THE STATE OF NEW HAMPSHIRE

BOARD OF MANUFACTURED HOUSING

Walter Bradley	)	
	)	Docket No. 001-97
v.	)	
Forest Park Realty Trust	)	
(Richard & Vicki Messina	)	

Hearing held on April 11, 1997, at Concord, New Hampshire.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Board of Manufactured Housing ("the Board") makes the following findings of fact and conclusions of law and issues the following order in the above-referenced matter.

PARTIES

1. Walter H. Bradley ("Complainant") is, or was at all times relevant to this matter, a lawful tenant of the Forest Park Estates MHP, a manufactured housing community located in Jaffrey, New Hampshire.

2. Forest Park Estates MHP ("the park") is a manufactured housing community located in Jaffrey, New Hampshire. Richard and Vicki Messina, d/b/a/ Forest Park Realty Trust, P.O. Box 912, Milford, NH 03055 are the owners and operators of the park. Mr. Messina appeared pro se before the Board at its hearing and is the author of all correspondence and submissions to the Board in this matter. For convenience, Mr. and Ms. Messina and Forest Park Realty Trust will be referred to as a unified ownership entity by the term "Respondent."

ISSUES PRESENTED

3. Complainant seeks a determination by this Board with respect to the following issue:

   A. Whether Section 4.B of the Forest Park Estates Rules and Regulations ("park rules"), which imposes a ten dollar ($10.00), and as amended effective March 1, 1997, imposes a

twenty dollar ($20.00) per person per month charge for more than two persons in residence, violates RSA 205-A: 2, VIII as applied to a minor child?

PRELIMINARY MATTERS
(Motion To Dismiss)

1. "Good Faith Negotiation"

4. As a preliminary matter, Respondent claims that Complainant has failed to "make a good faith effort to resolve this matter" as certified to in conformity with NH. Admin. R. 201.14(a) on the face of the Complaint. By letter dated February 8, 1997 to the Board, Respondent appears to seek dismissal of the action on this ground. Accordingly, the Board will treat this issue as a motion to dismiss the Complaint.

5. The Board finds that Complainant submitted his Complaint to the Board on January 31, 1997.

6. The Board further finds that Complainant contacted Respondent by handwritten letter dated January 21, 1997, informing Mr. Messina with specificity of the nature of his complaint, inviting dialogue and stating that he would file with the Board seven days from the date of the letter.

7. Mr. Messina does not dispute that he received Complainant's January 21 letter. Indeed, in his February 8 communication to the Board, which the Board is construing as his motion to dismiss, Mr. Messina attached his response to Complainant's letter: a Forest Park Estates memo, dated January 29, 1997 and captioned "Re: Your ltr." That memo states in relevant part:

> "We received your ultimatum; unfortunately, we cannot respond in such a short time. It is unnecessary and unreasonable to demand such a service....Rules were coordinated with legal assistance and state statutes. We shall research and provide you with an answer. In the meantime, do whatever you have to do. It is disappointing to have to deal under duress."

8. The Board views Mr. Bradley's actions in this matter as entirely consistent with Board rules requiring that tenants give notice to park owners or management of their complaint and to attempt to initiate dialogue at least five days prior to filing a complaint.
9. The Board further views Respondent's response -- in particular, his characterization of Mr. Bradley's letter as an "ultimatum" and his refusal to respond in any substantive manner within the statutory five day period -- as constituting a refusal by Mr. Messina to engage in good faith negotiation. Accordingly, Respondent has no basis on this record to seek dismissal of Mr. Bradley's Complaint.
10. Therefore, the Board finds that Respondent's motion to dismiss is without merit and the Motion is DENIED.

2. Jurisdiction of the Board

11. Respondent also argues that the Board lacks jurisdiction over this matter in that the charges at issue constitute "rent," which is beyond the competence of this Board under RSA 205-A:27, II.
12. The Board notes that, under RSA 205-A:27, I, its jurisdiction extends to all matters addressed by RSA 205-A:2; and that this matter arises specifically under RSA 205-A: 2, VIII, which addresses the imposition of surcharges for additional residents.
13. The Board finds that the charge at issue in this matter constitutes a surcharge for an additional resident as contemplated by RSA 205-A:2, VIII (a). Therefore, the Board finds that it has clear jurisdiction to review the matters raised in this Complaint, notwithstanding RSA 205-A:27, II.

3. Federal Preemption

14. At hearing, Respondent appeared to argue that the complaint was also subject to dismissal to the extent based on RSA 205-A:2, VIII(a) because that statute is itself preempted by the Federal Fair Housing Act, 42 U.S.C. sec. 3604 et seq.

