *Retirement Guru Retiring*, SUN SENTINEL, Oct. 10, 1997, at 1D.

101. Nelander, *supra* note 99.

102. *Id.*

103. *Retirement Living Revisited*, *supra* note 84.

104. Nelander, *supra* note 99.

105. *Id.*

tury Village, "they bought an apartment."[106] Levy often said that with Century Village he was selling a lifestyle, not an apartment.[107] In fact, he scrimped on the apartments to keep costs low.[108]

Moving from the North to Florida can be a very optimistic shift, regardless of other downsides discussed in this Article. Retirees make the move intending to live many more years, and in an active lifestyle.[109] Fifty-five-plus communities are attractive to retirees because organized activities and recreation are generally more accessible, security is provided within the community's walls, and the larger communities even provide transportation to shopping and houses of worship.[110] Moving to a 55-plus community in Florida also gives many the opportunity for a fresh start: "new environment, new furniture, new life style, new friends."[111]

But relocating to a 55-plus community in a distant state has high costs for some, well beyond the attractive prices for condominiums. Some, of course, miss family. Moving from an area with mixed age groups to a 55-plus community can be a "bit of a shock."[112] Retirees in Florida see doctors' offices that are "packed," the new friends they have made begin dying off, and "[i]t becomes very depressing."[113]

B. Many 55-plus Communities May Be Depreciating Assets

As life spans continue to grow, a process of reverse migration has developed for many retirees.[114] Rather than spend their final years in a 55-plus community, many extreme elders find they cannot continue to live alone.[115] The most fortunate ones are able to sell their 55-

106. *Id.* All four Century Villages were also benefitted by Academy Award winner Red Buttons, who served as celebrity spokesman for Levy. *Id.* Century Village was called "that Red Buttons place . . . ." *See* Diane Lade, *Red Blitz Helped Start Gray Wave*, SUN SENTINEL, Apr. 27, 1997, at 3F [hereinafter *Red Blitz*].

107. Horn & Lade, *supra* note 98.

108. *Id.* Century Village apartments are modestly sized. *See supra* note 87. The apartments were finished with basic appliances, laminate countertops in the kitchens and bathrooms, and inexpensive carpeting throughout.

109. *Consumer's World*, *supra* note 96.

110. *Id.*

111. *Id.*

112. Linda Lynwander, *After Moving to Florida, Many Return*, N.Y. TIMES, Feb. 21, 1993.

113. *Id.*

114. Ruth La Ferla, *Retirees Come Full Circle*, N.Y. TIMES, Nov. 28, 2004.

115. *See generally* Daniel Vasquez, *Signs an Older Relative Needs Help at Home*, SUN SENTINEL, Dec. 3, 2011, http://articles.sun-sentinel.com/2011-12-03/

plus condominium for a good price, or are otherwise financially capable of moving to some community offering additional care and services, perhaps closer to other family members.[116] Most retirees moving to Florida envision a life of "tennis, bridge and golf. And few anticipate[d] living past their 70's, to an age when declining health and loneliness would compel them to pull up roots again."[117]

Fifty-five-plus communities worked for a time because the Greatest Generation had a comfortable retirement premised on federal benefits and pensions, and did not live long enough to exhaust their money or need more services.[118] The current recession has forced many retirees to live on significantly less due to lower returns on stocks, bonds, and other investment instruments.[119] Now that people are living longer, at some point a substantial number will find that their 55-plus community no longer meets their needs. Many find their options at that point to be quite limited because of their income and savings.

One problem is that many 55-plus condominiums fail to appreciate, and even decline in value.[120] In 2010, *Forbes* magazine noted that the price of a basic one-bedroom condominium in the Century Villages in West Palm Beach and Boca Raton was "as little as $8,500."[121] Unless the retiree has a source of money beyond a Century Village condominium, leaving for a facility offering additional services for extreme elders, such as independent or assisted living, may be financially impossible.[122]

business/fl-elder-care-tips-vasquez-20111202_1_elder-affairs-senior-citizens-south-florida-relatives.

116. *See generally* Paula Span, *More on the Nursing Home Exodus*, N.Y. TIMES, Dec. 27, 2011, http://newoldage.blogs.nytimes.com/2011/12/27/more-on-the nursing-home-exodus/.

117. *Id.*; *see also* Susan Donaldson James, *Seniors Find Sun, Sin and Sorrow in a Fla. Retirement Village*, ABC NEWS (July 30, 2012), http://abcnews.go.com/Health /kings-point-aging-america-lonely/story?id=16873524.

118. Fran Hathaway, *At 'Third State,' Boomers Act Well*, PALM BEACH POST, Feb. 6, 2000.

119. *See* Catherine Rampell, *In Hard Economy for All Ages, Older Isn't Better . . . It's Brutal*, N.Y. TIMES, Feb. 2, 2013, http://www.nytimes.com/2013/02/03/ business/americans-closest-to-retirement-were-hardest-hit-by-recession.html? pagewanted=all.

120. *See generally* Lade, *supra* note 17; Zack O'Malley Greenburg, *Florida Retirement Homes on Sale*, FORBES, Dec. 6, 2010; Daniel Vasquez, *Living with Rules, A Dilemma: What to do with Inherited Condo*, SUN SENTINEL, Dec. 17, 2008; Greene & Levitz, *supra* note 57.

121. Greenburg, *supra* note 120.

122. *See generally* La Ferla, *supra* note 114.

Fifty-five-plus communities often experience their own real estate booms and busts. *Forbes* also noted that while one bedroom condominiums at Century Village Boca Raton were selling for as little as $8,500, the median price for one-bedroom condominiums in all of Boca Raton was $50,000.[123] At the time, five to six percent of the units in Century Village were vacant.[124] In 1997, condominiums at Century Village Boca Raton were selling for double the original sales price, while a few miles away, at Century Village Deerfield Beach, substantially identical condominiums were selling for less than the price originally offered by the community's builder.[125] Meanwhile at Century Village West Palm Beach, "where the complex is not as lushly landscaped and the apartments a few years older, prices start at $11,000—less than most new automobiles."[126]

Because only those aged fifty-five and older may purchase these condominiums, their resale price does not track the broader real estate market.[127] One possible explanation is simply the local glut or scarcity of available units, based on the number of recently deceased residents.[128] Another explanation, found at many 55-plus communities, including the Century Villages at West Palm Beach and Deerfield Beach, is that potential buyers decided "that two-story buildings with no elevators, called garden apartments, were a bad idea for a retirement complex."[129] "Century Village. . . looks spare. Its two- and four-story buildings look vaguely institutional and the grounds lack the polished landscaping of more contemporary projects."[130] Mortgages are also difficult to get for condominiums priced under $50,000.[131]

Real estate sales in Florida are often depressed because the enormous amount of newly constructed housing drives down prices for a "used home."[132] "But nothing is as bad as a condo in a retirement

123. Greenburg, *supra* note 120.
124. *Id.*
125. Lade, *supra* note 120.
126. *Id.*
127. *See id.*
128. *Id.* Other factors could include the number of heirs over fifty-five and interested in keeping the unit, the number of heirs below fifty-five forced to sell the unit, and the condominium association's rules on renting units. *Id.*
129. *Id.* "A herd of real estate white elephants was born, because all of the West Palm units, and more than half of the Deerfield Beach ones, were garden apartments." *Id.*; *see infra* Part III.D (three story buildings at Century Village Pembroke Pines without elevators).
130. *See Retirement Living Revisited*, *supra* note 84.
131. Greenburg, *supra* note 120.
132. Lade, *supra* note 120.

community . . . as the strict rules further eliminate potential buyers."[133] In addition, the quintessential Century Village model of "[i]slands of apartments surrounded by asphalt . . . catwalks, jalousie windows and numbered parking spaces" are no longer popular with current buyers.[134]

Florida is also not as popular as it used to be.[135] From 2008 to 2009, Florida decreased in population (by approximately 50,000 people) for the first time since 1946.[136] And while Florida has continued to grow since 2009, its growth has slowed and projections are that its growth rate will continue to decline.[137] Broward and Palm Beach counties, once farm and swamp land reimagined as a retirement haven, are now "a congested urban environment," and are not as popular with retirees as they once were.[138] The current generation is also much more likely to "age in place," wherever they currently live, than to move to Florida.[139] Retiring to the Sunbelt generally is not as popular as it used to be, either.[140] From 2001 to 2008, the number of people living in active adult 55-plus communities decreased by 700,000.[141] A 2008 survey by AARP found that nine out of ten Americans preferred to "age in place" rather than move.[142]

Another explanation relates to the lifecycle of 55-plus housing—as well as its residents. A newly constructed 55-plus community will likely sell units to people who are just at the retirement age or below (and planning for the future).[143] Assuming the retirees stay in their

133. *Id.*

134. *See generally The Next Wave: Where, What Cost?*, SUN SENTINEL, Apr. 27, 1997, http://articles.sun-sentinel.com/1997-04-27/features/9705060276_1_housing-developers-retirement-single-family-homes.

135. Haya El Nasser, *For Florida, 'End of an Era' of Population Growth*, USA TODAY, Sept. 1, 2009, http://usatoday30.usatoday.com/news/nation/2009-08-31-florida_N.htm; Damien Cave, *After Century of Growth, Tide Turns in Florida*, N.Y. TIMES, Apr. 29, 2009, http://www.nytimes.com/2009/08/30/us/30florida.html?pagewanted=1&_r=3; *see also The Next Wave: Where, What Cost?*, *supra* note 134.

136. James Thorner, *Florida Loses Population for the First Time Since World War II*, TAMPA BAY TIMES, Aug. 11, 2009.

137. Stanley K. Smith & Stefan Rayer, *Projections of Florida Population by County, 2009–2035*, FLA. POPULATION STUDIES, Mar. 2010, at 1.

