FIRST-AID FOR HOUSING THE LOW- AND FIXED-INCOME ELDERLY: THE CASE FOR RESUSCITATING COOPERATIVE HOUSING

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For many low- and fixed-income elderly people, finding affordable housing to meet their financial and social needs is a challenge. In this note, David S. Wilson explores the state of cooperative housing and its potential to meet the housing needs of the elderly. Cooperative housing offers some benefits of ownership along with the opportunity to live in an active community. For the elderly, a cooperative can serve as a social network in which they can meet neighbors and participate in community governance. However, cooperative housing has faced many barriers, especially from mortgage lenders, that have limited its growth as a housing option. Mr. Wilson proposes promulgating a model statute that would encourage local governments to implement laws favorable to cooperatives, provide an insurance program to encourage lenders to become active in the cooperative housing market, offer tax incentives to developers and individuals, and expand the federal government's Section 8 housing program to assist low-income elderly who seek to live in cooperative housing. These

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The author would like to express his love, honor, and gratitude to his wife, Kristin, and children, Kate, Emma, Annie, and Tommy, for their love, support, and patience through the writing of this note and throughout our law school experience. Without them none of this would have been possible. The author would also like to thank Winfield Village Cooperative, Inc. and its residents and management for opening my eyes to the benefits and challenges of cooperative ownership and for providing a wonderful home during our law school years.

recommendations would allow cooperative housing to become a more viable option for the elderly and better meet this segment's unique financial and social needs.

I. Introduction

Dee Hawn moved into Winfield Village Cooperative in Savoy, Illinois, in 1975.[1] In her forties at the time, Dee struggled to make ends meet as a working mother with two daughters living at home. More than thirty years later, Dee's children are grown, and she has transitioned into retirement. Although she now has no mouths to feed, her financial struggle continues as she relies on a fixed-income of Social Security and pension benefits to meet the necessities of life, including housing.

Dee remains an active member of the Winfield Village community: she works in her garden, weeds community flowerbeds, and participates in board meetings. Dee takes pride in her community and garners a sense of value by actively participating in it. Throughout the 348-unit complex, a significant elderly population interacts with a diverse assortment of race, age, and familial status. Winfield Village provides a quiet, safe community where Dee and others like her reap the benefits that come from living in a cooperative housing environment. This idyllic life starkly contrasts with the squalor and disrepair common in other low- or fixed-income housing options.[2]

This note's primary purpose is to highlight the failures of low-income housing policy in providing low- or fixed-income elderly people with cooperative housing, an option that meets this population's unique financial and emotional needs.[3] The government's focus on rental and home ownership programs makes it difficult to finance cooperatives, which classify as neither true ownership nor true rental.

1. Interview with Dee Hawn, Assistant Sec'y, Winfield Vill. Coop., in Savoy, Ill. (Sept. 7, 2006).

2. *See, e.g.*, Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 387, 388 (2000) (relating the story of one mother's experience in low-income housing, including broken elevators, urine-soaked stairs, lack of heat, and flooding from broken water pipes).

3. Because of the minimal availability of cooperatives, Professor John Sprankling has gone so far as to classify cooperative ownership as "essentially a legal dinosaur—a method for dividing ownership of multi-story apartment buildings that developed before the condominium era." JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 580 (2000).

There is some indication that a focus on promoting home ownership has the unfortunate effect of exacerbating the problems associated with providing affordable rental housing.[4] In reality, providing "[h]ousing alone will not solve the problem."[5] This note suggests that establishing cooperative housing as a more substantial component of the housing market will provide the low- and fixed-income elderly with both the financial benefits of renting and the emotional benefits of ownership. Cooperative housing uniquely offers this combination of benefits.

Part II of this note explains the basic structure of cooperative housing and the ways in which cooperative housing provides a unique combination of rental and ownership benefits to the elderly and concludes by focusing on the historically relevant approaches to low- and fixed-income housing. Part III examines the failure of current housing policy in meeting the needs of the elderly and the ways in which cooperative housing provides essential housing needs for the low- and fixed-income elderly. The analysis concludes with a discussion of why current housing policies compel would-be "cooperators" to select other organizational forms. Part IV proposes key factors that should be taken into account in the development of effective housing policy for the elderly and suggests a simple approach to allow cooperative ownership to become a more commonly accepted form of ownership, thus allowing it to play a more significant role in forming effective national housing policy for the elderly.

II. Background

According to the National Association of Housing Cooperatives, more than 1.2 million individuals and families live in cooperative housing units across the country.[6] As background, this section describes the nature of cooperative housing and provides a glimpse into the tumultuous history of government involvement in promoting cooperative housing.

4. Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 425 (2004).

5. *Id.* at 420.

6. *See* Nat'l Ass'n of Hous. Coops., About NAHC & Housing Co-ops, http://www.coophousing.org/about_nahc.shtml (last visited Oct. 2, 2006).

A. Cohousing as a Theoretical Framework for Cooperatives

Current research on privately owned and operated residential communities that encompass cooperative housing generally refers to such models as "cohousing"[7] or "common interest communities" (CICs).[8] As a legal entity, cohousing can take many forms,[9] although most tend to organize as condominium ownership.[10] In general, a cohousing organization's legal formation focuses on three factors: "associational ownership of common property, deed restrictions that limit individual owners' uses of their property, and a mandatory homeowners association that administers the property and enforces restrictions."[11] A U.S. Department of Housing and Urban Development (HUD) report in the late 1990s hailed cohousing as an innovative ownership model and praised it as an effective means of keeping community costs affordable.[12]

B. Cooperatives in General

A form of cohousing,[13] today's cooperative housing model first emerged in the mid-nineteenth century.[14] Traditional cooperative ownership is characterized by "member-user ownership of the coop-

7. *See generally, e.g.*, Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. L. 3 (1999) (referring to residential communities "initiated, developed, and managed by residents" as "cohousing").

8. *See* Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 553–54 (2002). As this note partially rejects the concept of common interest communities, this section uses the term "cohousing" to refer to the general category.

9. For a discussion of specific examples of the decision-making process and ultimate decisions of various cohousing groups, see Fenster, *supra* note 7, at 24–44.

10. *Id.* at 19–20 (describing literature on setting up cohousing that specifically recommends the condominium form of ownership partially because it is "well understood and accepted by the banking industry"). Condominium ownership is an ownership structure in which a single building is broken up into units intended for individual use and common areas. *See, e.g.*, 765 ILL. COMP. STAT. 605/2(d) (2006). Owners typically hold the individual units in fee simple absolute with ownership of the common areas allocated to the units based on a percentage set at the time of condominium declaration. *See, e.g.*, *id.* at 605/2(g), 605/4(e).

11. Fenster, *supra* note 7, at 19.

12. *See id.* at 50–51.

13. Although condominium and cooperative ownership are both forms of cohousing and are often jointly addressed in both academic and statutory texts, fundamental differences in ownership exist. *See, e.g.*, discussion *infra* Part III.C.2.

