

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ELMER CHRISTENSON,
Complainant

and

**BARBARA SCHWARTZ, AND
CLARICE HOFSTRA,**
Complainants,

v.

**ROBINWOOD VILLAGE, INC.,
HOWARD AND BETTY HARTSHORN,**
Respondents

DOCKET NO. H-5713

DOCKET NO. H-5720

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainants in these consolidated cases are Elmer Christenson (hereinafter "Christenson") and Barbara Schwartz (hereinafter "Schwartz"), acting under power of attorney for Clarice Hofstra (hereinafter "Hofstra"). (NT 8, 54, 170; CE 1 and 14.)

2. The Respondents in these cases are Howard and Betty Hartshorn (hereinafter collectively "Hartshorns") and Robinwood Village, Inc. (hereinafter "RV Inc.").

3. In 1967, the Hartshorns became the owners of 60 acres of land located in Chestnuthill Township, Monroe County. (NT 260-262.)

4. After making the decision to build an adult community on these 60 acres, on June 28, 1985, the Hartshorns incorporated RV Inc. (NT 262, 278.)

5. Howard Hartshorn was the president of RV Inc. and owned 51 percent of its stock. (NT 270, 322, 326, 333.)

6. Betty Hartshorn became RV Inc.'s secretary. (NT 322.)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

AN	Administrative Notice Taken
CE	Complainant's Exhibit
NT	Notes of Testimony
RE	Respondent's Exhibit

7. Once RV Inc. was formed, the Hartshorns deeded the 60 acres of land to RV Inc. (NT 268.)

8. The plan was to construct a 49-unit townhouse community (hereinafter "Community") on the 60 acres, where individual buyers would purchase "footprints" and eventually jointly own the remaining common areas. (NT 262, 409.)

9. A footprint was that portion of the 60 acres upon which a buyer's unit would be built. (NT 269, 407.)

10. Initially, footprints were sold by RV Inc. to individual buyers for \$18,000. (NT 148, 281-282.)

11. Once a footprint was purchased, a buyer would then contract with Harwood Construction Corporation to build a unit. (NT 277, 281-282, 408.)

12. Construction of the first unit began in about 1986, and construction of the remaining units continued until the final unit was sold in 1995. (NT 275, 277.)

13. In the period April 1986 through January 1990, 38 townhouse units were sold by RV Inc. (NT 275.)

14. Of the remaining 11 units, in 1990 only one unit was sold; in 1991, two units were sold; in 1992, one unit; in 1993, two units; in 1994, three units; and in 1995, two units. (NT 277.)

15. Following percolation testing and before any construction began, the township declared restrictions on the number of residents per unit as three, and the maximum number of units permitted to be constructed on the 60 acres as 56. (NT 266, 267.)

16. These restrictions were implemented because of a limitation on the capacity of the sewage system. (NT 267.)

17. On February 4, 1986, a "Declaration of Covenants, Conditions and Restrictions Applicable to Robinwood Village, Inc." (hereinafter "Covenants") was recorded in the Monroe County courthouse. (NT 271; RE 2.)

18. The Hartshorns had drafted the Covenants, and RV Inc. promulgated them. (NT 96, 272.)

19. Intending the planned Community to be an adult Community, these comprehensive Covenants contained the following provisions:

a. 3.3.1.1. Limitation of two weeks per year for grandchildren visitation.

No person under the age of forty-five (45) shall reside in a Dwelling Unit except for a lawfully married spouse of a person who is forty-five (45) or more years of age. The surviving spouse under the age of forty-five (45) years may continue to reside in a Dwelling Unit after the death of his or her spouse, so long as he or she does not remarry someone less than forty-five (45) years.

b. 3.3 states in pertinent part: "The Maintenance Corporation shall have the right to enforce [the age restriction]. . ."

c. 3.3.20. The covenants, conditions and restrictions contained in the Agreement and all amendments thereto are subject to and must comply with all applicable laws, ordinances and regulations of the United States of America, the Commonwealth of Pennsylvania, the County of Monroe, Township of Chestnuthill. The invalidation of one (1) or more of such covenants, conditions and restrictions by Judgment or Court Order shall in no way effect any of the other provisions contained herein which shall remain in full force and effect.