138. Diane C. Lade & Dana Williams, *Census Show Fewer Seniors in Some South Florida Cities*, SUN SENTINEL, Nov. 30, 2011.

139. WILLIAM H. FREY, THE UNEVEN AGING AND 'YOUNGING' OF AMERICA: STATE AND METROPOLITAN TRENDS IN THE 2010 CENSUS (2011); Brandon, *supra* note 5.

140. Greene & Levitz, *supra* note 57.

141. *Id.*

142. *Id.*

143. *See* Monson, *supra* note 6.

condominiums as long as possible, most residents in a thirty-year-old 55-plus community will be in their eighties and nineties.[144] Many retirees "[62] and younger are reluctant to live in a community with most residents in their 80s and 90s."[145]

In 2005, approximately one quarter of the residents of Century Village Boca Raton (the second newest of the Century Villages) was older than eighty-five, and eighty-seven percent experienced some form of disability.[146] It is challenging to meet the needs of the aging populations of these communities, which were never designed to offer services for extreme elders, while at the same time stabilizing (or even increasing) property values by maintaining some appeal for younger retirees.[147]

Kings Point is another enormous 55-plus community in Delray Beach, Florida near Boca Raton. When some residents of Kings Point proposed offering "affordable home health care, an emergency response system, meal delivery, housekeeping, handymen, and counseling, as well as doctors who make house calls," the community defeated the proposal, because it would "look like a nursing home."[148] According to one gerontologist, describing the large 55-plus communities such as Kings Point and Century Village, "[i]f you let the density of old people get too high . . . at some point what you'll have is a nursing home on hundreds of acres."[149]

An additional factor depressing the market for 55-plus housing is the age restriction itself. After losing a parent, an heir to a 55-plus condominium has a "few tough choices: [d]ecline the gift, sell at rock bottom prices, try to rent it (if the condominium documents or board permit it) or be prepared to pay thousands for property taxes,[150] as-

144. *Id.*
145. *Id.*
146. Hood, *supra* note 86, at 2–3.
147. Sara Rimer, *New Needs for Florida's Retirement Complexes*, N.Y. TIMES, Mar. 23, 1998, http://www.nytimes.com/1998/03/23/us/new-needs-for-retirement-complexes-oldest.html?pagewanted=all&src=pm.
148. *Id.* In the end, a center to offer the services was created, although it is headquartered in a shopping center outside the Kings Point walls. *Id.*
149. *Id.*
150. A "homestead exemption," or a reduction in the assessed taxable value of a condominium is only available in Florida when the condominium is the owner's primary home. *See* Sloane, *supra* note 84. Heirs who inherit a fifty-five-plus condominium cannot live in the unit and they therefore do not qualify for the homestead exemption. *See Individual and Family Exemptions*, FLA. DEP'T REVENUE, http://dor.myflorida.com/dor/property/taxpayers/exemptions.html (last visited Apr. 21, 2013).

sessments, maybe even a mortgage."[151] In 2008, one heir to a Century Village condominium was told by a real estate agent to "put it on the market for $35,000, but not to expect to get it."[152] At the time, the condominium had a $40,000 mortgage and $15,000 in upgrades.[153] According to the president of the umbrella association for Century Village in Boca Raton, the relatives usually "just dump it" for a "relatively cheap price[]."[154] This, of course, depresses the price for all other resales as well.

It is possible that some 55-plus communities will continue to amass vacant units until enough are empty for wholesale change, or until the condominium association is forced to break the age restriction.[155] Longer life spans and a difficult resale market lock older residents into their condominium, even when they are no longer healthy enough to live on their own.[156] They often cannot afford long-term care, so they stay put.[157]

C. Conflicts Arising Over Children and Others Under Age Fifty-Five

The news media is replete with tragic stories of children barred from living with their grandparents in a 55-plus community. Chaz Chope made national headlines after he moved into his grandparents'

151. Daniel Vasquez, *Living with Rules, A Dilemma: What to do with Inherited Condo*, SUN SENTINEL, Dec. 17, 2008, http://articles.sun-sentinel.com/2008-12-17/news/0812160502_1_century-village-condominiums-rent-property-taxes.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See id.*; Robin Benedick, *Decades-Old Complexes for Seniors a Tough Sell*, SUN SENTINEL, Dec. 24, 2006; Monson, *supra* note 6. A real estate investor noted in a 2006 South Florida newspaper article that at the time 2,700 condominiums were listed for sale just in Palm Beach County's retirement communities—9% of the county's total listings. Paul Owers, *Retirement Condos Flooding Market*, SUN SENTINEL, June 26, 2006. Twenty percent of the listings in Century Village Boca Raton and Kings Point had been on the market for 200 days or more. *Id.* It is entirely possible that today's outdated age-restricted housing may eventually become tomorrow's (perhaps city or county sponsored) affordable housing for families. In fact, some buildings in Century Village Deerfield Beach have allowed families under age fifty-five to move in. Greene & Levitz, *supra* note 57. While that may have some positive attributes, the question remains how to meet the needs of the elders currently living in these communities.

156. *See id.*; Monson, *supra* note 6. Approximately one million elders with health and mobility problems have unmet needs in their current homes. Pynoos et al., *supra* note 12, at 81. Hazards in a home can lead to falls requiring costly hospitalizations and increased medical care. *Id.* at 82.

157. *See id.*

home to escape his stepfather's physical and emotional abuse; he was told to leave by town officials enforcing the restriction against children.[158] Desarae Carrie, whose mother was dying of cancer, was initially barred from living with her grandparents, her only living relatives, in their 55-plus community.[159] Kimberly Broffman's mother was a substance abuser; her grandparents took her in and then faced eviction proceedings from their 55-plus homeowner's association.[160]

The current economic downturn is undoubtedly responsible for some of these stories. Parents may be out of work or losing their home. The parents may be divorcing and need to rely on the grandparents until they are resettled. In the most tragic cases, one or both parents may be criminals, drug-addicted, or abusive, and the grandparents step in to help. Under the FHA, twenty percent of the units in 55-plus housing can serve those under age fifty-five without sacrificing the community's exempt status.[161] That twenty percent, however, is generally set aside to assist adult heirs of 55-plus real estate who have inherited a home and are not yet over age 55; it is "never" used to accommodate minors.[162]

In these situations, the grandparents (and 55-plus community) may be pulled into expensive litigation.[163] Or the grandparents may be forced to sell their homes, often at a loss because of the time pressure to get out.[164] These situations add to a public perception that the rules under which 55-plus communities are governed are difficult to live under, and may contribute to depressing prices for these homes. Of course, there is also an enormous human toll in these tragic situations.

158. *See Youngtown; Kid's Stuff*, ARIZ. REPUBLIC, Aug. 21, 1996, at B4; *Retirement Town Evicting Residents' Grandson, 16*, CHI. TRIB., Dec. 24, 1996, at N6; *Youngtown to Hold Off on Evicting Teenager*, ARIZ. REPUBLIC, Jan. 22, 1997, at B1.

159. *Adult Community Told to Let Teen-Ager Stay*, N.Y. TIMES, Feb. 23, 1997, at 19.

160. Stefanos Chen, *The Minor Threat: Age-Restricted Communities Evicting Children*, AOL REAL ESTATE, (Jan. 6, 2012), http://realestate.aol.com/blog/2012/01/06/the-minor-threat-age-restricted-communities-evicting-children; Drew Harwell, *8-Year-Old Can Stay in Grandparents' Age-Restricted Neighborhood Judge Rules*, TAMPA BAY TIMES, May 15, 2012.

161. *See* 42 U.S.C. § 3607(b)(2)(C)(i), (ii), (iii) (West, Westlaw through 2012 P.L. 112-195).

162. Chen, *supra* note 160. "Never," as used in Stephanie Chen's article, is a strong word. I did not, however, in researching this issue, find any examples of communities that used the 20%-under-55-cushion to accommodate children in unfortunate circumstances.

163. *Id.*

164. *Id.*

D. Low- and Mid-Rise Buildings Without Elevators

Multistory condominium buildings without any elevators are common in 55-plus communities in Florida.[165] Who was most under the thrall of Peter Pan thinking—the purchasers, the developers, or the governments that permitted condominiums for elders to be built without elevators—is subject to debate. But certainly without any requirement in the FHA for special facilities and services in 55-plus communities, such buildings will continue to be built.[166]

None of the thousands of condominiums in two-story buildings in Century Village West Palm Beach or Deerfield Beach were built with elevators.[167] One hundred sixty-six two-story buildings in Kings Point were built with no elevators.[168] A resident at Kings Point pointed out that he knew "people who don't bother to come downstairs for months at a time."[169]

At Century Village Pembroke Pines—the newest of the four Century Villages—six three-story buildings have no elevators.[170] "Retirees . . . bought second- and third-floor apartments in buildings without elevators—never thinking they would get too old to climb the stairs . . . ."[171] A city commissioner noted that residents who "bought their apartments years ago and could walk up the stairs are now frail and elderly and in some cases can't leave their apartments."[172]

During the planning stages of Century Village Pembroke Pines in the 1980s, city officials insisted on elevators in all buildings.[173] But the developer told the mayor that apartments would be priced $10,000 less in buildings without elevators and could then be purchased by lower-income retirees who would enjoy a lifestyle they could not oth-

165. *See* Rimer, *supra* note 147.
166. *See generally* Joe Kollin, *What Is Answer On Elevators*, SUN SENTINEL, May 30, 1993, at 10.
167. Horn & Lade, *supra* note 100.
168. Kollin, *supra* note 166. After litigation and the intervention of HUD based on the Americans with Disabilities Act, Kings Point eventually installed $20,000 lifts (rather than $68,000 elevators) in all of the two-story buildings. Marian Dozier, *Kings Point Elevator, Lift Battle Comes To A Head*, SUN SENTINEL, Nov. 4, 2001, at 1B. The lifts, similar to "forklifts," "frequently don't work." *Id.*; *see also* Rimer, *supra* note 147.
169. Kollin, *supra* note 166.
170. Joe Kollin, *Pines Won't Finance Condo Elevator Studies*, SUN SENTINEL, Nov. 6, 2003, at 48.
171. *Id.*
172. *Id.*
173. *Id.*

erwise afford.[174] The city permitted the construction. In 2003, the residents of the six buildings without elevators asked the city for money to help find federal grants to pay to install elevators.[175]