14. Kathryn J. Sedo, *The Application of Securities Laws to Cooperatives: A Call for Equal Treatment for Nonagricultural Cooperatives*, 46 DRAKE L. REV. 259, 260–61 (1997). In 1865, Michigan became the first state to recognize cooperative incorporation by statute. *Id.* at 261.

erative, democratic control (usually meaning one vote per member regardless of how many shares or how much equity [is] owned), payment of patronage dividends based on usage of the cooperative, and limited return on capital."[15] Cooperatives generally fall into one of three categories: consumer, agricultural, and worker.[16] Cooperative housing is a form of consumer cooperative.[17] This is because of the cooperative's unique capital structure, cooperative housing's initial investment, and all future income tend to come exclusively from its members.[18]

C. Cooperative Housing's General Structure

The typical cooperative housing structure is that of a corporate cooperative,[19] under which the organization functions as a non-profit corporation[20] with each member owning a share of the corporation's stock.[21] In addition to traditional shareholder rights, each shareholder has the proprietary right to occupy one of the dwelling units owned and operated by the corporation.[22] This model allows groups to own, operate, and share the costs of a mutually beneficial multifamily housing development.[23]

The primary challenge of creating cooperative housing is that the costs associated with developing the property may exceed the developer's expected return on the investment.[24] For example, if a developer builds a 100-unit complex and depends on the local real estate market to set the sale price, the developer may be able to sell the units

15. *Id.*
16. *Id.*
17. *See id.*
18. *Id.* at 262–63.
19. Salvatore LaMonica, Note, *Developer Leases Under the Condominium and Cooperative Abuse Relief Act of 1980*, 15 HOFSTRA L. REV. 631, 631 n.1 (1987).
20. New York, for example, requires that

> [a] cooperative corporation shall be classed as a non-profit corporation, since its primary object is not to make profits for itself as such, or to pay dividends on invested capital, but to provide service and means whereby its members may have the economic advantage of cooperative action, including a reasonable and fair return for their product and service.

N.Y. COOP. CORP. LAW § 3(d) (McKinney 2006).

21. *See* Midwest Ass'n of Hous. Coops., A Guide to Cooperative Housing, http://www.mahc.coop/Coop.htm (last visited Oct. 2, 2006) [hereinafter Cooperative Housing Guide].
22. *Id.*
23. *See id.*
24. *See* Williams, *supra* note 4, at 423.

as condominiums for $50,000 each, generating $5 million in revenue. However, cooperative housing shares do not have the same fee simple property rights as condominiums and will not fetch the same price.[25] Thus, the cooperative housing shares may sell for only $5000, generating only $500,000 for the developer. There is simply more economic incentive to develop condominiums than cooperative housing.

Despite these challenges, developers still build housing cooperatives—some of which are significant endeavors. For example, in 1965, one of history's largest housing cooperatives broke ground in New York City.[26] Housing nearly 50,000 residents by 1975, the cooperative consisted of "a 200-acre site containing 35 high-rise buildings and 236 town houses."[27] In accordance with the typical low-income cooperative structure, the developer planned to recover the $283,695,550 construction cost through a combination of sales of stock in the non-profit corporation to residents and a government-subsidized mortgage.[28]

This cooperative, aptly named Co-op City, is a vivid example of the financial difficulties associated with cooperatives. In the initial marketing push, the developer estimated that prospective residents would pay an average rate of $23.02 per room in monthly carrying charges to satisfy the monthly mortgage payments.[29] However, the total construction costs for Co-op City exceeded estimates by $125 million.[30] As a byproduct, the actual price per room in 1974 was $39.68.[31]

D. Legislative Responses to the Housing Crisis

Commentators suggest that the United States has been in an "affordable housing crisis for many years,"[32] and Congress has authorized a variety of programs through the years in an attempt to deal with this crisis. The following subsections summarize the programs offered since the boom of government-assisted housing began in the early 1960s.

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25. An economic view of property law instructs that fee simple ownership has the highest possible economic value because the property is freely transferable to those who value it the most and the transfer will happen with the least amount of transaction costs. *See* SPRANKLING, *supra* note 3, at 18; *see also supra* note 10.
26. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 840 (1975).
27. *Id*.
28. *Id*. at 843.
29. *Id*.
30. *Id*. at 844.
31. *Id*.
32. Williams, *supra* note 4, at 418.

1. THE FAILURE OF GOVERNMENT SUBSIDIES

Led by President Johnson's commitment to affordable housing,[33] Congress tried to solve the housing crisis of the 1960s with programs to encourage developers to build low-income housing options that provided mortgage subsidies at the fixed interest rate of 1%.[34] At the foundation of government involvement in promoting cooperative housing in the 1960s was a desire to overcome the reduced profits of cooperative housing.[35] When Congress passed the 1961 Housing Act,[36] it authorized the Federal Housing Administration (FHA) "to insure mortgages at below-market rates for affordable rental housing."[37] The Housing Act of 1968[38] created programs under Section 235 and Section 236 designed to subsidize private developers and low-income housing via interest rate subsidies.[39] These programs, however, became fraught with corruption and failed to provide substantial housing to the intended recipients.[40] Studies indicated that only 43% of subsidized housing residents were poor.[41]

The sixties also saw the emergence of condominium ownership in the United States.[42] Although condominiums initially faced significant legal obstacles, actions by both the FHA and Congress eventually solidified condominium ownership as a viable housing option.[43] The promulgation of a model statute to assist the states facilitated this shift toward promoting condominiums.[44] As a result, the current U.S.

33. *Id.* at 429.
34. William Tucker, *The Source of America's Housing Problem: Look in Your Own Back Yard*, CATO INST., Feb. 6, 1990, http://www.cato.org/pub_display.php?pub_id=987&full=1.
35. Williams, *supra* note 4, at 429.
36. 12 U.S.C. § 1715 (2000) (mortgage insurance for condominiums).
37. Williams, *supra* note 4, at 429.
38. 42 U.S.C. § 3601 (2000).
39. Williams, *supra* note 4, at 429–30.
40. Tucker, *supra* note 34.
41. *Id.*
42. *See* Jan Z. Krasnowiecki, *The Pennsylvania Uniform Planned Community Act*, 106 DICK. L. REV. 463, 473 (2002).
43. *See id.* at 473–77.
44. UNIF. CONDO. ACT (1980), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1980s/uca80.htm. The National Conference of Commissioners on Uniform State Laws described some of the challenges faced by condominiums that led to the promulgation of the Uniform Condominium Act in 1980, including the fact that "the various states [were using] varying and sometimes inappropriate terminology . . . [and were] creating different 'bundles of rights' for purchasers of condominiums." *Id.* These problems made it "difficult for a national lender to assess the appropriateness [of lending funds to condominiums in various states]." *Id.* It also limited consumers' ability to "become educated in this very complex

housing market has relatively few numbers of cooperatives while condominiums constitute a robust portion.[45]

2. THE RISE OF THE VOUCHER

In 1974, Congress added Section 8 to the Housing Act.[46] Section 8 created vouchers for use by individuals to rent existing housing and by developers to build multi-unit housing for the poor.[47] Many have lauded the voucher program for successfully assisting millions of low-income families in finding suitable housing.[48] The program allowed Section 8 voucher holders to rent qualifying properties by paying 30% of their income as rent while subsidies paid the remaining balance.[49] Developers were able to take advantage of these vouchers when the government granted large blocks of fifteen-year vouchers to the developers who would then, with guaranteed subsidies in hand, develop properties.[50]

Early in the Reagan administration, analysis of public housing showed that the vouchers given to developers had created a glut of low-income housing.[51] In response, Congress scaled back the voucher program in 1981 to include only individual vouchers for existing housing.[52] Additionally, vouchers became "portable," meaning that

area." *Id*. As this note demonstrates, cooperative housing faces very similar challenges.

45. In 2003, there were a total of 6,080,000 condominium units and 693,000 cooperative units in the U.S. housing market. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2003 tbl.1A-1, *available at* http://www.census.gov/hhes/www/housing/ahs/ahs03/tab1a1.htm (last visited Oct. 2, 2006).