20. The Covenants created promises which run with the land between RV Inc. and each individual buyer of a unit and between each buyer with each other. (RE 2.)

21. An amendment dated December 20, 1991 to the Pennsylvania Human Relations Act (hereinafter "PHRA") generally made discrimination in the form of age and familial status in the housing context illegal. (AN.)

22. An exception in the PHRA specifically exempts "housing for older persons" from the age and familial status provisions. (AN.)

23. The amendment of the PHRA of December 20, 1991 rendered a substantial portion of paragraph 3.3.1.1. of the Covenants illegal on its face. (AN.)

24. In the fall of 1989, the common areas which were then owned by RV Inc. were deeded to the Robinwood Village Recreation and Maintenance Association Inc. (hereinafter "Association"). (NT 268, 421.)

25. On November 13, 1989, the Association was incorporated. (NT 279.)

26. In 1989, the initial five-member board of directors for the Association was appointed by Howard Hartshorn. (NT 270, 312, 373-374, 414.)

27. Howard Hartshorn was the Association's board president until 1994. (NT 314, 319, 356, 414.)

28. In or about 1991-92, four owners (Nolin, Duffy, Lodge and Hughes) drafted by-laws for the Association. (NT 220, 394, 413; CE 16.)

29. The owners of the Community then adopted those by-laws. (NT 394.)

30. Under Article XIII, Section 2 of the Association's by-laws, the Covenants may only be changed by a unanimous vote of the owners in the Community. (CE 16.)

31. The Association collects a fee of \$135 per month, per owner, and is responsible for the maintenance of common area lawns, garbage removal, and snow plowing. (NT 25, 274.)

32. The Association is a distinctly separate entity from RV Inc. and has its own legal representation. (NT 396.)

33. By operation of Section 3.3.17 of the Covenants, either the Association or any owner in the Community has the right to enforce provisions of the Covenants. (RE 2.)

34. The Hartshorns did not reside in a unit in the community until June 1996. (NT 262.)

35. During an Association meeting in approximately 1992-93, 30 owners in attendance voted on the issue of possibly changing Section 3.3.1.1. of the Covenants. (NT 417, 423.)

36. Of the 30 voting, eight voted not to amend the Covenants. (NT 417.)

37. From the time federal and state laws relating to age and familial status changed in the housing area, Howard Hartshorn had pressed the Association's board of directors to evaluate the status of the Community with respect to whether the Community fell within an exception to the laws' requirements. (NT 425.)

The Hofstra Property.

38. On August 10, 1987, for a total price of \$137,681, Hofstra purchased a footprint and a unit in the Community. (NT 24, 82.)

39. At the time of her purchase, Hofstra acknowledged that she had read the Covenants. (NT 59; RE 1.)

40. On August 21, 1990, Hofstra had a stroke and from that point no longer resided in the Community. (NT 25, 76.)

41. On April 19, 1989, Hofstra had given Schwartz power of attorney. (NT 54, 170; CE 14.)

42. Another power of attorney was given to Schwartz on November 19, 1993. (NT 54; CE 1.)

43. In September 1991, Schwartz placed the Hofstra unit up for sale. (NT 15.)

44. Initially, the Hofstra property was listed with Park Avenue Real Estate with Carol McGary as the listing real estate agent. (NT 15; CE 2.)

45. Carol McGary was also a resident of the Community and was RV Inc.'s agent for new units in the Community. (NT 20, 28.)

46. Initially, the Hofstra property was listed for a price of \$136,000. (NT 16.)

47. Park Avenue Real Estate listed the Hofstra property until December 30, 1991. (NT 28, 77.)

48. While listed with Park Avenue Real Estate, the Hofstra property was not even shown. (NT 19.)

49. Schwartz next listed the Hofstra property with Coldwell Banker. (NT 22, 78.)

50. Although prospective buyers looked at the Hofstra property, the property did not sell at that time. (NT 16, 22, 78, 103.)