If residents of a condominium want to pay to install elevators, generally 100% of the unit owners must approve.[176] At $1,000 to $2,000 per unit or more, it is difficult to reach unanimity on this issue, especially with the first-floor unit owners voting, if there is no local, county, state, or federal money forthcoming.[177] While the mayor of Pembroke Pines said he had trouble feeling sorry for people who purchased such apartments, a resident responded "[t]o say people knew what they bought when they were eight or ten years younger isn't right . . . . when you move in, you're younger and healthier and you can't think down the road to the day when you might not be healthy."[178]

Even buildings with elevators are a problem, however, because elevators break. For someone with a disability or with impaired movement, it does not matter whether the building is two-stories, seven-stories, or twenty-stories.[179] In Century Village Boca Raton, there is only one elevator in each of the many four-story buildings.[180] Necessary repairs can take weeks, during which infirm residents are stranded.[181]

When an eighty-one-year-old resident was stuck in the then twenty-two-year-old elevator at Century Village Boca Raton, the county fire department had to rescue him.[182] At Century Village Pembroke Pines, the aging elevators occasionally break down, and ailing residents "call fire-rescue for help getting up and down the stairs."[183] Of course, those are the residents who are physically capable of walking up and down the stairs with emergency personnel assistance;

174. *Id.*
175. *See id*. The City of Pembroke Pines denied the request. *Id.*
176. *Id.*
177. *Id.* First-floor apartment owners disapprove elevators out of belief that they will lower property values. *Id.*
178. *Id.*
179. Joe Kollin, *Tall Order: Add Low-Rises to Elevator Generator Laws*, SUN SENTINEL, Jan. 9, 2008 [hereinafter *Tall Order*].
180. *See generally* Paola Iuspa-Abbott, *An Uphill Climb*, SUN SENTINEL, June 23, 2007.
181. *Id.*
182. *See id*.
183. Joe Kollin, *Broken Elevator Causes Stress*, Sun Sentinel, January 11, 2003.

many cannot walk the stairs under any circumstances.[184] It certainly appears that these costs are shifted from the developer and the owners to the city and county.[185]

Disabilities in elders are not uncommon.[186] According to the 2000 Census, 42% of those sixty-five and over are disabled.[187] The number of individuals requiring personal assistance also rises with age, from 8.1% of those age sixty-five to sixty-nine, to 34.9% for those over eighty years old.[188] While the decision not to install elevators may seem perplexing in 2012, the large number of elders reaching extreme advanced age may not have been fully anticipated.

Government (and taxpayers as a whole) paying for elevators and rescue services may be costly, and while unusual, there may be some logic to it. Taxpayers pay for schools, playgrounds, and other services for children.[189] Previously, elders did not live long enough to require government services and care.[190] In fact, our society has never been "this old."[191] "We will all probably end up starting out in retirement relatively healthy with discretionary resources. But as our life changes, our circumstances change."[192] In response, some large 55-plus communities like Kings Point have added facilities intended to assist extreme elders trying to age in place.[193]

184. *See id*.

185. There are other costs, in addition to the human costs and governments costs. The fight to install an elevator years after the development is constructed not only may pit neighbor against neighbor, it may result in costly litigation, and the involvement of the federal government. *See* Liewer, *supra* note 78; D. Aileen Dodd, *Pay for Elevators Pit Floor Against Floor at Kings Point*, Sun Sentinel, March 20, 1993; Dozier, *supra* note 168.

186. Robert G. Schwemm & Michael Allen, *For The Rest Of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 130–31 (2004).

187. *Id.*

188. *Id.* Such assistance includes help with at least one activity of daily living, including "ambulation, bathing, feeding, eating, and toileting." Pynoos et al., *supra* note 12, at 80–81.

189. *See generally* Greene & Levitz, *supra* note 55.

190. Rimer, *supra* note 147. In the noted Mt. Laurel zoning cases, one method used by a township to keep taxes low and avoid the costs of family and low-income housing was to zone a large amount of land for senior citizens with the apparent belief that such a restriction would result in tax revenues without costs for services. *See* South Burlington County NAACP v. Mt. Laurel Tp., 67 N.J. 151, 168–69 (1975).

191. *Id.*

192. *Id.*

193. *Id.* Most housing for elders is tightly regulated, but 55-plus housing is generally exempt from substantive regulation beyond the age restriction itself. *See generally* LAKE SEMINOLE SQUARE, http://www.brookdaleliving.com/lake-seminole-square.aspx (last visited Apr. 21, 2013).

Elevators remain an enormous problem. The former secretary of the Florida Department of Elder Affairs, E. Bentley Lipscomb, recalled a telephone call from a South Florida county official who said "[w]e've got all these third-story apartments without elevators . . . . How do we apply for money for elevators?"[194] After telling him there was no money for elevators, Secretary Lipscomb said "[w]hat do you do? Do you have the Governor call out the National Guard to move these people up and down the steps? We didn't think ahead."[195] And the federal government, through the FHA, did not require anyone to think ahead.

E. One Case in Point: The Impact of Hurricane Wilma on Several Boca Raton Area 55-Plus Communities

Sometimes it takes a disaster to show the weaknesses in a system. Americans learned about the problems in disaster planning and the Federal Emergency Management Agency (FEMA) after Hurricane Katrina hit New Orleans in August 2005. Receiving less attention was October 2005's Hurricane Wilma, the most intense tropical cyclone ever recorded in the Atlantic Ocean.[196] It hit Mexico as a Category Five hurricane, with winds over 150 miles per hour when it struck the Yucatan Peninsula. The hurricane then curved northeast on an arc taking it to Florida. It dropped to a Category Two hurricane as it crossed the state, entering through the Gulf of Mexico on the west coast of Florida. But it intensified to a Category Three storm as it passed over the warm waters of the Atlantic Ocean off Florida's east coast, inflicting enormous damage to southern Palm Beach County and its large and numerous 55-plus communities.[197]

Wilma was the third most costly hurricane in American history at over $20 billion.[198] And Florida does a better job than many hurricane-prone states in building codes, public awareness, and emergency

194. *Id.*
195. *Id.*
196. *Central Pacific Hurricane Center: Tropical Cyclone Records*, NAT'L WEATHER SERVICE, http://www.prh.noaa.gov/cphc/pages/FAQ/Tropical_Cyclone_Records.php (last visited Apr. 21, 2013).
197. *See* Barton & O'Connor, *supra* note 81.
198. RICHARD J. PASCH ET AL., NAT'L HURRICANE CENTER, TROPICAL CYCLONE REPORT: HURRICANE WILMA (2006), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL252005_Wilma.pdf.

preparedness.[199] But there is a limit to the apparatus of the state after a major natural disaster, particularly when so many of its victims were vulnerable and frail elders in communities built long before building codes had been improved.

Just before the storm, the staff at a visiting nurse agency told the out-of-town children of parents living in the affected communities to "[c]ome and get your parents or send a plane ticket."[200] Unfortunately, their warning turned out to be well-warranted. After Wilma, rescuers found "severely dehydrated residents trapped and unable to call for help because phone service was out."[201]

A week after Wilma, rescue workers and supplies had not reached southern Palm Beach County's giant 55-plus communities.[202] Ten days after Wilma in Century Village Boca Raton, people still had no electricity or running water and were waiting for emergency supplies of food, water, and ice.[203] "Hundreds stayed stranded in multi-story buildings with no working elevators. Residents in their 80s and 90s stood in line for food and water. Uncounted numbers dependent on oxygen, dialysis, insulin and other medicine waited, worried and did without."[204]

During those terrible days after the hurricane, elders went without food, or survived on bread and water, or candy.[205] Without electricity, ailing elders were unable to use elevators to reach feeding sites; even if they could walk down the stairs, many could not walk back up, particularly lugging emergency relief supplies.[206] Others who could get out and drive were too frightened to drive through intersections with no operating traffic lights.[207] Twenty-five thousand kosher

199. *See* INS. INST. FOR BUS. & HOME SAFETY, RATING THE STATES: AN ASSESSMENT OF RESIDENTIAL BUILDING CODE AND ENFORCEMENT SYSTEMS FOR LIFE SAFETY AND PROPERTY PROTECTION IN HURRICANE-PRONE REGIONS, (2011), http://64.16.194.32/content/data/file/ibhs-rating-the-states.pdf; *Who Is Accredited?*, EMERGENCY MGMT. ACCREDITATION PROGRAM, http://www.emaponline.org/index.php?option=com_content&view=article&id=175&Itemid=139 (last visited Apr. 21, 2013).

200. Antigone Barton, *Upheaval Takes A Toll*, PALM BEACH POST, Nov. 5, 2005, at 1A [hereinafter *Upheaval*].

201. *Tall Order*, *supra* note 179.

202. *See* Barton & O'Connor, *supra* note 81.

203. *See* Upheaval, *supra* note 200.