46. "The program was created by a 1974 amendment to the Housing Act of 1937, Housing and Community Development Act of 1974, Pub. L. No. 93-383, Title II, § 201(a), 88 Stat. 633, 662–66, and has been revised since then, importantly in 1998 by the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, Title V, § 545, 112 Stat. 2518, 2596–604." Langlois v. Abington Hous. Auth., 207 F.3d 43, 45 (1st Cir. 2000); *see also* Williams, *supra* note 4, at 440.

47. Tucker, *supra* note 34; *see also* Mbulu, *supra* note 2, at 391; Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 899 (1990).

48. Williams, *supra* note 4, at 440. Section 8 served 30,000 households in 1974, and the number grew to approximately 1.4 million by 2000. *Id.* at 441.

49. *See* William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1365 (1991); Williams, *supra* note 4, at 440.

50. Tucker, *supra* note 34. These subsidies were subject to fraud similar to that of Section 235 and Section 236. *Id.*; *see also* discussion *supra* notes 38–41 and accompanying text.

51. Tucker, *supra* note 34.

52. *See* Mbulu, *supra* note 2, at 391; *see also* Williams, *supra* note 4, at 420 (noting that waiting lists for subsidized housing vouchers are extremely long).

holders could use them in any jurisdiction offering Section 8 vouchers.[53] In 1987, Congress made the Section 8 voucher program permanent and allowed families to rent properties that cost more than fair market rent (FMR) if the voucher holder paid the incremental costs above FMR.[54]

3. INTRODUCING REVERSE MORTGAGES

In 1988, Congress implemented the reverse mortgage program[55] in an effort to "reduce the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income."[56] Through a reverse mortgage, qualified individuals age sixty-two or older[57] can take advantage of the equity accrued in their homes by converting it "into a line of credit or a stream of annuity payments repayable only from the proceeds of the eventual sale of their home."[58] Essentially, this turns the traditional mortgage on its head. Rather than the borrower paying the bank, the lender in a reverse mortgage buys the equity in the elderly homeowner's home through an annuity payment in return for a mortgage interest.[59] The amount available for the borrower depends on a number of factors, including the home's value, the age of the borrower, the policies of the individual lender, and the prevailing interest rates at the time of the loan.[60]

A reverse mortgage is an attractive option because it is a nonrecourse loan, the lender cannot foreclose on the property if the borrower honors the terms of the mortgage agreement, and, most importantly, the loan does not have to be repaid until after the death of the borrower.[61] Despite the benefits of a reverse mortgage, it is a type of

53. Williams, *supra* note 4, at 441.
54. *Id*. The calculation for FMR is set by regulation. *See generally* 24 C.F.R. § 982 (2006).
55. *See* Patriot, Inc. v. HUD, 963 F. Supp. 1, 3 (D.D.C. 1997).
56. 12 U.S.C. § 1715z-20(a)(1) (2005).
57. *Id.* § 1715z-20(b)(1).
58. *See* Jacqueline Queener, Note, *Finding the Gold to Finance the "Golden Years": Options for Financing Long Term Care in Arizona*, 45 ARIZ. L. REV. 857, 888 (2003); Coop. Hous. Coal., Removing Legislative Barriers to Reverse Mortgages for Senior Cooperative Homeowners, http://www.chc.coop/chc/contents.nsf/docadd/icongs1737doc.htm (last visited Oct. 1, 2006) [hereinafter CHC].
59. *See Patriot, Inc.*, 963 F. Supp. at 3; Queener, *supra* note 58.
60. Queener, *supra* note 58.
61. *Id.* at 888–89.

loan, and any decision involving the acquisition of debt must be a cautious one.[62]

Although the reverse mortgage program was initially limited to only 2500 individuals,[63] Congress gradually expanded it, and the program reached a high-water mark of 250,000 participants in 2005.[64] Considering that only 60,000 reverse mortgages existed in 1999,[65] today's quarter-million figure is evidence of the program's popularity and success.

4. REPEALING PUBLIC HOUSING

In 1988, the President's Commission on Privatization recommended moving the provision of low-income housing to the private sector. This change is still reflected in today's public housing policy.[66]

By the early 1990s, low-income housing consisted of a combination of both public and private ownership.[67] Faced with the need to balance the national budget and to salvage a bloated HUD, the Clinton administration adopted a "Continuum of Care" concept to "solve, rather than institutionalize, the problem of homelessness among American families."[68] The process ultimately led to more privatization of low-income housing. Henry Cisneros, former head of HUD, explained what the Clinton administration saw:

> A . . . dramatic change [that] transform[ed] public housing as we know it . . . . We . . . mov[ed] from a system where HUD fund[ed] local housing authorities, whether they perform[ed] or not, to a system where we fund[ed] the residents instead. The residents then [could] make a real choice about whether they want[ed] to stay in places that [were] unsafe and unkempt. When the residents have a real choice about being able to leave, they can force the housing authorities to improve them with a threat they will leave and have real choice about being able to leave.[69]

62. *Id.* at 894.
63. 12 U.S.C. § 1715z-20(g) (1988) (current version at 12 U.S.C. § 1715z-20(g) (2005)).
64. 12 U.S.C. § 1715z-20(g) (2005).
65. Queener, *supra* note 58, at 889.
66. *See* Schill, *supra* note 47, at 878.
67. *See id.* at 880.
68. Mbulu, *supra* note 2, at 392.
69. Henry Cisneros, *Community-Based Efforts to Achieve Economic Justice*, 22 N.Y.U. REV. L. & SOC. CHANGE 737, 745 (1996–97).

5. CURRENT HOUSING POLICY

Changes in HUD's structure during the 1990s led to the current housing policy and its focus on privatization.[70] One commentator suggests that "[w]e have entered the golden age of 'privatization.'"[71] More than ever, "condominiums, cooperatives, planned, walled and gated communities" are a staple part of both urban and suburban housing.[72]

HUD's position is that additional funding for the Section 8 program will address current issues facing low-income housing without the need for additional housing.[73] Thus, "[i]t is a problem of affordability," not availability.[74] The long wait times for those seeking voucher benefits strongly support HUD's position:

> [T]here is a national average time on the waiting list of . . . 28 months for Section 8 vouchers, but in large cities the wait is much, much longer. . . . In New York City or Washington, the wait for Section 8 is 8 years; in Los Angeles it is 10 years. The combined waiting lists in Chicago alone could consume all 60,000 vouchers appropriated in [fiscal year] 2000.[75]

In the context of low- or fixed-income elderly, however, affordability or availability does not matter; they simply do not have the time to wait for the vouchers.[76]

E. Focus and Policies Supporting Housing Programs

The standard government low-income housing programs focus on rentals or home ownership.[77] Cooperative housing offers a unique combination of both rental and ownership features,[78] but it is a mis-

70. *See id.* at 737–44. Mr. Cisneros further explained that there was a "dramatic reinvention . . . underway at HUD" during the 1990s, "arguably the most dramatic changes to occur since the formation of the department." *Id.* at 744. Communities were offered "no strings money" so long as they "target[ed] lower income people, . . . observ[ed] fair housing laws, focus[ed] on strategies of economic development, and . . . [met] the needs of our most vulnerable populations," including the elderly. *Id.*

71. Franzese, *supra* note 8, at 553. Professor Franzese notes that the term "privatization" is a "pejorative term used to describe the 'shift of government functions from the public sector to the private sector.'" *Id.*

72. *Id.* at 554.

73. Williams, *supra* note 4, at 442.

74. U.S. DEP'T OF HOUS. & URB. DEV., SECTION 8 TENANT-BASED HOUSING ASSISTANCE: A LOOK BACK AFTER 30 YEARS 14 (2000), *available at* http://www.huduser.org/publications/pdf/look.pdf [hereinafter HOUSING ASSISTANCE].

75. *Id.* at 14–15; *see also* Williams, *supra* note 4, at 442–43.