51. Schwartz tried a third listing agency: J. P. Miller Real Estate, Philip Stetler, agent. (NT 22, 79.)

52. Stetler refused to list the Hofstra property because of the Covenants. (NT 22, 79.)

53. Schwartz returned to Coldwell Banker, Jim Morruck, agent. (NT 24.)

54. On November 19, 1993, the Hofstra property was conveyed, and the deed was recorded on December 12, 1993. (NT 49, 68, 82; RE 3.)

55. The Hofstra property was sold for \$100,000. (NT 70, 242.)

56. The Hofstra property was sold to Carolyn Carney, a thirty-five year old woman. (NT 69, 238; RE 3.)

57. Carney's parents were the intended residents of the Hofstra property. (NT 71, 238.)

58. Schwartz and the real estate agent from Coldwell Banker discussed the legality of the Covenants. (NT 105.)

59. Until Stetler refused to list the Hofstra property, Schwartz was unaware of the Covenant restrictions. (NT 108.)

60. At all times, the agents for the Hofstra property listed and advertised the Hofstra property for people forty-five years of age and older. (NT 106.)

61. No potential buyer of the Hofstra property was ever denied an opportunity to purchase the Hofstra property because of the Covenant restrictions. (NT 80-81.)

62. The condition of the Hofstra property was not good; there were holes in the walls and ceilings from numerous plants and pictures having been hung, there was no washer and dryer, and the dishwasher had to be replaced. (NT 239.)

The Christenson Property

63. On September 12, 1987, Christenson purchased a unit in the Community. (NT 114.)

64. On July 17, 1992, Christenson listed his property for sale with ERA Realty, Shirley Upstein, agent. (NT 132-133; CE 11.)

65. The listed price was \$134,000. (CE 11.)

66. Christenson had told Upstein that a buyer would have to be at least forty-five years old. (NT 132-133.)

67. There were no prospects for the Christenson property for a while. (NT 134.)

68. At the time the Christenson property was for sale other units in the Community, both new and used, were for sale. (NT 132.)

69. Christenson's real estate agent instructed Christenson that he was not restricted to selling his property to a buyer over forty-five years of age. (NT 146.)

70. On July 3, 1993, the Christenson property was sold for \$119,000. (NT 125, 136, 156.)

Market Fluctuation.

71. Property values in Monroe County peaked between 1987-89. (NT 220.)

72. Beginning in 1989, property values began to fall and continued to fall for the next three to five years. (NT 220.)

73. Single family dwellings decreased in value between 20 to 30 percent. (NT 220.)

74. At the time Schwartz and Christenson were attempting to sell property in the Community, overall sales in the county had decreased, and the time it took to sell property had dramatically increased. (NT 222.)

CONCLUSIONS OF LAW

1. The PHRC has jurisdiction over the parties and subject matter of these consolidated cases.
2. The parties have fully complied with the procedural prerequisites to a public hearing in these cases.
3. When the Hartshorns wrote and RV Inc. promulgated the Covenants which are the subject of these cases, it was not unlawful to have adults-only complexes in Pennsylvania.
4. Effective December 21, 1991, the PHRA made discrimination in housing on the basis of age and familial status, with defined exceptions, illegal.
5. Section 3.3.1.1. of the Covenants is illegal under the PHRA and is therefore unenforceable.
6. Neither RV Inc. nor the Hartshorns attempted to enforce Section 3.3.1.1.
7. Neither RV Inc. nor the Hartshorns had either the power or authority to modify Section 3.3.1.1. of the Covenants.

OPINION

These consolidated cases arise on complaints filed by Elmer Christenson (hereinafter "Christenson") and Barbara Schwartz (hereinafter "Schwartz"), under power of attorney for Clarice Hofstra (hereinafter "Hofstra"), against Robinwood Village, Inc. (hereinafter "RV Inc."), and Howard and Betty Hartshorn (hereinafter "Hartshorns"), at Docket Nos. H-5713 and H-5720.