204. *Id.*

205. Lisa J. Huriash, *Marooned*, SUN SENTINEL, Nov. 4, 2005; Barton & O'Connor, *supra* note 81.

206. *Id.*

207. *Id.*

meals were flown in from New York and distributed by volunteers; "FEMA shmeema, we have each other," said one volunteer.[208]

Because no help was available, stronger residents helped the others, finding ice for insulin supplies and building barricades of severed tree limbs around downed power lines to stop those with visual impairments from walking on them.[209] When the Area Agency on Aging finally arrived, they brought peanut butter and jelly sandwiches to diabetics, and ham sandwiches to devout Jews.[210] A week after the storm, FEMA had still not visited Century Village Boca Raton.[211]

Florida state regulations require continuing care communities[212] to have evacuation plans, supplies, and medical staff for their residents, and nursing homes must have back-up generator power.[213] Yet "hundreds of thousands of seniors living in South Florida's independent retirement communities [were] . . . on their own during the first few days after a hurricane."[214]

In Kings Point, a few miles from Boca Raton, "[i]t took emergency workers five days after Hurricane Wilma to find a man dead in his wheelchair in his Kings Point apartment . . . ."[215] Some of the 13,000 people living in Kings Point are "ill and frail shut-ins living alone" and unknown to their neighbors.[216] Some were still waiting for electricity, food, and water seven days later, unable to drive, with difficulty walking, and fending for themselves.[217]

At Leisureville in Pompano Beach, the 3,000 residents were without electricity for one week after Wilma. According to a local newspaper, one woman "spent much of [that week] leaning on her walker behind her screen door, looking out from her dark apartment in Leisureville, waiting for something to happen—an ice or food de-

208. *Id.*
209. Barton & O'Connor, *supra* note 81.
210. *See id.*; Huriash, *supra* note 205; Barton & O'Connor, *supra* note 81.
211. *Id.*
212. *See* LAKE SEMINOLE SQUARE, *supra* note 193.
213. Diane C. Lade, *Storm Helpers Send Signal: Hanging Card Lets Seniors Tell Others How They're Doing*, SUN SENTINEL, June 14, 2006.
214. *Id.*
215. *Id.*
216. *Id.* Even almost one year after Hurricane Wilma, there were no significant changes to protect elders, particularly those who were ill, frail, and living alone. The best the Area Agency on Aging offered was distributing 100,000 door hangers which state "Ok" in green on one side, and "help," in "hot pink" on the other. *Id.*
217. Jamie Dean, *Hardest Hit*, STUDENT NEWS DAILY, Nov. 15, 2005, www.studentnewsdaily.com/world-briefs/hardest_hit/print.

livery, the appearance of an electric company truck. For the past week, she has eaten cereal and peanut butter and jelly sandwiches."[218]

In Century Village Boca Raton, residents were "running out of medicine and food—some afraid to leave their homes, some unable to because they [were] connected to oxygen tanks."[219] When a Red Cross truck finally arrived, more than 1,000 Century Village residents stood in line to receive food, water, and ice, and some residents, many over age eighty, helped unload the truck.[220] After Wilma, social service agencies "sent case managers into devastated communities such as Sunrise Lakes and Century Village in Boca Raton and Deerfield Beach" trying to create a registry of people with special needs, but there are "hundreds" of retirement communities in the county.[221]

Analyzing the performance of 55-plus communities in Florida in the aftermath of a major natural disaster is prudent. Hundreds of thousands of elders, including extreme elders, live in these communities. And most of these communities feature two- to four-story buildings utilizing elevators with no emergency generators (if they have elevators at all), or any special equipment to assist elders after a disaster.[222] Unfortunately, Florida is prone to hurricanes, and these elders have relocated to a home made even more dangerous by the lack of special facilities or services needed after a hurricane.

Some of this points to lapses in federal, state, and county emergency planning and relief. After a storm of this magnitude, however, there is a limit to the amount of relief that can be provided, particularly in the first few hours after the storm. The fact is that hurricanes will continue to strike Florida, and these challenges appear to be exacerbated by the design of 55-plus communities: constructing low- and mid-rise buildings without elevators; providing only one elevator in

218. Barton & O'Connor, *supra* note 81.
219. *Id*.
220. Dean, *supra* note 217.
221. *Id*.
222. *See generally* Scott Wymant, *Panel Told of Need for Generator Law*, SUN SENTINEL, Jan. 19, 2006; *Hearing Before the S. Special Comm. On Aging*, 109th Cong. (2009) (statement of E. Douglas Beach, Ph.D.), *available at* http://www.aging.senate.gov/events/hr212db.pdf. *But see* Daniel Vasquez, *Some Condos Cut Back-Up Generators*, SUN SENTINEL, Oct. 12, 2011. The newest Century Village, at Pembroke Pines, includes in each apartment a panic button for medical and security emergencies. *See* Glenn Hoffer, *Century Village Pembroke Pines Development Opening Clubhouse*, SUN SENTINEL, Dec. 8, 1985; Murphy, *supra* note 84. It is not stated whether these panic buttons are connected to emergency generators in case of power interruption. *See id.*

buildings four-stories and higher; not including any emergency generators; having no internal professional medical staff; and including no panic buttons or other safety devices in individual apartments.[223] Because the communities are built and managed without adequate resources, elders are placed at risk, lives are lost, and additional costs fall on taxpayers.

After Hurricane Wilma, some Florida legislators, county officials, and community leaders began to question the very nature and concept of 55-plus communities.[224] Officials and other leaders said that "[n]o longer can the elderly be left to languish in upper-story condos or be forced to trek far for food, water and ice after a storm."[225] State Representative Irv Slosberg (D-Boca Raton) noted that the lack of working elevators was a "public safety issue" and, although not specifying where the money would come from to install emergency generators, said "[w]hen we have a community of senior citizens, that's the job of the government to take care of people who can't take care of themselves."[226]

Some Florida leaders have begun to question the status quo. The director of the Broward County Area Agency on Aging said that not only should emergency generators be required for 55-plus housing, "they shouldn't be allowed to build higher than two stories . . . . We keep encouraging seniors to retire to Florida but then they get older and frailer and we're really not taking care of them properly."[227] A community leader from the Delray Beach area suggested banning 55-plus communities, "because with a mix of ages, communities would be better able to respond to disasters."[228]

Today, however, 55-plus communities are built in Florida without any additional requirements for emergency equipment. Florida state law does require new residential buildings taller than seven stories to have an emergency generator to power an elevator following a power failure.[229] After Hurricane Wilma, Florida passed a law requir-

223. Patty Pensa, *After Storm, Safety of Seniors a Concern*, SUN SENTINEL, Nov. 13, 2005.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. FLA. STAT. ANN. § 553.509 (2012); *Division of Hotels and Restaurants Emergency Power FAQ*, FLA. DEP'T BUS. & PROF'L REGULATION, http://www.myflorida

ing existing high-rises (seventy-five feet high or higher) to be retrofitted with emergency generators if none existed.[230] But the law was repealed soon afterwards because of the financial impact on "cash-strapped condo communities."[231] Low- and mid-rises were not, and are not, required to make any such modification. Meanwhile, 55-plus communities continue to be built in Florida.[232]

Of course the danger is not only in South Florida with hurricanes—or extreme heat.[233] Other popular places for 55-plus communities include California, which can suffer devastating earthquakes, and Arizona, which suffers from extreme heat, dust storms, and occasional power failures.[234] The question is whether the risk, particularly to extreme elders, is being appropriately managed when the developers building 55-plus communities are not required to include emergency equipment, or other services and facilities to assist advanced elders.

IV. Edith's Story

A. Edith and Phil

While quite unusual for a law review article, I think it important to share my own story—or more precisely, my mother's story. It is one thing to describe the policy concerns that 55-plus housing presents, and it is quite another to live through its challenges. Of course, there is a risk that anecdote can be substituted for empiricism. Nonetheless, in researching this Article, I found my family's experiences to be so similar to the many others cited in news stories and academic pieces throughout this Article. The following is my attempt to describe the challenges of 55-plus housing in a personal way.

license.com/dbpr/hr/faqs/hr-faq-emergencypower.html (last visited Apr. 21, 2013).

230. H.B. 7121, 80th Reg. Sess. (Fla. 2006).

231. Vasquez, *supra* note 222.

232. *See* Pensa, *supra* note 223.

233. *See e.g*. Sonja Isger, *The Heat Index Climbs Above 100 - Again - In Palm Beach County, Treasure Coast*, PALM BEACH POST, June 14, 2010 (discussing dangers of extreme heat).

234. *See, e.g*., Julie Watson, *Outage in Southwest U.S. Leaves Millions Without Power*, LAS VEGAS SUN, Sept. 8, 2011 (power failure with 113 degree temperatures); *Outage Heats Up Sun City*, YOUR WEST VALLEY NEWS, June 28, 2011, http://www.yourwestvalley.com/topstory/article_828e3f78-a1b8-11e0-976b-001cc4c03286.html (power failure effecting Sun City with 116 degree temperatures); Eddi Trevizio, *Rain, Dust Storms Hit Maricopa, Pinal Counties*, ARIZ. REPUBLIC, July 31, 2011; Mike Sakal, *Record Temps with Valley Under Excessive Heat Advisory*, E. VALLEY TRIBUNE, Aug. 22, 2011 (116 degree temperatures).

My mother, Edith Goodman Bauer, was born on August 16, 1921 in the Middle Village section of Queens, New York. A child of the Great Depression, Edith found it difficult to attend college while working full-time, and eventually withdrew from school to support herself.

The shortage of men during World War II allowed many women to enter formerly male-dominated professions. Edith received vocational training and became a meteorologist for the U.S. National Weather Service. At the time, it was unusual for a woman to be a meteorologist, and Edith continued in a job she enjoyed tremendously even after she married Phil Bauer[235] in 1959. She continued working (and frequently had overnight shifts) until I was born three years later. Phil, too, was a child of the Great Depression and had taken over his father's small leather jobber business after he served in the Army during World War II.

After I entered middle school, Edith went back to work, this time as a benefits authorizer for the U.S. Social Security Administration. Edith and Phil always struggled with money; as a self-employed businessman, some years were better than others for Phil. But Edith and Phil believed it important for me to grow up with a stay-at-home mother until I was in middle school, and they sacrificed to make it work. Once back in the workforce, Edith's job in the federal government assured them a small pension and access to good health insurance.