76. *See* discussion *infra* Part III.A.2.

77. Williams, *supra* note 4, at 417.

78. Cooperative Housing Guide, *supra* note 21.

understood and largely unknown ownership model.[79] As such, cooperative housing hopefuls often face the challenge of borrowing from traditional lenders who are reluctant to deal with the unfamiliar cooperative housing structure.[80]

The primary goal of housing assistance is to reduce the rental costs of acceptable housing.[81] Federal housing assistance for the low-income household differs from other forms of welfare.[82] These differences are key in understanding and formulating an effective housing policy.

The differences between the policies for housing assistance and for other welfare programs are stark. First, unlike traditional welfare benefits, housing assistance is not an entitlement for people with low incomes.[83] Second, the federal government distributes almost all of its federal housing assistance through HUD rather than leaving distribution to the individual states.[84] Finally, federal control results in a high level of fairness among those who receive benefits[85] because of a standard formula that accounts for variations in local housing costs.[86]

F. Type of Property Interest: Personal or Real Property?

One main problem that cooperative housing has faced is the difficulty of classifying the type of interest a buyer obtains when purchasing a cooperative ownership interest: is it personal property, or is it real property?

79. WeOwn.Net, Ownership Models, http://www.weown.net/OwnershipModels.htm (last visited Oct. 1, 2006).

80. *See* discussion *infra* Part III.D.2.

81. G. Thomas Kingsley, *Federal Housing Assistance and Welfare Reform: Uncharted Territory*, 1997 URB. INST. 2, *available at* http://www.urban.org/uploadedPDF/anf_a19.pdf.

82. *Id*.

83. *Id*. To qualify for Section 8 vouchers, for example, the applicant must meet specified income requirements and then must "apply to a local public housing agency (PHA) that administers [the] program. When an eligible family comes to the top of the PHA's housing choice voucher waiting list, the PHA issues a housing choice voucher to the family." U.S. Dep't of Hous. & Urb. Dev., Tenant Based Vouchers, http://www.hud.gov/offices/pih/programs/hcv/tenant.cfm (last visited Oct. 1, 2006); *see also* 24 C.F.R. § 982.202 (2006).

84. Kingsley, *supra* note 81.

85. Because federal housing assistance is not an entitlement, there is fundamental unfairness in that those who receive benefits are treated equally, whereas those who do not receive benefits get nothing. *Id*.

86. The standard assistance calculation requires recipients to direct 30% of their income to housing payments, with the remainder of the rental charges being subsidized. *See generally* 24 C.F.R. § 982 (2006); Kingsley, *supra* note 81.

1. THE SUPREME COURT'S ANSWER IN *FORMAN*

The stage began to be set for the Supreme Court to rule on the personal-versus-real property issue in 1965, when Riverbay Corporation ("Riverbay"), the organization that owned and operated Co-op City, began recruiting prospective residents.[87] After Riverbay's initial cost estimates proved to be grossly low,[88] fifty-seven residents who joined Co-op City based on the 1965 estimates sued on behalf of the other 15,372 cooperative members seeking tens of millions of dollars in damages.[89] The residents based their claims on the Securities Act of 1933[90] and the Securities Exchange Act of 1934,[91] claiming that the information distributed in 1965 indicated that developers would bear any increase in costs.[92]

United Housing Foundation (UHF), the non-profit group responsible for starting Co-op City and forming Riverbay,[93] moved to dismiss the case based on the premise that the federal court lacked jurisdiction because the "shares of stock in Riverbay were not 'securities' within the definitional sections of the federal Securities Acts."[94] The district court agreed and dismissed the case, finding that semantically referring to the interests as "stock" did not automatically trigger the federal securities acts.[95]

On appeal, the Second Circuit reversed on two grounds.[96] First, the court found that the definitional sections in the securities acts specifically included "stock," and a literal application was necessary.[97] Second, it held that the sale of the interests "was an investment contract" subject to the federal securities acts.[98]

The appeals court decision provided the opportunity for the Supreme Court to rule authoritatively on the "securities" nature of cooperative ownership. In *United Housing Foundation, Inc. v. Forman*,[99] the

87. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 841, 843 (1975).
88. *See* discussion *supra* Part II.C.
89. *Forman*, 421 U.S. at 844.
90. *Id.* at 845.
91. *Id.*
92. *Id.* at 844.
93. *Id.* at 841.
94. *Id.* at 845.
95. *Id.* at 840 (citing Forman v. Cmty. Servs., Inc., 366 F. Supp. 1117 (S.D.N.Y. 1973), *rev'd*, 500 F.2d 1246 (2d Cir. 1974), *rev'd*, 421 U.S. 837 (1975)).
96. *Id.* at 846 (citing Forman v. Cmty. Servs., Inc., 500 F.2d 1246 (2d Cir. 1974), *rev'd*, 421 U.S. 837 (1975)).
97. *Id.*
98. *Id.*
99. *Id.* at 840.

Court held that traditional cooperative housing shares, regardless of the attendant nomenclature, were not securities within the context of the federal securities acts.[100]

The *Forman* Court's underlying analysis of why cooperative housing shares are not securities illustrated the true nature of this type of ownership:

> Common sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock. These shares have none of the characteristics "that in our commercial world fall within the ordinary concept of a security."[101]

In addition to this commonsense analysis, *Forman* clarified how to determine whether the subject of a transaction is a security: disregard form, and focus on substance, with an "emphasis . . . on [the] economic reality."[102] Therefore, the Second Circuit's literal approach was misplaced, for simply calling a property interest "stock" does not make it a security.[103]

2. THE INTERNAL REVENUE SERVICE'S ANSWER

The Internal Revenue Service (IRS) similarly recognizes the real property nature of cooperative ownership. Under Section 1031 of the tax code, property owned "for productive use in a trade or business or for investment" may be exchanged "for property of like kind" without recognizing tax liability.[104] Although stock is explicitly excluded from coverage under Section 1031,[105] the IRS recognizes function over form by classifying cooperative housing shares as real property interests that are like kind with condominium interests.[106]

100. *Id.* at 847.
101. *Id.* at 851 (quoting H.R. REP. NO. 73-85, at 11 (1933)).
102. *Id.* at 848 (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).
103. *Id.* at 850. The Court notes, however, that although the name is not dispositive, it is also not "wholly irrelevant." *Id.*
104. I.R.C. § 1031(a)(1) (2006).
105. *See id.* § 1031(a)(2).
106. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200137032 (June 15, 2001) (finding that "[t]he Taxpayer's presently held [cooperative] interest as tenant, and the condominium to be received in the exchange, are both real property interests . . . for purposes of section 1031 of the Code").

3. THE FEDERAL MORTGAGE INSURANCE ANSWER

Congress has long had a mortgage insurance program for cooperative housing, but unlike the Supreme Court and the IRS, the statute treats cooperative housing as rental property rather than real property owned by individual members.[107] It does so in three ways. First, the statute focuses on the "projects insurable" under the program,[108] thus indicating a blanket mortgage rather than individual mortgages.[109] Second, the statute explicitly ties itself to the rental property insurance program.[110] Third, the statute severely limits the ability of individual cooperative members to hold insurance mortgages on their individual dwelling units.[111]

Each of the views discussed above recognize different elements of cooperative housing's nature. The *Forman* Court and the IRS view cooperative housing as real property ownership. The cooperative mortgage insurance program treats cooperative housing as primarily rental property. Understanding the basic nature of cooperative housing and reconciling these conflicting views of cooperative ownership is essential to ensuring that lenders who are unfamiliar with this type of ownership can fund it just as they would fund traditional home or condominium ownership.