Both the Christenson and Schwartz-Hofstra complaints were initially filed on or about March 18, 1993. In both complaints the Complainants generally alleged that RV Inc. and the Hartshorns "prevented/refused to allow [them] to sell [their] property because of the age 40-45 and/or familial status of the buyers." Allegedly this "prevented/refused" action is a violation of Sections 5(h)(1) and 5(h)(3) of the Pennsylvania Human Relations Act (hereinafter "PHRA"). In a pre-hearing order dated June 19, 1996, the Complainants were instructed to amend their complaints to state their allegations more fully and in much greater detail. In amended complaints dated June 27, 1996, the Complainants not only failed to state clearly their allegations against the three separately named Respondents, the Complainants also attempted to pursue additional allegations under Sections 5(d) and 5(e) of the PHRA. By letter dated August 23, 1996, the Complainants were informed that their June 19, 1996 amendments failed to state their cases more fully and in sufficiently greater detail. Subsequently, each Complainant filed second amended complaints dated September 3, 1996.

The Christenson second amended complaint generally alleged "that the Respondents committed discriminatory practices. . . because of familial status, by development, enforcement and refusal to remove the covenant which restricted Complainant from selling his property to potential purchasers under the age of forty-five (45) and those with children." Christenson's complaint further generally alleges that the "covenant and Respondent's acts violates sections (d), (e), h(1), h(3), h(5) of the PHRA." In this regard, the complaint again does not attempt to separate which named Respondent of the three did what specifically. Furthermore, the attempt to assert Section 5(d), (e) and (h)(5) claims is beyond the scope of Christenson's original complaint. Additionally, the language of the amended complaint fails to articulate any particulars of the basis for either a 5(d), (e), or (h)(5) claim. Accordingly, the Christenson matter will be analyzed under Sections 5(h)(1) and 5(h)(3) only, as originally asserted.

The Schwartz-Hofstra second amended complaint also continues to fail to specify with sufficient detail exactly which Respondent is alleged to have done what. The Schwartz-Hofstra, like the Christenson complaint, will be analyzed under Sections 5(h)(1) and 5(h)(3) only.

Both complaints' main focus is upon language in a covenant which the Complainants assert has hindered their attempts to sell their property.

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated both Christenson's and Schwartz and Hofstra's allegations, and at the conclusion of the investigation concluded that probable cause existed. Thereafter,

the PHRC attempted to eliminate the alleged unlawful age-based discrimination through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified all parties that it had approved a consolidated public hearing.

The consolidated public hearing was held on October 29 and 30, 1996, in Stroudsburg, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the consolidated complaints was presented by PHRC staff attorney Jonathan J. Williams. Robert H. Nothstein, Esquire, appeared on behalf of RV Inc. and the Hartshorns. Following the consolidated public hearing, the parties were afforded an opportunity to submit briefs. Post-hearing briefs on behalf of the parties were received on or about January 27, 1997.

When the Hartshorns first took measures toward creating RV Inc. and established the "Declaration of Covenants, Conditions and Restrictions Applicable to Robinwood Village, Inc." (hereinafter "Covenants"), Sections 5(h)(1) and 5(h)(3) of the PHRA provided:

5. It shall be an unlawful discriminatory practice. . .

(h) For any person to:

(1) Refuse to sell, lease, finance or otherwise to deny or withhold any housing accommodation or commercial property from any person because of the race, color, religious creed, ancestry, sex, national origin or handicap or disability of any prospective owner, occupant or user or such housing accommodation or commercial property, or to refuse to lease any housing accommodation or commercial property to any person due to use of a guide animal because of the blindness or deafness of the user, or use of a support animal because of a

physical handicap of the user or because the user is a handler or trainer of support or guide animals.