15. The apparent basis of the pre-emptive effect asserted by the Respondent is that RSA 205-A:2, VIII(a) "refers" to adults and persons under the age 18. In effect, Respondent argues that, because the Fair Housing Act forbids discrimination against tenants on the basis of, among other things, age and minority, it invalidates those provisions of state statute which restrict the ability of manufactured housing park landlords to impose extra charges on children under the age of 18.

16. This argument is, of course, ludicrous. As an initial matter, the federal Fair Housing Act does not have any generally preemptive effect on state laws which forbid discriminatory treatment of particular classes of tenants, unless such laws are clearly in conflict with the federal statutory scheme. This is not the case here. As set out in more detail below, both the federal Fair Housing Act and RSA 205-A:2, VIII (a) forbid discriminatory treatment of children or of family or residential groups which contain children. As such, the statutes are entirely in harmony and no aspect of RSA 205-A:2, VIII (a) is in conflict with, or pre-empted by federal law.

17. Therefore, Respondent's motion to dismiss the complaint on the basis of federal preemption of the applicable state law is DENIED.

SUBSTANTIVE ISSUES
Findings of Fact

15. Mr. Bradley has resided in the park since October 1992 with his daughter, Jamie, now aged 20.

16. Mr. Bradley testified that his manufactured residence contains two bedrooms and two full baths.

17. The current dispute had its genesis in January 1995, when Ms. Diane Carey moved into Mr. Bradley's residence with her then six-year old daughter, Nicole Reed.

18. Section 4 (B) of the Forest Park Estates Rules and Regulations (the "Park Rules") provides in relevant part:

> Lot Rent for Home and Occupants: Lot rent is based on one or two (1 or 2) persons per home. $10.00 extra per person per month is due with the current lot rent to cover the extra water and sewer used by the extra persons living in the home.

19. Section 4 (C) of the Park Rules provides in relevant part:

> Guests: Residents may have overnight guests staying in the park; however, prior written permission must be obtained for guests staying longer than thirty (30) days and the $10.00 charge per person per month is applicable until the guest leaves. Should the guest wish to become a permanent resident, guest must fill out an application and be approved by Park management in writing.[1]

20. There is no dispute that Ms. Carey originally entered the park as a guest of Mr. Bradley. In or about February of 1995, Mr. Bradley notified park management that Ms. Carey and her daughter would be remaining in his home. Respondent responded with a written notice enclosing an application for residence to be filled out by Ms. Carey.

21. Ms. Carey testified that she sent in the application on her behalf and that of her daughter, but did not submit a $50.00 application fee.

22. The record in this matter does not demonstrate that park management took any further action regarding Ms. Carey and her daughter. The park has not rejected Ms. Carey or her daughter as park residents. Nor has it ever formally accepted Ms. Carey or Ms. Reed as residents. Rather, Respondent appears to have simply refrained from processing the application submitted by Ms. Carey, so that no formal record of action regarding her status exists.

23. However, beginning in January, 1995 and continuing until March 1, 1997, the park assessed Mr. Bradley with a ten dollar per month surcharge for each of Ms. Carey and her minor daughter. Effective March 1, 1997, park management amended its rules to increase the per-person surcharge to twenty dollars ($20.00) and asserts a present intention to impose that charge with respect to both Ms. Carey and her daughter.[2]

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[1] By rule change effective March 1, 1997, Respondent has increased the surcharge for residents or guests to $20.00 per person. But see footnotes 2 and 4 below for a discussion of the potential legal issues posed by this increase.

[2] In testimony, a question emerged as to whether park management's notice to tenants of this and other rules changes -- which were promulgated on or about January 1, 1997 with an effective date of March 1, 1997 --conformed to the requirement of RSA 205-A:XI that rules changes be published at least 90 days prior to becoming effective.

Because this issue was not within the scope of the complaint, the Board does not find as a matter of law that the rules change was defective. However, in light of undisputed testimony establishing that the rules change at issue was not promulgated ninety days in advance of the effective date as required by New Hampshire law, the Board urges Respondent to review with counsel the question of whether he may enforce those rules without first republishing them in a manner which complies with applicable law.

Conclusions of Law

24. RSA 205-A:2, VIII (a) makes it illegal for park management to make or attempt to impose any rule which:

> "Establishes an additional charge or increased rental payments, directly or indirectly, for persons under the age of 18 residing in manufactured housing. The park owner or operator may make reasonable rules governing the number of adults or total number of persons permitted to reside in manufactured housing and may charge an amount not to exceed $10.00 per adult per month where the number of adults residing in manufactured housing exceeds the limit established by such rules.