III. Analysis

Housing policy has taken a long road from government-sponsored public housing to predominantly privatized low-income housing. Successful programs such as Section 8 and reverse mortgages are meeting many of the needs of our country's elderly popula-

107. *See* 12 U.S.C. § 1715e (2005).
108. *See id.* § 1715e(a). *Compare id.* § 1715e (focusing on blanket mortgages for cooperative ownership), *with id.* § 1715y(a) (2005) (establishing the purpose of the condominium mortgage insurance program as "increasing the supply [of] privately owned dwelling units . . . which [are] part of a multifamily project"). For a more detailed discussion on how mortgage lending works for cooperative housing, see discussion *infra* Part III.D.2.
109. A blanket mortgage is a single mortgage covering the entire property. Krasnowiecki, *supra* note 42, at 473.
110. *See* 12 U.S.C. § 1715e(a) (extending the authority granted under the rental property insurance statute to forms of cooperative ownership); *id.* § 1715e(e) (specifically incorporating provisions of the rental property insurance statute); *see also id.* § 1713.
111. *See id.* § 1715e(d). For a more detailed discussion on how the statute limits the ability of cooperative members to hold insured mortgages on their individual dwelling units, see discussion *infra* Part III.D.2.

tion, but there are still deficiencies. Cooperative housing can and should play a larger role in meeting those needs.

This section begins by analyzing the deficiencies of the primary mechanisms for administering housing support for the low- and fixed-income elderly and the negative effects of the trend toward converting cooperatives into condominium ownership. Then it takes an in-depth look at how and why cooperative housing can more effectively meet the housing needs of many low- and fixed-income elderly.

A. The Deficiencies of Reverse Mortgages and Section 8

1. THE FAILURE OF REVERSE MORTGAGES TO REACH THE ELDERLY POOR

Although reverse mortgages are a wonderful option for elderly people who may have transitioned to living on a fixed income,[112] the statute does not apply to people who do not own homes or whose homes remain highly leveraged.[113] Although survey data show that this is not a concern for the majority of the elderly,[114] approximately 4.32 million elderly are renters and are therefore excluded from taking advantage of the benefit.[115] In addition, nearly half of elderly renters have a household income of $13,540 or less.[116] This reflects the inability of the reverse mortgage program to assist those elderly who are in the most need.[117]

Prior to 2000, the statute even restricted the term "mortgage" to "a first mortgage on real estate, in fee simple, or on a leasehold,"[118]

112. There is some question about the actual scope of reverse mortgages and whether they actually alleviate poverty. Nandinee K. Kutty, *The Scope for Poverty Alleviation Among Elderly Home-owners in the United States Through Reverse Mortgages*, 35 URB. STUD. 113, 113–14 (1998). Some scholars, however, believe reverse mortgages could raise as many as 20% of the elderly poor above the poverty line. *Id*. at 115.

113. Queener, *supra* note 58, at 888 (explaining that reverse mortgages are available to those who own their homes free and clear or who have very low mortgage balances). *See generally* 12 U.S.C. § 1715z-20.

114. ADMIN. ON AGING, DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2004, at 11 (2004), *available at* http://assets.aarp.org/rgcenter/general/profile_2004.pdf [hereinafter ADMIN. ON AGING PROFILE] (noting that in 2003, 80% of households with an older person at the head owned homes, of which 72% were mortgage free).

115. *Id*.

116. *Id*.

117. *Id*.

118. 12 U.S.C. § 1707(a) (2005). Prior to 2000, the definition of mortgage in § 1707(a) was specifically incorporated into 12 U.S.C. § 1715z-20 via subsection (b)(2).

thus excluding elderly owners of cooperative housing interests because such interests are more likely to be considered personal property than real property held in fee simple.[119]

In 2000, Congress changed the reverse mortgage statute's definition of mortgage by decoupling it from the standard definition of mortgage and inserting a definition that includes cooperative ownership.[120] While superficially positive, the definition still limits the cooperative homeowner's access to a reverse mortgage. The revised definition of "mortgage" includes a "first mortgage or first lien on real estate, in fee simple, on all stock allocated to a dwelling in a residential cooperative housing corporation, or on a leasehold."[121] In addition, the statute further dictates that the mortgage must "be secured by a dwelling that is designed principally for a 1- to 4-family residence," thus restricting cooperatives that have more than four dwelling units from obtaining the benefit.[122]

Although Congress took a step in the right direction with the 2000 amendment, it did not go far enough to assuage the fears of lenders, many of whom remain hesitant to work with cooperative shareholders in reverse mortgages. This illustrates the national housing policy's oversight or intentional exclusion of the cooperative shareowner from programs designed to assist the elderly.

2. THE OLD GET OLDER: WAITING FOR SECTION 8 VOUCHERS

Although waiting lists may be one indicator of a government-supported housing program's success,[123] mere demand cannot serve as the primary indicator of a program's effectiveness.

According to the Department of Health and Human Services' Administration on Aging (AoA), 18.1 million Americans were between the ages of sixty-five and seventy-four in the year 2000.[124] If

119. CHC, *supra* note 58 (stating that a "housing cooperator's . . . interest (in most states) is considered personal, rather than real, property").

120. *Compare* 12 U.S.C. § 1715z-20(b)(2) (1998), *with* 12 U.S.C. § 1715z-20(b)(4)–(5) (2005). 12 U.S.C. § 1707, which provides the general definitions for the federal mortgage insurance program, narrowly defines mortgage as a "first mortgage on real estate, in fee simple or on a leasehold." 12 U.S.C. § 1707.

121. 12 U.S.C. § 1715z-20(b)(4)–(5).

122. *Id.* § 1715z-20(d)(3).

123. *See, e.g.*, Schill, *supra* note 47, at 898–99 (lauding the satisfaction of consumers of public housing and its attendant living conditions based on the presence of "extremely long waiting lists").

124. ADMIN. ON AGING, DEP'T OF HEALTH & HUMAN SERVS., AGING INTO THE 21ST CENTURY (1996), *available at* http://www.aoa.gov/prof/Statistics/

these 18.1 million Americans retired at age sixty-five, became dependent on fixed-income Social Security benefits, and sought Section 8 benefits to assist with housing, nearly six million would die before qualifying for Section 8.[125] Considering that are also nearly six million Americans over the age of sixty-five are also poor or "near poor"[126] and have limited access to medical care, it is likely that many of those six million waiting to qualify for Section 8 would also be the ones in greatest need. In addition, based on wait times of ten years, more than half of the life expectancy for these elderly would pass before they received their Section 8 benefits.[127] Therefore, while the Section 8 program's success is commendable in the aggregate,[128] its timing deficiencies are simply unacceptable in the context of the elderly.[129]

B. The Damaging Results of Condo Conversion

One of the primary challenges facing cooperative housing is the lure of converting these properties into condominiums. Led by the Hawaiian congressional delegation, members of both the House and the Senate introduced bills during 2005 aimed at removing tax liability for individual leaseholders in a cooperative who convert their ownership into fee simple condominium ownership.[130] Although these proposals provide an exclusion for government-subsidized cooperatives,[131] all subsidized cooperatives will eventually qualify as owners pay off their subsidized mortgages.[132]

future_growth/aging21/demography.asp [hereinafter AGING INTO THE 21ST CENTURY].

125. *See* discussion *supra* Part III.A.2. The AoA projects that there will be nearly 12.68 million elderly between the ages of seventy-five and eighty-four in 2010. AGING INTO THE 21ST CENTURY, *supra* note 124.

126. ADMIN. ON AGING PROFILE, *supra* note 114. This report classifies the near poor as those whose wages place them at more than 100% but less than 125% of the poverty level. *Id*.