(3) Discriminate against any person in the terms or conditions of selling or leasing any housing accommodation or commercial property or in furnishing facilities, services or privileges in connection with ownership, occupancy or use of any housing accommodation or commercial property because of the race, color, religious creed, ancestry, sex, national origin, handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, of any present or prospective owner, occupant or user of such housing accommodation or commercial property.

By amendment effective December 22, 1991, these PHRA provisions were subsequently modified as follows:

5. It shall be an unlawful discriminatory practice. . .

(h) For any person to:

(1) Refuse to sell, lease, finance or otherwise to deny or withhold any housing accommodation or commercial property from any person because of the race, color, *familial status, age, religious creed, ancestry, sex, national origin or handicap or disability of any person, prospective owner, occupant or user of such housing accommodation or commercial property, or to refuse to lease any housing accommodation or commercial property to any person due to use of a guide animal because of the blindness or deafness of the user, or use of a support animal because of a physical handicap of the user or because the user is a handler or trainer of support or guide animals or because of the handicap or disability of an individual with whom the person is known to have a relationship or association.*

(3) Discriminate against any person in the terms or conditions of selling or leasing any housing accommodation or commercial property or in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation or commercial property because of the race, color, *familial status, age, religious creed, ancestry, sex, national origin, handicap or disability of any person, or the use of a guide*

or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals *or because of the handicap or disability of an individual with whom the person is known to have a relationship or association.*

(Note: The modified language has been italicized.)

The Covenants which are the subject of the Complainants' complaints were drafted by the Hartshorns and promulgated by RV Inc. The recording of these Covenants initially occurred on February 4, 1986. Section 3.3.1.1. of the Covenants states:

3.3.1.1. Limitation of two weeks per year for grandchildren visitation.

No person under the age of forty-five (45) shall reside in a Dwelling Unit except for a lawfully married spouse of a person who is forty-five (45) or more years of age. The surviving spouse under the age of forty-five (45) may continue to reside in a Dwelling Unit after the death of his or her spouse, so long as he or she does not remarry someone less than forty-five (45) years.

Section 3.3.20. of the Covenants states:

3.3.20. The covenants, conditions and restrictions contained in the Agreement and all amendments thereto are subject to and must comply with all applicable laws, ordinances and regulations of the United States of America, the Commonwealth of Pennsylvania, the County of Monroe, Township of Chestnuthill. The invalidation of one (1) or more of such covenants, conditions and restrictions by Judgment or Court Order shall in no way effect any of the other provisions contained herein which shall remain in full force and effect.

Section 3.3.1.1. of the Covenants was intended to restrict the planned 49-unit community development as an adults-only community. The effect of any covenant is to spell out restrictions on the use of certain land. When someone purchases land

subject to a covenant restriction, that person binds themselves by contract to abide by the terms of the covenant.

Here, when the Covenants were created, it was lawful in the Commonwealth to discriminate in housing with respect to both age and familial status. Between the filing of the Covenants and December 21, 1991, Pennsylvania law did not prohibit such forms of discrimination.

Federally, a ban on familial status was incorporated into the Fair Housing Act by the Fair Housing Amendments Act of 1988. (Pub.L. 100-430, 102 Stat. 1619 (1988).) Prohibitions under the Fair Housing Act against familial status discrimination became effective on March 12, 1989. Thus, even under earlier federal legislation, the Covenants were lawful when created.

Both Pennsylvania's PHRA amended provisions and the federal Fair Housing Act's bans on familial status discrimination in housing were not absolute. Each legislation provided for exemptions for "housing for older persons." Section 5(h)(9) of the PHRA states:

(9) Nothing in this clause (h) of this section, regarding age or familial status, shall apply with respect to housing for older persons.

The 1991 modification of the PHRA defined housing for older persons. That definition was found in Section 4(w) of the PHRA which originally stated:

(1) The term "housing for older persons" means housing:

(i) Provided under any State or Federal program that the Pennsylvania Human Relations Commission determines is specifically designed and operated to assist elderly persons as defined in the Federal or State program;

(ii) Is intended for, and solely occupied by, persons sixty-two years of age or older; or,

(iii) Is intended and operated for occupancy by at least one person fifty-five years of age or older per unit.