Edith and Phil were never able to afford a house in New York City. Instead, in 1964, they availed themselves of New York's Mitchell-Lama program, designed to keep the working middle- and lower middle-class in the city by creating limited equity cooperative apartments.[236] The apartments sold for approximately $650 per room.[237] While the apartments were generously sized, and in our case located in a nice neighborhood in southern Brooklyn with good public schools (and a partial view of the Atlantic Ocean just one block away),[238] the

235. *Phillip Morris Bauer*, GENI (Dec. 8, 2010), http://www.geni.com/people/Philip-Morris-Bauer/6000000006174052058.

236. *About the Mitchell-Lama Housing Program*, N.Y. S. HOMES & COMMUNITY RENEWAL AGENCY, http://www.nyshcr.org/Programs/mitchell-lama (last visited Apr. 21, 2013).

237. *See generally* Alan S. Oser, *A Big Refinancing at a Middle Income Co-op*, N.Y. TIMES, Apr. 28, 1996.

238. Interestingly, the cooperative apartment I grew up in, Warbasse Houses, was a naturally occurring retirement community. *See* Bertrand, *supra* note 65. *See*

apartments could not be sold for market value. When they finally sold their apartment in 1990, Edith and Phil received approximately $8,000 from the co-op board.

Edith and Phil dreamed of a retirement with a more relaxed lifestyle. Phil enjoyed the sun and warm weather and had been enamored with the vision of a Florida lifestyle ever since being granted military leave there while serving in the Army. Edith dreamed of a place where she could take classes, read, and enjoy animated discussions with fellow lovers of current events and politics.

Edith and Phil were more comfortable financially in the 1970s and began an annual ritual of December family vacations to Miami Beach. The earlier visits focused on the warm weather in the winter, palm trees and exotic birds, and even Santa Claus in shorts. The later visits were spent visiting family and friends, all of whom had purchased their slice of the Florida dream in a 55-plus community in Broward or Palm Beach counties, the two counties immediately north of Miami-Dade.

B. Century Village

In 1968, the first Century Village opened in West Palm Beach. Not only was Miami Beach filled with billboards advertising "that Red Buttons place in Florida," everyone Edith and Phil met seemed to be talking about it.[239] For Edith and Phil (and particularly Phil) Century Village was not just another 55-plus community—it was the embodiment of a dream for his generation, Jewish veterans of World War II from New York and the rest of the Northeast.[240] Century Village offered a lifestyle heretofore unknown for people of modest incomes. For a mere $7,000, one was able to purchase an apartment, adjacent to a golf course, and often with a view of water.[241] Everyone was talking about the Century Village lifestyle. It was like living in a Catskills resort hotel, or a "summer camp" for seniors.[242]

generally Oser, *supra* note 237. Today, Warbasse has 2,900 seniors occupying 74% of the units; approximately 1,000 elders are seventy-five or older. *Id.*

239. *Red Blitz*, *supra* note 106. *See generally* Nelander, *supra* note 99.

240. *See generally Retirement Living Revisited*, *supra* note 84; *Red Blitz*, *supra* note 106.

241. *Red Blitz*, *supra* note 106.

242. *See Celebration's On for Century Village*, MIAMI HERALD, Dec. 15, 1988; *Retirement Living Revisited*, *supra* note 84.

Edith was not very impressed by the modest apartments. Regardless, Phil and Edith could not stop talking about the Century Village clubhouse and other facilities. Phil was particularly intrigued by the wide range of classes and clubs; he thought he might develop a hobby in retirement (and as far as Edith was concerned, any hobby at all would suffice).

When the construction of the third Century Village in suburban Boca Raton was announced, Edith and Phil jumped, purchasing their two bedroom, 1.5 bath, 880-square-foot condominium for $35,100, the least expensive two-bedroom apartment available in a four-story building (with an elevator). Edith and Phil paid cash they had saved for their retirement, never having borrowed money in their lives.[243]

Century Village Boca Raton was a stereotype of South Florida living, with three- and four-story buildings surrounded by asphalt parking lots and outdoor catwalks leading to the apartments. Particularly when it was first built, with minimal landscaping, it would not have been confused with the many nearby luxury golf club gated communities. But it was Edith's and Phil's dream: they rented the unit for years to help pay for it, until they were able to fully retire in 1990.

Edith and Phil embraced retirement with gusto. They became active members in several organizations, with Edith and Phil both serving terms as president of the Century Village B'nai B'rith chapter. They took classes at Florida Atlantic University and went to lectures, plays, and other cultural events. They developed a large circle of friends and went out to more dinners than they ate in; and yes, early bird specials made that pursuit very affordable. They had eight incredible years together.

Edith and Phil hoped to "grow old in place."[244] They knew Century Village offered no services for extreme elders. Indeed, they were very conscious of the fact that their apartment was on the third floor of a large building with only one elevator; the apartment had a small step at the entry door, and featured corridors and bathrooms that would be difficult to navigate with a walker, let alone a wheelchair. But unlike many of their friends, Edith and Phil had a plan.

243. Greenburg, *supra* note 120 ("For low-end condos you'll probably have to pay cash anyway since banks rarely bother with loans below $50,000.").

244. *See generally* LEHNING ET AL., *supra* note 59.

They had purchased a home health care policy to bridge the gap between Century Village and assisted living or a nursing home. The policy they purchased was from Conseco, and its benefits included considerable in-home practical nursing care if they ever needed it. Unfortunately, Conseco went into bankruptcy[245] and the insurance policy retained little value. By the time this happened, Edith and Phil were too old to purchase alternative insurance. Edith and Phil agonized over the Conseco bankruptcy because it destroyed their carefully laid out plans for aging in place in Century Village; I know Edith worried about it every remaining day of her life.

Soon after Phil passed away in 1998, Edith had what the doctors called a "small" stroke. Of course all strokes are debilitating, and Edith's balance, speech, and memory were affected. Though she zealously went through therapy several times, things were never quite the same. She was living alone. She had some trouble walking and finding the right words to express herself. And as the youngest in her social group, she soon found herself very much alone, as each friend in turn passed away.

I was living in Chicago at the time, and my brother Roger, Edith's stepson from Phil's first marriage, lived in Indiana. We both visited frequently and called regularly. We did everything we could for Edith from a distance. Of course this is one of the problems with Sunbelt 55-plus communities; they bring people to a lovely community, but one that is often very far from family and any dependable support system.

Although Edith was living reasonably well and independently, her world was getting smaller and smaller. She still drove, but sparingly, and only during the day. Jaunts as far as Florida Atlantic University for classes, just five miles away, became impossible. Some weeks Edith would leave her condominium only a few times, going to the supermarket or a club meeting. Most of her friends had died, or moved into assisted living or nursing care in a northern state, near their children.

245. *See generally* Glenn Singer, *Conseco Offers 3 Policy Options*, SUN SENTINEL, May 19, 2004; *Rebuilding Conseco*, INDIANAPOLIS STAR, August 13, 2004, http://www2.indystar.com/library/factfiles/business/companies/conseco/2000.html.

C. Hurricane Wilma

Gradual declines are hard to detect, even for devoted, but untrained, children. Our rude awakening came in the wake of a major natural disaster. The eye of Hurricane Wilma, described *supra* Part III.E, passed directly over the many 55-plus communities concentrated in Southern Palm Beach County, and Northern Broward County, particularly impacting the towns of Boca Raton, Delray Beach, and Deerfield Beach. I watched the disaster unfold on television. Since Edith lived seven miles inland, and on the third floor of a four-story building, I was not worried about storm surge from Wilma. But I never imagined the wind impact would be so severe.

Edith's land-line phone service went out only briefly; I was able to keep in touch with her throughout most of the storm and the day after. Her electricity ended with the storm's arrival, and her potable water stopped soon afterwards. There was a disconnect that disturbed me. I could see on the television news that Southern Palm Beach county had been devastated. But Edith, the former meteorologist, seemed unperturbed. She thought I was silly, but I insisted on driving to Boca Raton to take her back to my home until the area returned to normal.

I had recently relocated to Tampa Bay to teach at Stetson University College of Law. It is approximately 250 miles from my home in St. Petersburg to Boca Raton; the drive never took more than four hours. The day after Wilma the drive took close to ten hours. The hardest part was crossing east from the Everglades into the populated regions of Palm Beach County near the Atlantic Ocean. Approximately fifteen miles inland, a high tension power line running north-south brings power to millions of people living in the metropolitan Miami, Ft. Lauderdale, and West Palm Beach areas. The power line was down, and there seemed to be no way to safely cross it to reach the coastal area of the state.

After hours of trying, I found an overpass unblocked by debris and well above the downed power line. I finally reached the population centers in Palm Beach County. There I saw what appeared to be anarchy. Most of the six million people in metropolitan Palm Beach, Broward, and Miami-Dade counties had no electricity. Traffic in South Florida is bad on the best of days; the day after Wilma, not a single traffic light that I saw was working anywhere; the police were spread too thin to help with more than the biggest intersections. And it seemed as though everyone had decided to drive somewhere, looking for water or milk or gas, or some other essential.

When I finally made it to Century Village, I was aghast. Most 55-plus communities in South Florida are distinguished by their elaborately landscaped walls, fences, and gatehouses, as well as the lush foliage inside the community. Century Village had been laid bare. Half the gatehouse was missing its roof; the other half was all but destroyed. Much of the landscaped circumferential fence was wrecked. And inside, decades of careful landscaping with beautiful trees and flowers were obliterated. For the first time ever, my SUV was used as intended, as I forged a circuitous path to Edith's home.