127. *Id*. at 1 (noting that life expectancy for those reaching the age of sixty-five averages 18.2 years for men and women combined).

128. As of the year 2000, 15%, or approximately 210,000, of those served by the Section 8 program were elderly. HOUSING ASSISTANCE, *supra* note 74, at iii.

129. *See* discussion *supra* Part II.D.1.

130. H.R. 2476, 109th Cong. (2005) (suggesting that gross income should exclude gains from the sale of cooperative housing and certain other leased fee interests); S. 83, 109th Cong. (2005) (specifically asking for the removal of tax consequences of converting from cooperative housing into condominiums).

131. S. 83. Although the Senate bill specifically excludes any government sponsored financing for affordable housing cooperatives, any such cooperative will fall within the scope of this bill once government financing is repaid because

While condominium conversions come with the promise of substantial returns, they can also result in adverse effects on the elderly.[133] In particular, removing the benefits of communal resourcing that are unique to cooperative housing leaves the elderly to individually shoulder the burden of the highly variable costs associated with ownership while living on fixed incomes.

C. The Superiority of Cooperatives in Providing for the Elderly

With an understanding of the negative relationship between current housing mechanisms and cooperatives, it is important to assess the benefits of cooperative ownership, the communal benefits of pooled resources for the elderly, and the broader benefits of cooperative ownership on the community at-large.

1. COOPERATIVES PROVIDE HOME OWNERSHIP

In *Forman*, the Court recognized that the most important characteristic of a housing cooperative is that it is a home.[134] Having dismissed the dispositive nature of the term "stock" as applied to the cooperative housing interest, the Court applied the test for assessing the nature of such cooperative housing interests.[135] The Court explained that "[t]he touchstone [of a security] is [the] presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[136] The Court held that the federal securities acts are irrelevant when personal consumption, such as living in cooperative housing, is the motive of the purchaser.[137] Unfortunately this accurate characteri-

the cooperative would no longer "include[] financing under any Federal, State, or local program." *See id.* § 1(B)(3).

132. The mortgage subsidy programs established under the Housing Act of 1968 were suspended in 1973. *See* Tucker, *supra* note 34. The result is that properties funded by these programs under forty-year mortgages will reach maturity by 2013, leaving their owners free to convert them to condominiums within the bounds of the proposed tax benefits.

133. Lisa A. Steinhardt, *Unit Owners' Ability to Cancel Contracts Under the Condominium Act*, 54 BROOK. L. REV. 589, 610 (1988) (citing Victoria A. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 188, 188–89 (1983); Kathleen Nesi, Note, *Condominium Conversions—Balancing Tenants' Rights and Property Owners' Interests*, 27 WAYNE L. REV. 349, 353 (1980)).

134. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851 (1975).

135. *See generally id.* at 851–53.

136. *Id.* at 852.

137. *Id.* at 852–53.

zation fails to permeate other areas of the law, leaving cooperative shareowners in an ownership limbo, owning neither a true security nor a true home.

2. POOLING RESOURCES IS ESSENTIAL

One of the primary benefits of cooperative ownership is that it provides the financial benefits of pooled resources, as with rentals, while creating "a community of interdependent, jointly responsible members."[138] Pooled resources can be especially beneficial to elderly people living on a fixed income.

Literature on affordable housing tends to lump the elderly into a general category of low-income individuals.[139] This narrow approach overlooks important factors and does not develop a holistic housing policy for the elderly. The fixed-income nature of social security, places the low-income elderly in a vastly different situation than low-income workers, who have a significantly higher potential to increase their income. Effective housing policy should account for these differences and attempt to maximize resources among the fixed-income elderly.

For example, assume that a resident in a condominium complex wakes up on a frigid winter morning and goes to the thermostat only to find that the furnace no longer works. As a condominium owner, the resident must find and pay for the replacement furnace, individually absorbing the full brunt of this sudden spike in cost because there is no pooling of resources.[140] If the same situation arises in the cooperative housing environment, the resident feels less of a sting from replacing the furnace because the corporation owns the unit and the pooled resources of all residents will cover such isolated costs.[141]

138. Simon, *supra* note 49, at 1366.

139. *See generally, e.g.*, Steinhardt, *supra* note 133, at 594 (lumping condominium and cooperative units together when looking at their proportion of the real estate market).

140. *See* Rebecca M. Ginzburg, *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in* Belle Terre, 83 B.U. L. REV. 875, 891 (2003). Though Ms. Ginzburg's paper discusses single unit cohousing (where the residents share relatively intimate common areas such as a kitchen) rather than multi-unit cooperative housing (where the residents share relatively public common areas such as playgrounds), the principles of "shared resources, companionship, and assistance available" are very similar. *Id.*

141. *See* Sedo, *supra* note 14, at 262 (noting that all forms of cooperative ownership "share a similar commitment to cooperative principles and a desire to improve the individual's economic situation by banding with other individuals that have similar economic interests in a democratic and fair manner").

This example illustrates how a cooperative housing system is more effective than a condominium or other fee simple ownership system for elderly residents living on a fixed income. Further supporting this proposition, empirical research involving elderly residents of cooperative-style living in Sweden and Denmark revealed that more than half of those surveyed identified "escaping from worries about house and garden management" as a significant factor in their decision to move into such housing.[142]

3. PROVIDING A SENSE OF WORTH AND COMMUNITY

Housing cooperatives allow the elderly resident to benefit from pooled resources while still realizing the additional benefits of a sense of ownership and a sense of community. Although the benefits of communal resourcing are of particular value to elderly people on fixed incomes, they are also valuable to other community members. Unlike the wage-earning poor, members of the fixed-income elderly population receive their income from sources such as Social Security, retirement investments, or pensions that do not require any time commitment. Therefore, the elderly have more time-based resources to contribute to their communities, including serving on committees, acting as directors on the board, and beautifying the property. This ability to be a productive member of the community provides the elderly with an enhanced sense of worth within the cooperative environment, and their contributions can benefit the entire cooperative community.

4. THE COMMUNITY AT-LARGE BENEFITS FROM COOPERATIVE OWNERSHIP

The general idea behind cohousing communities is compelling, particularly in a world where technology limits direct human contact and interaction among neighbors.[143] In fact, many disciplines agree

142. Jung Shin Choi, *Evaluation of Community Planning and Life of Senior Cohousing Projects in Northern European Countries*, 12 EUR. PLAN. STUD. 1189, 1203 (2004). Some northern European countries have extraordinarily high home ownership rates among the elderly, reaching as high as 90% in Norway. Lars Gulbrandsen & Asmund Langsether, *Family Transactions in the Norwegian Housing Market*, 20 HOUSING, THEORY & SOC'Y 137, 137 (2003).

143. *See* Franzese, *supra* note 8, at 557.

that a "sense of community is no longer a natural by-product of daily life."[144] This is particularly true of the noninstitutionalized elderly.[145]

Cooperative housing furthers the proposition that community matters.[146] Despite problems with the common interest community "there is hope and promise in the construct. Precisely because of their flaws as well as their potential, common interest communities have the capacity to be catalysts for a renewed, revitalized sense of community and sense of place."[147]

One commentator suggests that the term "'[c]ommon interest community' has become a misnomer of sorts"[148] because there is a constant struggle in cohousing communities between the common interests of the residents and the need for rules to govern unpopular behavior. In the context of cooperative ownership and the low- or fixed-income elderly, this note suggests that a more appropriate moniker than "common interest communities" is "*community* interest communities." This terminology highlights the idea that the community at large has a vested interest in individual cohousing communities and how they operate.[149] So viewed, the cohousing community is subject both to internal common interests as well as to broader community interests.