(2) In determining whether housing qualifies as housing for older persons under this clause (w), the Pennsylvania Human Relations Commission's requirements shall include, but not be limited to, the following:

(i) The existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons;

(ii) That at least eighty percent of the units are occupied by at least one (1) person fifty-five years of age or older per unit; and

(iii) The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

(3) Housing shall not fail to meet the requirements for housing for older persons by reason of unoccupied units, provided that such units are reserved for occupancy by persons who meet the age requirements of this clause (w).

Recently, effective July 12, 1996, Section 4(w)(2)(i) was repealed.

The purpose of the exemption for housing for older persons is to protect the interest of older persons to live in housing which meets their needs and to not unfairly limit the housing choices of elderly persons. These exemptions recognize that some older Pennsylvanians choose to live together with fellow senior citizens in retirement-type communities. The exemptions further appreciate the interest and expectations these individuals have in living in environments tailored to their specific needs. Here in Pennsylvania, under the PHRA, as of December 21, 1991, adults-

only housing became unlawful unless it could meet one of the exemptions listed above in Section 4(w)(1) of the PHRA.

Under federal law, a "grandfather" clause was included in the 1988 amendments to the Fair Housing Act for existing adults-only housing developments that do not meet the Act's definition of housing for older persons. Section 6(d) of that Act provided:

Housing shall not fail to meet the requirements for housing for older persons by reason of. . . persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements. . . provided that new occupants of such housing meet the age requirements. . .

This provision in the federal law was intended to give adults-only complexes which existed on the date the law was enacted an option of maintaining their policies without forcing current residents to move out. All future occupants, however, would have to meet the requirements for older persons.

The PHRA has no comparable transitional grandfathering clause. Instead, Section 4(w)(3) merely allows for unoccupied units to not count against the requirements for housing for older persons under Section 4(w) of the PHRA. Here, there has been no attempt to show that the units occupied as of December 21, 1991, and the units occupied subsequently meet any of the exemptions found in Section 4(w)(1) of the PHRA.

Accordingly, Section 3.3.1.1. of the Covenants is unlawful on its face as violative of the PHRA. However, the inquiry in these cases does not stop there. It is imperative to the resolution of these consolidated cases that the exact relationships of the parties be understood.

We begin with Christenson's assertion that the development of the Covenants was discriminatory. Once again, although it has been established that the Hartshorns wrote the Covenants and RV Inc. promulgated them, at the time these actions occurred, there was no law against adults-only communities in Pennsylvania. Accordingly, no violation of the PHRA occurred regarding the development of the Covenants.

Second, Christenson and, by implication, Schwartz-Hofstra, assert that both the Hartshorns and RV Inc. "enforced" the age restriction of Section 3.3.1.1. of the Covenants. Under Section 3.3.17. of the Covenants either the Association or any owner in the community has the right to enforce the provisions of the Covenants. However, after a review of the entire record, it is clear that no attempt had been made to enforce Section 3.3.1.1. of the Covenants. Furthermore, RV Inc. only had authority to seek enforcement of the Covenants as an owner in the community.

On November 13, 1989, an entity entitled "Robinwood Village Recreation and Maintenance Association, Inc." (hereinafter the "Association") was incorporated. This separate and distinct Association can be found attempting to enforce provisions of the Covenants such as sign violations and parking restrictions, however, there is no evidence that the Association ever either threatened or attempted to enforce Section 3.3.1.1. of the Covenants.

Even when the prospective purchaser of the Hofstra property was a thirty-five year old individual, neither the Association nor any owner in the community tried to "enforce" Section 3.3.1.1. of the Covenants.