Desperate to get out of South Florida by dusk, I forced Edith to pack a few essentials, threw everything in her refrigerator and freezer away, and made it back to Tampa Bay safely. Edith protested the entire way that I was overreacting. And always frugal Edith was furious that, in my haste, I had not carefully packed every item in the refrigerator and freezer to take with us.

It took six weeks for Century Village and the rest of the area to function mostly normally, and Edith remained in my home in St. Petersburg for almost two months. The electricity was out for two weeks or more in Century Village and many of the other large retirement communities, and there was no safe running water.[246] Edith was one of the lucky ones.

D. Independent Living at Lake Seminole Square

During Edith's time in my home, I was able to see her decline more clearly, and it became obvious to me that it was dangerous for her to continue living alone in Century Village. Edith knew this too; after one very calm heart-to-heart, she agreed that she needed to move, but we had no idea of where she could go, or what we could afford.

Edith's federal pension, Social Security benefits, and modest retirement savings allowed her to live comfortably. Having grown up during the Depression, she was frugal to a fault. One of her favorite activities was finding incredible bargains on designer clothing and costume jewelry at discount stores; people always remarked on how well-dressed she was. Beyond that mild indulgence, she cut coupons,

246. *See generally Upheaval*, *supra* note 200.

bought food on sale, and managed to squirrel away enough money to give presents to her family. But the amount of money required for a continuing care community seemed well beyond what she could afford.[247] And she refused to take any money from me (or her stepson) at all; although on an academic salary, and at the time an assistant professor, there were certainly limits to what I could afford as well. She also refused to even consider living with me.

Before the ramifications of Hurricane Wilma affected housing prices in Palm Beach County, and just prior to the housing bust which destroyed whatever value remained, Edith's condominium was valued as high as $150,000. We needed every penny of that and more in order to afford continuing care. Although we found continuing care communities in South Florida to be well out of Edith's price range, we found similar communities in the Tampa Bay area (where the property values are generally much lower) that were on the cusp of affordable, assuming we could sell her Century Village condominium for a top dollar price. After touring a dozen communities, we found Lake Seminole Square[248] in suburban St. Petersburg to be the best choice.

Lake Seminole Square is a continuing care community concentrated in one large building near St. Petersburg. In some respects, it is a miniature Century Village, offering hotel-like amenities with an active social program. Even better than Century Village, Lake Seminole Square offers dining services, and most residents in independent living gathered each evening for dinner.

But there were three major differences between Lake Seminole Square and Century Village. The first is that Lake Seminole Square had a variety of health and safety systems to take care of its residents. These ranged from having nurses on staff, to systems in place to check on the physical and mental well-being of residents every day. The complex is constructed with excellent safety systems, including multiple elevators, battery operated emergency lights in every apartment, and no-step showers. The complex has its own generators, and we were told it could survive independently with stored food and on its

247. A "continuing care community" (sometimes called "progressive care") offers "in a single-campus setting a variety of residential options designed exclusively for senior citizens, including . . . 'independent living, 'assisted living,' and 'nursing home.'" Schwemm & Allen, *supra* note 186, at 136 n.65. Continuing care communities have become very popular in recent years, particularly for middle- and upper-income elders. *Id*. *See generally* Jordan, *supra* note 2, at 212–18.

248. LAKE SEMINOLE SQUARE, *supra* note 193.

own power for several weeks following a major hurricane. This was particularly important to Edith, because as the reality of Hurricane Wilma set in, she realized that she was no longer safe in her third-floor Century Village home.

The second difference was that while still offering a rich variety of social programs, Lake Seminole Square's programs were all age appropriate. There is a vast difference between a fifty-five-year-old and an eighty-five-year-old. Century Village catered to the younger retirees, while offering nothing for extreme elders. Lake Seminole Square, on the other hand, offered exercise classes and social events geared towards elders Edith's age, with an incredibly supportive staff to help them get the most out of each day. Since most residents had stopped driving, the community offered transportation every day for necessary trips to supermarkets and drug stores, but also trips to shopping malls, museums, and cultural events. As a part of the monthly package, residents were also driven to and picked up from all "professional appointments," including visits to doctors, dentists, lawyers, and accountants.

The third difference was the hardest to analyze as a consumer. The very nature of a continuing care community is that it offers a variety of services related to independent and assisted living, as well as nursing care. Most continuing care communities offer some buy-in package that allows residents to purchase a degree of certainty over future medical and nursing costs.[249] The packages vary from receiving all, some, or none of the buy-in costs back upon departure.[250] Departure, of course, in this case, usually means death, with the corpus being transferred to the heirs. The greater the services offered to the resident, the less paid back to the heirs. The most comprehensive packages give nothing back after buying in, but include assisted living and nursing care at set—and very affordable—rates.[251] Meanwhile, the retail price of nursing care in the United States averages over $83,000 per year.[252]

249. Ashlea Ebeling, *Eight Questions to Ask Before Buying Into a Senior Community*, FORBES, (July 1, 2010), http://www.forbes.com/2010/07/01/retirement-housing-nursing-alzheimers-ccrc-personal-finance-continuing-care-retirement-communities.html.

250. *Id.*

251. *Id.*

252. Craig Guillot, *'Granny Pods' vs. Nursing Homes*, MSN MONEY, (July 20, 2012), http://money.msn.com/baby-boomers/granny-pods-vs-nursing-homes-hsh.aspx.

We struggled over which package to buy; Edith was adamant about eventually leaving some money for me and her stepson. We finally chose one of the least expensive packages, which gave her independent living at the market rate, access to all the services the community offered, a few days each year of assisted living or nursing care if medically required, and some of the buy-in costs refunded to her heirs after death. She received no benefit towards nursing home care, but we decided to worry about that later. The buy-in cost was $106,000, with a monthly payment of $1,705 for all services.[253]

E. The Housing Market Collapses

Edith decided that she would sell her Century Village condominium and move to Lake Seminole Square. She returned to a Century Village still recovering from Hurricane Wilma, put her condominium on the market, and hoped for the best.

Fifty-five-plus community property values rarely track consistently with general real estate values. In addition, Century Village and other 55-plus communities in the area had experienced several unique decreases in value over the years, usually brought about by a glut of units on the market, or by heirs dumping the units at any price offered.

Where condominiums identical to Edith's had been selling for $150,000 a few months earlier, the ramifications of Hurricane Wilma were impacting the market. Rather than prices simply declining, people just stopped buying, waiting to see how the area recovered from the disaster. While Edith's condominium had only easily reparable damage (part of the enclosed balcony had been ripped away by the winds and that was covered by insurance), other buildings were missing roofs, and the entire complex looked like a giant construction site. There were also few trees or flowers left; the simple construction of the modest concrete buildings was no longer camouflaged by lush greenery.

Soon after that, the housing bust began and America entered the Great Recession. Unlike other markets, there are always condominiums for sale in 55-plus communities. Generally in the real estate mar-

253. Residents of Lake Seminole Square, like many continuing care communities, receive a life estate in their apartment. In addition, the package of services offered is drafted so as not to fall under state insurance laws. Edith's monthly fees increased between 5% and 10% each year she lived in Lake Seminole Square.

ket, when prices drop, people can take their home off the market and wait it out, or often even rent their home. It is more complicated in a 55-plus community. When the owners die, as happens frequently, particularly in older 55-plus communities, the heirs are left with property that may not fit into their own retirement planning. If they are under 55, they cannot live in the home unless the association agrees to an exception. Often, rentals are restricted by the condominium association's covenant or rules. Because there are often so many units for sale, prices are depressed in excess of whatever the broader housing market is experiencing. Heirs will often sell the condominium to anyone making an offer. At the large 55-plus communities in Palm Beach county, condominiums were selling for under $20,000, if they were selling at all.

After six months on the market, only two people had even come to see Edith's condominium. We changed real estate agents twice, but they were doing all they could. The problem was there were few buyers, and even they were waiting for the market to bottom out. Edith was not the only person with this problem in Century Village. She told me about her many neighbors, all contemporaries, who needed additional care but could not afford it, and could not sell their apartment to get it. The few Century Village apartments that were selling were priced as low as $16,000 for two bedrooms. Meanwhile Edith's health continued to decline. It became clear that living alone in Century Village was no longer safe, and I had to come up with a plan.

Several years earlier, Edith's local bank had been acquired by one of the large national banks. One day, Edith walked into the newly established branch to make an inquiry regarding her checking account; the new checking statement format had confused her. While she walked in with a question for the bank, she walked out with two new credit cards, a money market account, a certificate of deposit, and a home equity line of credit.

I already had power of attorney over Edith's financial affairs and had begun monitoring her bank accounts and bills. She was doing a great job paying her bills, but it was important that I watch her finances. I needed to see that Edith continued to pay her bills and make sure she did not become the victim of fraud.

When she told me what the bank had done, I was angry and horrified. Purely from a policy perspective, I thought it unconscionable for a woman Edith's age to be persuaded to accept a large number of financial instruments that she did not need or fully understand. I imagined that the new bank had targets for new product sales, and Edith helped them reach their quota that month. I also knew that Edith was very frugal, and as long as her judgment remained solid, she would never run up a large debt. I rested easier knowing that these new credit lines could do no real harm, as long as I continued to watch over her spending.

But Edith ended up with a $130,000 home equity line of credit that she had never tapped. And now, two years later, she needed to move into independent living at Lake Seminole Square, and neither of us had $106,000 to buy into the community. So facing her increasingly rapid decline, and our inability to sell the Century Village condominium, we used the home equity line of credit to buy into Lake Seminole Square. Edith moved into her new apartment in March of 2006.

For another fourteen months, or about two years in total, we tried to sell or even rent Edith's vacant Century Village condominium. We lowered the price again and again. We offered all the furniture at no charge. We offered cash for renovations. We did everything we could think of, and everything the real estate agents asked us to do. In two years, I recall fewer than three couples even looking at the place, and no one made any offer. There were hundreds of Century Village condominiums on the market at the time.