D. The Ups and Downs of Cooperative Ownership

1. MAINTAINING AFFORDABILITY AND PROMOTING COMMUNITY

Although community is a necessary element of housing policy, it is often overlooked and in need of rejuvenation. Additionally, housing policy requires viable low-income housing options to be available in the market. Cooperative housing can play a crucial role in the development of both of these policy concerns.

144. *Id*. at 565 (quoting Stephen E. Cochrun, *Understanding and Enhancing Neighborhood Sense of Community*, 9 J. PLAN. LITERATURE 92, 92 (1994)).
145. ADMIN. ON AGING PROFILE, *supra* note 114, at 5.
146. Franzese, *supra* note 8, at 560.
147. *Id*.
148. *Id*.
149. Various communities are experimenting with innovative ownership models designed to bring the benefits of long-term, quality affordable housing. *See generally* Ed Finkel, *Affordable Forever: As the So-Called Housing "Bubble" Continues to Inflate and the Number of Subsidized Units Continues to Shrink, Many Cities Are Turning to Community Land Trusts to Narrow the Gap*, PLANNING, Nov. 2005, at 24. One of the most promising models is to use a land trust to control appreciation in the housing unit. *Id.*

Balancing rule enforcement with the need to build community is a key concern for those developing and living in cohousing environments, including cooperative housing.[150] The predictability and conformity that support the creation of rules can also create anti-community sentiments as conflicts arise in enforcing those rules.[151] In some cases, these disagreements have become so prevalent that state legislatures have barred certain restrictions.[152]

Cooperative housing's corporate structure provides effective means of restricting various forms of action in relation to ownership. One of the primary tools to maintain the affordability of cooperative housing is to restrict the equity that accrues on the ownership by implementing caps requiring payment of excess gains to the city[153] or by providing a regulated schedule for equity advancement.[154]

Critics of the cooperative ownership model argue that the limited equity drawn from the resale of cooperative shares thwarts the ability of the moving party to buy property on the open market without the equity drawn from the sale of the cooperative shares.[155] The reality, however, is that if appreciation runs unconstrained, a reduction in the low-income housing stock is guaranteed.[156] Additionally,

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150. Those familiar with the famous 1990s sitcom Seinfeld may recall the "Soup Nazi," the owner of a local "soup place" who requires ordering perfection and who tells failing customers, "No soup for you!" *Seinfeld: The Soup Nazi* (NBC television broadcast Nov. 2, 1995). Part of the underlying humor is the illogical rationale that saying or doing something slightly out of the norm would lead an entrepreneur to forgo the profits from a sale of soup. Such humor is lost on cohousing communities bound by rules and aggressive enforcement.

151. *See* Franzese, *supra* note 8, at 558. For an insightful summary of the types of disagreements that can arise in cohousing situations, see *id.* at 574.

152. Across the nation, legislatures are considering other bills to curb overreaching restrictions and potentially troublesome association and board action. For example, in Nevada, legislative enactments have created an ombudsman's office to assist CIC residents with association problems and to require that association managers be licensed. "In Vermont, a 'right to dry' bill was introduced last year that would void most prohibitions on clotheslines . . . . [I]n Virginia, legislation has been proposed that would make it a misdemeanor for any entity or locality to prohibit a homeowner from flying the American flag." In California, legislation was recently enacted to prohibit associations from banning pets.

Id. at 575 (quoting Laura C. Trognitz, *Yes, It's My Castle*, A.B.A. J., June 2000, at 30, 31).

153. *See* Simon, *supra* note 49, at 1362–63.

154. *See, e.g.*, Winfield Vill. Coop., Inc., Bylaws, Article III § 8(d)(4), http://www.winfieldvillage.com/pdf/bylaws.pdf (last visited Oct. 1, 2006).

155. *See* Simon, *supra* note 49, at 1363.

156. *See id.*

there is a distinct possibility that, in the new market, the moving party will either no longer be considered low-income or will not find higher housing costs.[157]

2. INADEQUACY OF LENDING OPTIONS

When determining which legal form of cohousing to adopt, a group better served by cooperative ownership may select a less suitable means simply because the organizational process is too complicated or because potential lenders are unfamiliar or unwilling to deal with cooperatives. In one research study, some cohousing groups rejected cooperative style ownership not because there was a better option available to meet their philosophical objectives,[158] but due to real or anticipated difficulties in obtaining a mortgage.[159] One group that did organize as a cooperative relied on the experience of an attorney who handled the group's legal ownership issues.[160]

The primary difference between cooperative ownership and other cohousing options is based on the form of the financing itself,[161] rather than on the substance of the residential nature of the ownership. In a cooperative, the mortgage is a blanket mortgage covering the entire property.[162] As such, the potential lender must view the property through the lens of collateral issues such as appraisal values—which tend to align with rental property—and potentially make difficult foreclosure decisions if even one member of the group is negligent on his or her portion of the loan.[163] In addition, lenders are hesitant to finance loans for cooperative housing because Fannie Mae, the Federal National Mortgage Association, does not purchase such loans.[164]

157. *See id*.
158. *See* Fenster, *supra* note 7, at 26–32.
159. *Id.* at 21.
160. The attorney, Susan McGreivy, was "a gay rights activist and attorney, who previously worked for the ACLU in Los Angeles. While not a member of the New York Bar Association, McGreivy [oversaw] the production of most of EVCC's agreements and documents with the help of local counsel." *Id.* at 37–38.
161. Krasnowiecki, *supra* note 42 ("In a cooperative, the building itself is owned by a corporation that, in turn, is controlled by the residents who hold voting shares of stock in the corporation. The 'ownership' which the residents have in their units is represented by long-term renewable leases plus the voting stock.").
162. *Id.*; *see* Fenster, *supra* note 7, at 21.
163. *See* Fenster, *supra* note 7, at 21.
164. *Id.* (noting that most banks will not loan to cooperative housing groups because the form is so unfamiliar, a fact magnified by Fannie Mae's unwillingness to purchase cooperative loans).

The cooperative mortgage insurance program augments these problems by failing to truly allow for individual insured mortgages in cooperative developments. The program restricts insurable individual mortgages in cooperatives to situations where the property is initially owned by a "nonprofit corporation or nonprofit trust organized for the purpose of construction of homes for members of the corporation."[165] It further limits the scope of insurable individual mortgages to mortgages that fully or partially replace the outstanding blanket mortgage.[166] Finally, individual mortgages may not exceed the individual property's pro rata share of the blanket mortgage balance.[167] These restrictions eliminate access to individual mortgages in two significant ways. First, many cooperative do not qualify under the "purpose of construction" provision. Second, the purchase price of a cooperative share is a cost that is above and beyond the obligations associated with the blanket mortgage. These restrictions contrast starkly with the condominium insurance program, which focuses extensively on individual unit ownership.[168]

These problems with financing cooperatives were also part of the primary drive to develop condominium ownership.[169] Condominium ownership fulfills the self-interested motives of potential owners of individual units in a multi-unit complex.[170] This is because condominium ownership overcomes the challenges associated with cooperative ownership such as limited appreciation gains that result from lower appraisal values and increased costs for subsequent purchasers who must maintain two separate payments—one for their portion of the original blanket mortgage plus any additional funds borrowed to purchase the previous owner's equity.[171] Condominium ownership, on the other hand, is financed on a unit-by-unit basis rather than being subject to a blanket mortgage for the entire property. This form of ownership and financing provides the lender with ease of under-

165. 12 U.S.C. § 1715e(a)(2) (2005).