As no evidence was presented that either the Hartshorns or RV Inc. attempted to enforce the unlawful provisions of the Covenants, no violation on this account has been established. This brings us to the final way both Christenson and Schwartz-Hofstra assert the PHRA was violated: The failure to remove the unlawful provision of the Covenants. Both by action of law and pursuant to a provision in the Association's by-laws, a covenant provision such as Section 3.3.1.1. may only be removed by unanimous consent of all owners in the community. Here, there is some vague evidence suggesting that a vote was taken on the question during a meeting in 1992 or 1993, which was attended by only 30 owners. At that time there were eight votes against changing the Covenants. Accordingly, all those in favor of changing the language of the Covenants were barred from doing so.

The question becomes, can either the Hartshorns or RV Inc. be held accountable for any failure to delete the offending paragraph? The simple answer is no. Neither the Hartshorns nor RV Inc. had either the power or authority to change the Covenants alone, once the first unit in the development was sold.

A portion of the legislative history of the federal amendments of 1988 illustrates the problem the Complainants in this case have. According to the Congressional Record, a colloquy between Senators DeConcini and Kennedy reflects the following intent:

Although a pre-existing age restriction in a deed may discourage some families from inquiring about a property, Congress does not intend to impose liability for the mere presence of an age-restrictive covenant if two conditions are met. These conditions are that (1) the age restriction was created before the enactment of the Act, and (2) the restriction is not enforced in the future. 134 Cong. Rec. S10549 (daily ed. Aug. 2, 1988).

Here, the restriction in question was certainly created prior to December 21, 1991, and there has been no evidence that there has been any attempt to enforce Section 3.3.1.1. of the Covenants.

Both Complainants recognized there was a fundamental question regarding the validity of Section 3.3.1.1. of the Covenants during the period their properties were for sale. However, much of the narrowing of the prospective buyer pool came at their own behest. Each Complainant had either informed their realtors that the restrictive Covenant existed, or did not instruct their agents to ignore the provision. The Covenant restriction banning anyone under forty-five years of age from residing in a dwelling unit violates both the Fair Housing Act and the PHRA and was simply unenforceable.

Section 3.3.20. of the Covenants provides for the invalidation of provisions of the Covenants when a provision fails to comply with an applicable federal or state law. Here, on its face, Section 3.3.1.1. failed to comply with federal law as of March 12, 1989, and it failed to comply with the PHRA as of December 21, 1991. Section 3.3.1.1. of the Covenants can not possibly comply with either law's exceptions because under neither the federal nor state law may a complex restrict the age of residents to over forty-five years of age.

In this case, the actions of the Complainants' real estate agents may very well have violated the PHRA. Furthermore, an issue may have existed regarding the action of the local Recorder of Deeds accepting the Covenants for filing after the effective dates of the federal Fair Housing Act amendments or the PHRA

amendments. See Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972). Also, either those owners in the community who had voted against the removal of the offensive provision, or anyone who may have attempted to enforce Section 3.3.1.1. of the Covenants may have been liable to the Complainants. See Casa Marie Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo, 752 F.Supp. 1152 (D.P.R. 1990). However, the Complainants here have chosen to pursue actions against the Hartshorns and RV Inc., neither of which can be held liable under the circumstances of these cases for violations of Sections 5(h)(1) and 5(h)(3) of the PHRA.

For this reason, the following order dismissing these cases is recommended.

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PENNSYLVANIA HUMAN RELATIONS COMMISSION**

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DOCKET NO. H-5713

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RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned consolidated matters, the Permanent Hearing Examiner finds that the Complainants have failed to prove discrimination in violation of Sections 5(h)(1) and 5(h)(3) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: _____

**Carl H. Summerson
Permanent Hearing Examiner**

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FINAL ORDER

AND NOW, this 21st day of April, 1997, after a

review of the entire record in these consolidated matters, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts as its own finding and incorporates the same into the permanent record of this proceeding, to be served on the parties to these complaints and hereby


ORDERS

that the complaints in these cases be, and same hereby are, dismissed.

By:


Raquel O. de Yienst, Vice Chairperson

Attest:


Gregory J. Celia, Jr., Secretary