Edith's monthly fee to Lake Seminole Square had already increased to $2,100 per month and increased each year. Edith also paid approximately $12,000 per year for her home equity line of credit, Century Village condominium fees, and insurance on both homes. The only positive change was her property taxes. The Century Village condominium was now appraised for so little money that it fell under Florida's Homestead Exemption and Edith paid no property taxes at all.[254]

Within two years, Edith had exhausted her discretionary savings and had dipped into her main retirement savings. In order to contin-

254. Many elders found the one "silver lining" to the real estate crash was they owed no property taxes to Florida. Michael Mayo, *Housing Crash's Small Silver Lining: $0 Property Tax Bills*, SUN SENTINEL, September 12, 20101. When a home is worth $25,000 or less, it is fully covered by Florida's homestead exemption for state residents. *Id.* In 2010, 15,389 condominiums in Palm Beach County, and 14,736 in Broward County were valued by the county assessor as being worth less than $25,000. *Id.* Many are in the 55-plus communities of Century Village, Kings Point, and Sunrise Lakes. *Id.*

ue to pay for two residences, she was going to have to spend the corpus of her retirement savings, which she depended upon for income. Tapping that money would only solve problems in the short-term, and only if the condominium sold almost immediately. Without the income from her savings, Edith would not have been able to afford her monthly payments to Lake Seminole Square, health insurance, or much of anything else. She certainly would have qualified for public assistance, although she never would have accepted it.[255] Edith also experienced extreme anxiety over her financial situation and required medication to cope with the situation.

Of course I offered Edith money, as did my brother. I frequently paid for groceries and a variety of other bills, but doing so often caused terrible arguments, and usually resulted in Edith becoming quite angry with me. I asked Edith to move in with me. I would have had to sell or rent my condominium, and purchase a house suited for both our needs. Doing so would have been problematic in that housing market, but I was more than willing to try. Edith refused to give up her independence, and I also knew that with her physical and mental decline, she needed a residential facility dedicated to elders that I could not reproduce.

In May of 2007, I made a decision, and I did so without discussing the matter with Edith.[256] Using my power of attorney, I contacted Edith's bank and explained my mother's dire situation, and I told them it was my intention to default on the home equity line of credit.[257] I asked the bank to accept the deed to the Century Village condominium in lieu of foreclosure.

Two factors benefitted me. First, HUD had issued a letter liberalizing the process for homeowners impacted by Hurricanes Katrina, Rita, and Wilma to offer a deed in lieu of foreclosure in hurricane rav-

255. At that point Edith was living on income below the federal poverty level. She did, however, still have the corpus of her modest retirement savings (that was invested for her income). She managed to live reasonably well because many of her needs were met through her monthly payment to Lake Seminole Square. But she still had to pay for health insurance, expensive prescription medicine and doctors' fees, as well as some food, clothing and other ordinary expenses. Edith became very anxious during this period and was treated by doctors for it. She told me "I grew up during the Great Depression—I don't want to die during one too."

256. I did discuss the matter with my brother and sister-in-law.

257. At the time, the account was not in default and Edith made her payments promptly each month. During my first conversations with the bank, it suggested increasing the Home Equity Line of Credit by $50,000, and letting Edith use that money to live on. I declined.

aged disaster areas.[258] Second, while defaults, short sales, and deeds in lieu of foreclosure are well known in the American lexicon today, this was still near the beginning of the housing bust. At that time, one could telephone a bank and speak with someone about such a matter, and even receive some sympathy. Even then, it still took approximately six months to work out the details.

I am not certain Edith ever entirely understood what I had done. While I did not hide it from her, I also did not press the issue. I think she understood it as a friendly transaction rather than the truth, which is the bank chose the least expensive of several undesirable outcomes.[259]

I have revisited this decision countless times. I have been criticized by friends and colleagues. Some have suggested that although I was not a co-signor to the home equity line of credit, I should have personally made all the payments on the loan, regardless of Edith's feelings on the subject. Others have said that there was some rough justice in seeing a bank paying for its decision to sell complicated financial instruments to a then eighty-four year old woman who did not fully understand what she was signing. I have had many regrets and second thoughts about this decision. But I will say that if I had to do it over again, I would. I would have done anything to protect Edith, and that included her emotional and financial well-being, in addition to guarding her health and safety.

The broader problem, however, is not Edith, Hurricane Wilma, the housing bust, or even, at least specifically, Century Village. The problem is that Edith followed Peter Pan's call to retirement bliss in Florida, far removed from friends, family, and any support system.

258. U.S. Department of Housing and Urban Development, Mortgagee Letter 2006-10, May 3, 2006.

259. I assume the bank was willing to accept the deed in lieu of foreclosure because of the HUD Order, as well as the fact that I was offering the bank the only real property that it could foreclose upon. Like many continuing care communities, residents of Lake Seminole Square receive a life estate in their apartment; a lien on a life estate is generally extinguished upon death. *See e.g.*, *In re Estate of Sterner*, 450 So. 2d 1256 (Fl. Ct. App. 4th) (citing Fla. Stat. § 733.803 (1983)). Had the bank been unwilling to accept a deed in lieu of foreclosure, I imagine it could have placed a lien on Edith's estate for the deficiency, although none of Edith's small estate was subject to probate, and there was very little for the bank to attach. The Mortgage Forgiveness Debt Relief Act of 2007 eliminated the tax consequences of a deed in lieu of foreclosure in Edith's situation. P.L. 110-142, 121 Stat. 1803. As far as Edith's credit rating, I was not concerned about her credit score at that point in her life. Interestingly, I did check after the property was transferred to the bank and her credit score remained high and unchanged.

What was perfect for a young retiree became a dangerous prison[260] with no escape for an extreme elder. And the very nature of many 55-plus communities ensures that this unhappy story will happen over and over again, as long as many 55-plus communities continue to be depreciating assets, offering no services for people in their later years.

The bank put Edith's Century Village condominium up for sale twice, with bids starting at $29,999. There were no takers. Although I do not know the details, the Palm Beach County property records show the condominium eventually sold in 2009 for $29,400. Edith died in a hospice on January 20, 2011, several days after suffering a massive stroke in her apartment at Lake Seminole Square.[261] She was found in her shower by the staff approximately one hour after the stroke when she failed to check in that morning as required.[262] While the professional nursing staff questioned whether they could have done better, perhaps by having each resident wear an expensive panic button necklace or bracelet, the system worked. Even if they had gotten to Edith sooner, the stroke was too severe for there to have been any recovery. When it happened, she was rendered unconscious immediately. She could not have pressed a panic button, and I have been told by every doctor that she felt no pain.

Edith never fully regained consciousness during those terrible days that followed, but it was clear that she knew when I was by her bedside. For some reason, I often think about what would have happened if she had still been living in Century Village. Although in the later years I tried to call Edith every day, sometimes I missed several days because of travel. I cannot stop myself from thinking about how long she might have laid in the shower in her Century Village condominium.

Edith's last five years at Lake Seminole Square were good and productive years. From being a virtual shut-in at Century Village, she came to enjoy the Lake Seminole Square evening meals, dressing up each night and fretting over who her tablemates would be. Edith participated in almost every night's social activity, including the once-a-week Bingo game. When I reminded Edith that she detested Bingo,

260. *See generally* Liewer, *supra* note 78.
261. *Edith Bauer Obituary*, SUN SENTINEL, Jan. 22, 2011, http://www.legacy.com/obituaries/sunsentinel/obituary.aspx?n=edith-bauer&pid=147964200&fhid=5131.
262. Residents merely had to push a button in their apartments by a certain time each morning. Edith referred to it as the "I'm not dead button."

she told me that she enjoyed the camaraderie and social nature of Lake Seminole Square that she had lost at Century Village. If that meant playing Bingo one night each week, then she would play Bingo.[263]

Edith joined clubs and organizations, went on outings, became a ferocious Wii bowling player, went to a gym class most mornings, and enjoyed her last years. She found a grateful audience for her superb cookies, cakes, and soups. At the same time, the Lake Seminole Square staff looked over her and took care of her in ways I was not trained to do. Her condition declined each year, but Lake Seminole Square made sure she was as safe and healthy as possible. Most importantly, Edith was happy there. As depressing as Century Village had become, particularly after Hurricane Wilma, Lake Seminole Square gave Edith a new lease on life, and one she embraced and enjoyed.

Regardless of how hard our lives became after Hurricane Wilma and the housing bust, the difficult challenges we faced were not caused by a natural disaster or man-made economic recession. I have come to believe that the real culpability lies with Century Village and the very nature of 55-plus housing that makes aging in place impossible.

V. Conclusion

There is nothing inherently wrong with the concept of 55-plus housing. Whether elders wish to live free from the noise of children, or just want to live with other individuals at the same stage of life, that is their choice—and they have earned it. But 55-plus housing is all too often built without the amenities required for extreme elders. In fact, any suggestion that such facilities might be required by the 1988 Act was removed by the 1995 amendments. Even so, it might be acceptable for 55-plus communities to offer no services if the condominiums retained value and were freely alienable, so that the proceeds could be used for a new home with more dedicated services. But that is not the case.

The developers of Century Village and its kin would undoubtedly argue against the imposition of additional safety systems and con-

263. After Edith died, I found approximately $150 in one-dollar bills in her desk drawer—all from Bingo winnings.

tinuing care requirements. The real estate developers lobbied against HUD when it tried to promulgate regulations describing required services and facilities, and the real estate industry won when Congress passed a law eliminating such requirements.[264] Developers might argue that these additional costs would raise the entry price of retirement housing. They undoubtedly would suggest that it would put active retirement communities out of the reach of the middle class.[265]

These same real estate developers, however, are the ones that constructed some multistory housing for elders without elevators, even receiving a code variance to do so.[266] Even buildings that already have elevators are a problem. Elevators break down and natural disasters cause power outages. The burden then falls on the police, fire department, and emergency agencies to assist people, with taxpayers at large shouldering the burden. In these days of government austerity, it is not unreasonable to suggest that the costs associated with emergency generators (or lack thereof) should have fallen on the real estate developers and buyers.