25. As an initial matter, the proscription against surcharges for children set out in the statute applies, by its terms, to "persons under the age of 18 *residing* in manufactured housing." The complicated history of Ms. Carey's and her daughter's entry into, and continued presence in the park necessitates that the Board address the issue of whether, under the facts presented, Ms. Carey's daughter can be characterized as residing in the park, notwithstanding the fact that management has never formally approved her as a park resident.

A. Residence

26. In this context, the Board finds that Ms. Carey and her daughter have resided with Mr. Bradley in his home continuously since January 1995. The Board further finds that beginning at least as early as February 1995, Respondent imposed and accepted an extra person charge from Mr. Bradley with respect to both Ms. Carey and her daughter.

27. Admittedly, this issue is not clear-cut in that Ms. Carey did not pay an application fee in connection with her application for formal residence for herself and her child and Respondent has not acted on the application. However, more than two years have passed since Ms. Carey and her daughter

moved into the park during which time Respondent has been aware of their presence and has taken no action to contest or clarify their status.

28. Accordingly, and on the basis of the unique circumstances presented in this case, the Board finds that as a matter of common sense and equity, Ms. Carey and her daughter have resided in the park since at least February 1995; that Respondent has been continuously aware of their presence in Mr. Bradley's home; and that Respondent, by accepting an extra person surcharge for their continued residence has, in effect, permitted and recognized them as residents.

29. Accordingly, the Board finds that Nicole Reed, a minor child, has resided in the park since at least February 1, 1995 and, as such she is a "person under the age of 18 residing in manufactured housing" as defined by RSA 205-A:2, VIII (a).[3]

B. <u>Surcharge</u>

30. There is no question but that Respondent has imposed an extra-person surcharge to Complainant's rent for the presence of a minor child in his home since at least February 1, 1995.

31. There is also no question that the imposition of such a charge, either directly or indirectly, for persons under the age of 18 residing in manufactured housing is expressly prohibited by RSA 205-A:2, VIII(a).

32. The Board reaches this conclusion as a simple matter of statutory construction. RSA 205-A:2, VIII (a) contains two linked provisions: First, the statute forbids any direct or indirect surcharge for child residents. Second, the statute explicitly limits the ability of manufactured housing park owners to impose "extra person" surcharges, to *adult* residents. The Board views the legislature's inclusion

of the word "adult" in the scope of the permissive language regarding surcharges as indicative of its intent to broadly ban the application of surcharges -- however characterized -- on children residing in a park.

33. Accordingly, the Board rules that, properly construed, RSA 205-A:2, VIII (a) broadly and generally forbids the imposition of an "extra person" surcharge for minor children residing in a manufactured housing park.[4]

34. However, Respondent argues that the surcharge is not a charge for minor children -- which he acknowledges would be illegal -- but rather a general surcharge on additional *persons* residing in the park, which is facially neutral as regards children and therefore not illegal when applied to a child.

35. In addressing this issue, the Board is mindful that RSA 205-A must be construed consistently with New Hampshire's civil rights laws, which, in this context, provide that New Hampshire citizens have a civil right to be free from discrimination in housing on the basis of, among other factors, age and familial status. RSA 354: 8-15. *See*, Brousseau v. Green Acres Mobile Homes, Inc., 135 N.H. 643, 645 (1992) (decided under prior law) (manufactured housing park may only restrict tenancies by age by conforming with the age limits and procedural requirements of RSA 354-A) See also, *1986 Op. Atty. Gen*. 189 (decided under prior law) (manufactured housing park may not restrict occupancy of tenants merely because they have children).

36. In this context, the Board notes that RSA 354-A:8 declares that:

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[3] In view of this conclusion, the Board notes that it is immaterial whether Nicole is viewed as an approved resident or as a guest under park rules and so whether the charge for her presence in Mr. Bradley's home is assessed under Section 4(B) or 4(C) of the rules.

[4] In addition, the Board notes that the currently effective surcharge of $20.00 per person is illegal even as applied to adults, in that the statute limits any such surcharge to $10.00 per person. RSA 358-A:2, VIII(a) .

> The opportunity to obtain housing without discrimination because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin is hereby recognized and declared a civil right.

37. RSA 354-A:10, II (1995) makes it unlawful:

> To discriminate against any person in the terms, conditions, or privilege of sale or rental of a dwelling or commercial structure, or in the provision of services or facilities in connection therewith, because of age, sex, race, color, marital status, familial status, physical or mental disability, religion or national origin.

38. While New Hampshire's fair housing law is not extensively developed, it has long been established that this state's civil rights laws should be construed in conformity with federal law. Scarborough v. Arnold, 117 N.H. 803 (1977) (decided under prior law).