166. *See id*. § 1715e(d) (stating that "a mortgage on any project of a corporation or trust of the character described in paragraph (2) of subsection (a) of this section may provide that, at any time after the completion of the construction of the project, such mortgage may be replaced, in whole or in part, by individual mortgages covering each individual dwelling in the project").

167. *See id*.

168. *See id*. §§ 1715y(a), (b).

169. Fenster, *supra* note 7, at 21.

170. *See id.*; Krasnowiecki, *supra* note 42, at 473–77.

171. For a more detailed discussion on how this process works, see Krasnowiecki, *supra* note 42, at 473–74.

standing, simple recourse in the event of default, and the backing of Fannie Mae. It also comes with the full backing of the federal mortgage insurance program.[172]

Fixed-income elderly people who are likely to live out the remainder of their days in some form of multifamily housing have limited self-interested motives for selecting condominium housing. Additionally, the reverse mortgage options for cooperative housing allow them to capitalize on their equity without the concerns of having to pay both their standard monthly housing charge and the cost of an equity loan.[173] Particularly in the context of low- or fixed-income elderly, limitations on alienability and suppression of appreciation are part of the economic benefits inherent in cooperative ownership.[174] Therefore, taking steps to expand access to and availability of cooperative housing will benefit this elderly population.

IV. Recommendation

Cohousing in general provides a useful means of integrating a sense of community back into our communities. Even advertisers for cohousing endeavors recognize the widespread longing to be a part of a community.[175] Yet however convincingly advertising campaigns portray and sell the hope of community, the potential for long-term success of cooperative housing remains uncertain.

The Supreme Court and the IRS already recognize function over form by treating residential cooperatives as home ownership.[176] They understand that the corporations that own cooperative housing possess one dominant asset: real property. The individual shareholders, meanwhile, have one dominant right: to occupy a dwelling unit. Despite these realities, cooperative ownership remains distant from the mainstream definition of real property ownership.

172. 12 U.S.C. § 1715y.

173. *See* discussion *supra* Part II.D.3.

174. Cooperative ownership provides "security of tenure and enable[s] the owner to recover his investment when he needs to leave, but den[ies] him the opportunity to capitalize [on] his surplus in the home or in the scarcity value of the site." Simon, *supra* note 49, at 1363.

175. Franzese, *supra* note 8, at 571 (noting that the owners of CICs intentionally use the Internet and other advertising media to "use this longing to sell [the] community").

176. *See supra* Part II.F.

Cooperative housing is a unique form of property that should be integrated into the so-called "'third sector' of affordable housing."[177] Third-sector housing is characterized as privately owned, socially focused, and price-restricted[178]—a perfect description of cooperative housing. If, however, the cooperative housing disappears or remains unused, it is useless as an element of housing policy.

Ensuring the effective preservation and growth of cooperative housing requires aggressive action. This note offers two general proposals to integrate cooperative housing into a comprehensive housing plan for the low- and fixed-income elderly: (1) alleviate lender fears by restructuring the cooperative mortgage insurance program to allow individual mortgages that rise above the blanket mortgage; and (2) provide incentives to encourage cooperative ownership.

A. Restructuring the Mortgage Insurance Program

The primary obstacle to moving cooperative ownership into the mainstream is blanket mortgage financing. It is time for mortgage insurance laws to welcome cooperative housing into the fold as a unique but nonetheless related sibling of condominium ownership and to alleviate the fear among individual lenders of dealing with cooperative ownership by providing protection and incentives. These changes can be accomplished by following a course of action similar to that used by advocates of condominium ownership.[179] Complexities surrounding the legal form of condominium ownership originally slowed the rise of the condominium.[180] Ultimately, condominium ownership survived because of the promulgation of a model statute for condominium-style ownership,[181] which Congress supported by implementing the Condominium Mortgage Insurance Program.[182] Cooperative housing must also have the kind of support that fosters individual ownership in order to enhance the viability of continued cooperative ownership. Therefore, the cooperative mortgage insurance program should follow the condominium model and offer broader access to insured individual mortgages on cooperative inter-

177. Fenster, *supra* note 7, at 51.
178. *Id*.
179. See discussion *supra* notes 42–44 and accompanying text.
180. *See* Krasnowiecki, *supra* note 42, at 476.
181. *See* UNIF. CONDO. ACT (1980), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1980s/uca80.htm.
182. *See* Krasnowiecki, *supra* note 42, at 476; *see also* 12 U.S.C. § 1715y.

ests and remove the caps associated with the blanket mortgage. These changes would help cooperative ownership become a mainstream housing option.

B. Creating Incentives for Cooperative Ownership

Helping cooperative housing ownership move into the mainstream of real property is not in itself a panacea for cooperative housing because of its unique ownership form. Housing policy must also provide adequate incentives for actual ownership and use.

Rather than accept the Hawaiian congressional delegation's proposals to exclude benefits realized through condominium conversion from gross income,[183] the government should adopt a tax policy that encourages conversion to cooperative ownership. The nature of such a policy would be complex due to the minimal value of cooperative shares as compared to fee simple ownership. Moreover, the government could provide individual incentives to people over the age of fifty-five who choose to live in cooperative housing. One incentive could take the form of a permanent exemption for the first $50,000 in cooperative equity from estate taxes or tax credits for taxpayers who qualify for and live in cooperative housing designated for low- to moderate-income residents.[184] Even if tax incentives are not possible, maintaining the status quo provides at least some protection for cooperative housing by taxing the realized gains of conversion away from cooperative ownership to condominiums.

In addition, the federal government should acknowledge the rental nature of cooperative housing by continuing to offer Section 8 vouchers for cooperative residents. To curb abuses potentially arising out of the dual nature of the cooperative as both an ownership and rental property, such vouchers may be limited only to qualified elderly. Specifically, the government can expand the Section 8 program by creating a subclass of vouchers that are exclusively for the use of

183. *See supra* note 130 and accompanying text.

184. The success of incentives used in the late seventies and early eighties to prompt rehabilitation of historic buildings indicates that tax credits may also be an effective means to facilitate development of new cooperative housing. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 514 (4th ed. 2004) ("Before 1976, the laws indirectly encouraged the destruction of historic structures since demolition costs could be written off. Tax incentives were created in 1976, and revised in 1981, in the form of rehabilitation investment credits. As a consequence, significant amounts of money were put into historic properties between 1976 and 1986.").

the elderly, with priority given to those seeking to reside in qualified cooperative housing.

By encouraging cooperative housing's acceptance in the mainstream and providing incentives for cooperative housing's creation and use, the federal government can solidify cooperative ownership as a fundamental part of a comprehensive housing strategy and as a viable option for housing the low- and fixed-income elderly.

V. Conclusion

Cooperative housing is not a panacea to solve the problems associated with housing the elderly in the United States. It is, however, a valuable arrow in the relatively small quiver of options available to the elderly. To maximize its benefits, it is time to move cooperative housing into the mainstream. Although cooperative ownership does not have the technical characteristics of real property, function rather than form must dictate its true place in housing policy.

Cooperative housing should be a meaningful part of a holistic housing policy that provides a uniquely valuable housing option for low- and fixed-income elderly. By coupling the financial benefits of pooled resources with the emotional benefits that come from a sense of ownership and community, cooperative housing is the perfect fit for low- and fixed-income elderly. To achieve the successful implementation of cooperative housing as an element of an effective housing policy, cooperative shares must be universally accepted as real property. Cooperative share ownership is functionally real estate ownership with tangible rights to occupy a dwelling unit. Welcoming cooperative ownership into the world of real estate will allow the elderly to maximize resources such as reverse mortgages with greater ease, thus improving their quality of life and reducing their dependence on other government-sponsored welfare benefits.