Whether it be elevator assistance, emergency services, or any of the other needs of elders, none of these are new costs. They all exist right now. The needs of elders in these communities bereft of needed services and facilities are often being paid for by counties, states, or the federal government.[267] For a fortunate few, some of the costs are being paid for by private insurance. But in many cases, the cost of care for extreme elders is not paid at all, leaving these elders prisoners in housing ill-suited for their needs and extracting a physical and emotional cost not only on the elder, but also on their families, friends, neighbors, and caregivers.

Unsafe Peter Pan housing adds to Medicare costs, and further burdens the federal and state governments. According to the U.S. Centers for Disease Control and Prevention, persons seventy-five and

264. *See generally* 141 CONG. REC. S18063 (Dec. 6, 1995) (Statement of Sen. Hank Brown & Sen. Jon Kyl).

265. *Id.*

266. Kollin, *supra* note 166.

267. In a time of budget short-falls for cities and counties, it is worth noting that because of the low property values for some 55-plus communities in Southern Florida, the residents are often not paying any property taxes to support these services. Mayo, *supra* note 254.

older have a fall rate of 115 for every 1,000 people,[268] and one out of every three Americans age sixty-five and older fall each year.[269] In 2009, 2.4 million nonfatal fall injuries among older adults were treated in emergency departments and more than 662,000 of these patients were hospitalized.[270] In 2000, direct medical costs of falls totaled a little over $19 billion—approximately $179 million for fatal falls and $19 billion for nonfatal fall injuries.[271] This equals $28.2 billion in 2010 dollars.[272] In 2020, "the annual direct and indirect cost of fall injuries is expected to reach $54.9 billion (in 2007 dollars)."[273] Direct costs are paid by Medicare, Medicaid, patients, and private insurance companies, but they do not account for disability dependence, inability to participate in household duties, and reduced quality of life.[274]

In a study of people age seventy-two and older, the average health care cost of a fall injury totaled $19,440, which included hospital, nursing home, emergency room, and home health care, but not doctors' services.[275] Almost one-third (30%) of adults aged sixty-five and above who were injured in bathrooms were diagnosed with fractures.[276] In addition, 389,000 adults aged eighty-five and older were hospitalized for their injuries.[277] Many people who fall, even if they are not injured, develop a fear of falling.[278] This fear may cause them to limit their activities, leading to reduced mobility and loss of physical fitness, which in turn increases their actual risk of falling.[279] Medi-

268. *Falls–Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/HomeandRecreationalSafety/Falls/index.html (last visited Apr. 21, 2013). The average fall rate for all age groups is forty-three. *Id*.

269. *Costs of Falls Among Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/HomeandRecreationalSafety/Falls/fallcost.html (last visited Apr. 21, 2013).

270. *Id*.

271. *Id*.

272. *Id*.

273. *Id*.

274. *Id*.

275. *Id*.

276. *Fall Risks for Older Adults*, CTRS. FOR DISEASE CONTROL AND PREVENTION, *available at* http://www.cdc.gov/features/fallrisks (last visited Apr. 21, 2013).

277. *Id*.

278. *See generally id.*

279. *Falls Among Older Adults: An Overview*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 20, 2012), http://www.cdc.gov/HomeandRecreationalSafety/Falls/adultfalls.html.

care and Medicaid pay for some medically necessary assistive devices but very few home modifications.[280]

Despite all these costs and dangers, and the sheer folly of allowing unsafe homes to be built for seniors, some would certainly argue that the market will correct itself. The argument might go: if there are too many condos being built, if retirees do not like four-story modest condos with access by outdoor catwalks, if new generations of retirees are less drawn to Florida, and if too many elders are being injured at home, then the market will correct itself.

But even a Law and Economics purist would allow for the fact that market corrections take time. Certainly the market will eventually correct for dangerous apartments in two- or three-story buildings for elders without elevators. But in the meantime, enormous costs and inefficiencies exist, as well as terrible dangers to our most vulner-

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280. Pynoos et al., *supra* note 12, at 82–83; *see also What is Long-Term Care?*, MEDICARE (Aug. 3, 2012), http://www.medicare.gov/longtermcare/static/home.asp. According to Medicare:

> Home modifications and repairs improve your safety, helps you perform daily activities such as bathing, cooking, and climbing stairs as well as maintain the value of your home.
> Possible adaptations for aging include:
>
> Installing grab bars, shower seals, or transfer benches
>
> Placing non-skid strips or decals in the tub or shower
>
> Adding lever handles on doors, loop handles on cupboards, and paddle electrical switches
>
> Installing ramps, elevators, or stair lifts
>
> Installing insulation, storm windows, and air conditioning
>
> Installing handrails for support
>
> Improving lighting around the home
>
> Installing security systems
>
> Adding living space for a caretaker
>
> Widening doorways to accommodate walkers, crutches, and wheelchairs
>
> Installing lock out features on stoves or ovens
>
> Adding digital displays on thermostats
>
> Minimizing thresholds on interior and exterior doorways for easy maneuvering
>
> Occupational and physical therapists are helpful in suggesting additional ways to adapt your home for safety and accessibility. Medicare does not pay home adaptations but does pay for some durable medical equipment. Medicaid may pay for home modifications and medical equipment. Many state and local governments have programs to provide loans and grants to help you pay for home modifications.

able citizens. Here, unrestrained market forces may very well kill some elders, and not everyone has family members or friends guarding their well-being.

There are other inefficiencies to take into account. An infirm occupant of a third-story walk-up is unlikely to increase consumer spending at local stores, or anywhere else. An infirm senior's lack of mobility may require expenditures for a practical nurse to help with stairs, and it is unlikely that such an expenditure is efficient. And cash-starved governments will continue to be asked to pay for new elevators, inefficiently shifting costs from the real estate developers and condominium owners to the public at large.

The point is that the most efficient action may be government regulation in the first place. If developers are adamant at pricing condominiums at an unrealistic entry point, and if people fail to show the common sense not to avoid buying in such buildings, perhaps this actually is an appropriate area for government regulation. Indeed, the government regulation may actually be more efficient; these costs already exist. It is only a question of whether private parties or the government eventually pays.

The challenge for elders does not begin and end in Boca Raton, or even Florida. Some years ago, the Boca Raton area was essentially built out, and new construction began elsewhere, particularly in Boynton Beach, a few miles north of Boca Raton.[281] Rather than the modest low- and mid-rise apartments favored in the 1970s and 1980s, much of the housing built in Boynton Beach was far more elaborate—larger single family homes, with grander recreational amenities.[282] Development for retirees in Florida also shifted to Naples, on the Gulf of Mexico, and The Villages,[283] a sprawling 55-plus community in an undeveloped area between Ocala and Orlando. Some retirees gave up Florida completely, favoring the mountains and mild climate of North Carolina and South Carolina,[284] as well as Georgia and Tennessee.[285]

281. *See generally* Chavez, *supra* note 76.
282. *Id.*
283. *See generally* THE VILLAGES, http://www.thevillages.com (last visited Apr. 21, 2013).
284. *See* Emily Gest, *Warming Trend More & More, Retiring New Yorkers Crave Southern Comforts*, N.Y. DAILY NEWS, Nov. 10, 1996; Haya El Nasser, *Meeting Retirement Halfway*, USA TODAY, Aug. 31, 2000; Jeff Gammage, *Tide of Gray Washes Into North Carolina*, PHILA. INQUIRER, Jan. 31, 1998.
285. *See generally* Robert Strauss, *Heading South, but Stopping Short of Florida*, N.Y. TIMES, Sept. 11, 2012, http://www.nytimes.com/2012/09/12/business

But wherever these 55-plus communities are located, elders of an advanced age will face the same challenge of living without the necessary health and safety services or facilities. It is likely that many of these newer 55-plus communities will fall out of favor at some point in the future, as tastes continue to change and evolve. These elders may not be able to sell their homes and may not be able to afford to move to a new home with the services and facilities they may need.

Congress gave real estate developers a privilege by allowing them to indulge in age discrimination, and that privilege has been abused. One answer may be to repeal the Housing for Older Americans Act, and declare that this experiment has failed.[286] Another is to make age discrimination illegal and allow age-integrated communities to exist, some of which may evolve into naturally occurring retirement communities.

But there are great benefits to 55-plus communities, not the least of which is that so many elders enjoy living in them, at least when they are younger. The best answer may be to acknowledge that our life spans have lengthened, and that we are likely to outlive a time when golf and tennis are the preferred activities of retirement. Fifty-five-plus communities must be built in a way that allows elders the real option of aging in place.

When Congress first passed the Fair Housing Act, it was right to recognize that in return for an exemption from civil rights laws, 55-plus housing needed to offer services and facilities appropriate for elders. Today, 55-plus housing still needs to offer vital services and facilities unknown in most of these communities. Peter Pan is a wonderful story, but Congress should not help perpetuate the fantasy that we will never grow old.

/retirementspecial/more-retirees-find-the-mid-south-an-alternative-to-florida.html?pagewanted=all&_r=0 (for an account of retirees choosing non-traditional retirement communities in Tennessee and Georgia amongst others).

286. In Canada, British Columbia, Saskatchewan, and Newfoundland & Labrador permit age-restricted housing for elders. L. REFORM COMMISSION N.S., SENIORS ONLY HOUSING 17 (2011), http://www.lawreform.ns.ca/Downloads/Seniors-only_Housing_Final.pdf. The Law Reform Commission of Nova Scotia recently considered the issue of age-restricted housing for elders and recommended against it. *Id.*