39. The federal analogue to RSA 354-A: 8-15 is the Fair Housing Act, 42 U.S.C. 3604 *et seq*. Extensive case law has interpreted that statute as forbidding not only direct housing discrimination on the basis of age and family status but also broadly based and facially neutral regulations -- like the surcharge at issue here -- which have a "disparate impact" on a protected class of persons, such as children or families with children. See, e.g., Town of Huntington v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 17 (1988). See also, U.S. v. Badgett, 976 F.2d 1176 (8th Cir. 1992); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977); Casa Marie, Inc. v. Superior Court of Puerto Rico for the District of Arecibo, 752 F.Supp. 1152, 1168 (D. Puerto Rico 1990).

40. Under federal fair housing principles, facially neutral housing policies which have a "significant discriminatory effect" on a protected class of persons may be viewed as having an impermissibly

disparate impact on such persons.[5] Establishment of a disparate impact shifts the burden of persuasion to the defendant to establish a legitimate purpose for regulation or policy. If such a legitimate purpose can be established, the complaining party must be "afforded a fair opportunity to show that the defendant's stated reason for the discrimination was in fact pretext." Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

41. Applied to the facts of this case, there is no question but that the park's extra person charge, though facially neutral with respect to children, places a particularized burden --i.e., has a potentially disparate impact -- on any family or residential group which includes minor children over the age of one. Thus, while the charge as applied to adults may be incurred voluntarily by a resident's acceptance of additional adult co-residents, the charge as applied to minor children is essentially a direct penalty imposed on residents for giving birth or adopting, or, as in the instant case, for expanding a household to include a partner with a child.

42. The Board views the imposition of such a penalty as plainly inconsistent with the broad statutory language of RSA 205-A:2, VIII(a).

43. The Board notes that, at hearing, Respondent asserted a legitimate business justification for the surcharge in the form of additional costs for services attributable to extra persons. The Board held open the record in this matter to permit Respondent an opportunity to establish the nature and level of costs imposed on the park by the presence of minor children. However, by letter to the Board dated April 28, 1997, Respondent declined to provide any such information. Thus the Board is

[5] A four prong test is ordinarily applied to determine disparate impact; (i) discriminatory effect; (ii) whether there is evidence of discriminatory intent; (iii) the defendant's purpose for taking the action; and (iv) in what context the argument is being used. See Casa Marie, Inc. v. Superior Court of Puerto Rico for the District of Arecibo, 752 F.Supp. 1152, 1168 (D. Puerto Rico, 1990).

constrained to note that Respondent has in fact made no showing whatsoever that minor children cause any meaningful increase in the operating costs of the park.

44. It is not, however, necessary for the Board to conclude that the surcharge violates state or federal fair housing law to conclude that it cannot be imposed in this case. Rather the Board concludes that it is not inconsistent with state and federal fair housing principles -- and the record in this case -- to hold that the proscription against surcharges for children set out at RSA 205-A:2, VIII (a) bars the facially neutral "extra person" charge at issue here when applied to a minor child residing in the park.

CONCLUSION

Therefore, the Board finds that the surcharge as applied to Ms. Carey's minor child, Nicole Reed, violates RSA 205-A:2, VIII(a) and ORDERS as follows:

A. Respondent is enjoined from imposing any further surcharge on Complainant's monthly rent based on the presence of Nicole Reed in Complainant's home;

B. Respondent is ordered to make restitution to Complainant in an amount equal to the total amount imposed on and paid by Complainant as a surcharge with respect to Nicole Reed's residence in his home from January 1, 1995 to the present.

A decision of the board may be appealed, by either party, by first applying for a rehearing with the board within twenty (20) business days of the clerk's date below, not the date this decision is received, in accordance with Man 201.27 Decisions and Rehearings. The board shall grant a rehearing when: (1) there is new evidence not available at the time of the hearing; (2) the board's decision was unreasonable or unlawful.

SO ORDERED:

BOARD OF MANUFACTURED HOUSING

By:_____
Eric Rodgers, Chairman

Members participating in this action:

Stephen J. Baker
Rosalie F. Hanson
Kenneth R. Nielsen, Esq.
Jimmie D. Purselley
Florence E. Quast
Eric Rodgers

CERTIFICATION OF SERVICE

I hereby certify that a copy of the forgoing Order has been mailed this date, postage prepaid, to Walter Bradley, 65 Forest Park Estates, Jaffrey, NH 03452 and to Richard & Vicki Messina, PO Box 912, Milford, NH 03055.

Dated:_____ _____

Anna Mae Twigg, Clerk
Board of Manufactured Housing

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