

# CONTINUING CARE COMMUNITIES

## INTRODUCTION

In 2002, the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21<sup>st</sup> Century reported to Congress: “A housing crisis is on the horizon, and more housing units *must* be created in response.”<sup>1</sup> With sixty million baby boomers (i.e., more than 20 percent of the total U.S. population) projected to be age 65 and over by 2029,<sup>2</sup> the commission warned that, without an immediate increase in production, housing and health care services would be “neither available nor affordable.”<sup>3</sup> Today, the situation is no less dire. In 2014, the Joint Center for Housing Studies of Harvard University confirmed that “the existing housing stock is [still] unprepared to meet the escalating need for affordability, accessibility, social connectivity, and supportive services” of our increasingly older population.<sup>4</sup>

One senior housing option that has been popular in recent decades is the “continuing care retirement community” (CCRC).<sup>5</sup> Continuing care communities offer a continuum of health-related services and residential options within a single-campus setting, from independent living units to assisted living facilities and skilled nursing care.<sup>6</sup> In the late-twentieth century, the number of continuing care communities skyrocketed from only 250 campuses in 1970 to just under 1,700 campuses by 1995.<sup>7</sup> When the Seniors Commission issued its report to Congress in 2001, over 350,000 seniors already lived in continuing care housing<sup>8</sup> and, by the mid-2000’s, there were over 2,400 campuses in the United States.<sup>9</sup> But in 2006, the housing bubble collapsed,<sup>10</sup> new developments plateaued, and the growth rate never recovered.<sup>11</sup> Today, even after real estate markets picked up speed, there are as few as fifteen new projects per year nationwide.<sup>12</sup>

Although CCRC closures and bankruptcies continue to be rare (even in recent years),<sup>13</sup> the collapse of the housing bubble illustrated a range of concerns that residents may have with the traditional model of care. This essay will explore whether a housing cooperative ownership structure—a pre-existing, but uncommon form of continuing care community—would be better equipped to address those concerns.

---

<sup>1</sup> COMM’N ON AFFORDABLE HOUSING & HEALTH FACILITY NEEDS FOR SENIORS IN THE 21<sup>ST</sup> CENTURY, A QUIET CRISIS IN AMERICA 70 (2002) [hereinafter SENIORS COMM’N] (emphasis added).

<sup>2</sup> SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, THE BABY BOOM COHORT IN THE UNITED STATES: 2012 TO 2060 1, 12 (2014), available at <https://www.census.gov/prod/2014pubs/p25-1141.pdf>.

<sup>3</sup> SENIORS COMM’N, *supra* note 1, at 13 (“This is the same generation that overloaded schools, challenged the health care system, and overburdened the transportation network.”).

<sup>4</sup> JOINT CTR. FOR HOUS. STUD., HOUSING AMERICA’S OLDER ADULTS 1 (2014) [hereinafter JCHS], available at [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing\\_americas\\_older\\_adults\\_2014.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014.pdf); see also SENIORS COMMISSION, *supra* note 1, at 70 (“[T]he sheer numbers of persons over age 65 will do more than challenge our housing resources—it will exhaust them . . .”).

<sup>5</sup> See, e.g., *Continuing Care Retirement Communities (CCRCs)*, Hearing Before the S. Spec. Comm. On Aging, 111th Cong. 1 (2010) [hereinafter *CCRC Hearing*] (opening statement of Sen. Herb Kohl, Chairman, Special Committee on Aging).

<sup>6</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-611, OLDER AMERICANS: CONTINUING CARE RETIREMENT COMMUNITIES CAN PROVIDE BENEFITS, BUT NOT WITHOUT SOME RISK 3 (2010) [hereinafter GAO]; SENIORS COMM’N, *supra* note 1, at 55–56.

<sup>7</sup> Frank R. Mandy, *The Evolution of Continuing Care Retirement Communities: Not Your Grandmother’s Retirement Community*, in RE-CREATING NEIGHBORHOODS FOR SUCCESSFUL AGING 91, 95–96 (Pauline S. Abbott et al. eds., 2009).

<sup>8</sup> SENIORS COMMISSION, *supra* note 1, at 100.

<sup>9</sup> Mandy, *supra* note 7, at 96.

<sup>10</sup> See generally RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010).

<sup>11</sup> GAO, *supra* note 6, at 10.

<sup>12</sup> See Jennifer Preston, *Faith-Based Housing That Meets Evolving Needs*, N.Y. TIMES, Mar. 12, 2014, at F4.

<sup>13</sup> *CCRCs Hearing*, *supra* note 5, at 9–10 (prepared statement of Alicia Puente Cackley, Director of Financial Markets and Community Investment, U.S. Government Accountability Office).

## I. EFFECTS OF AGING ON HOUSING CHOICES

The overwhelming majority of adults today prefer to “age in place”<sup>14</sup> (i.e., to stay in the same house or community in which they spent their working- or their family-rearing years<sup>15</sup>). According to one AARP study, 89 percent of older adults prefer to stay in their current residences for “as long as possible,” while an equally high margin prefer to stay in their current community.<sup>16</sup> This preference bears out in practice, as more than 75 percent of adults age 80 and over continue to live in their homes.<sup>17</sup> But if older adults are content to age in place, then why does the United States face a senior housing crisis?

The answer is that the preference of most adults to retire at home or in familiar surroundings is not always possible. In fact, it is often not. For adults age 65 and over, the most popular reasons for moving are health-related.<sup>18</sup> The U.S. Department of Health and Human Services estimates that as many as 70 percent of adults age 65 and over will ultimately require some form of long-term care.<sup>19</sup> Unfortunately, most seniors today live in so-called “Peter Pan housing” which “presumes the owners will never grow old.”<sup>20</sup> These homes rely on interior and exterior stairways or have narrow doorways and hallways, which are obstacles to walker or wheelchair access, and often lack even the most basic accessibility features for aging residents (e.g., lever-style doors).<sup>21</sup> In fact, only 1 percent of housing today has all five of the Joint Center for Housing Studies’ “universal design features”: (1) a no-step entry; (2) single-floor living; (3) extra-wide doorways and hallways; (4) easily accessible electrical switches and outlets; and (5) lever-style doors and faucet handles.<sup>22</sup> Over time, the absence of accessibility features become significant “[b]arriers to aging in place”<sup>23</sup> and, despite the desire to stay put, the cost of retrofitting of current homes by individual seniors is often prohibitive.<sup>24</sup>

Now, the first baby boomers reached retirement age in 2011. Most of these seniors, however, qualify as part of the “young old” age group (i.e., those aged 65 to 75), which is “still physically and socially active, independent, and generally in good health.”<sup>25</sup> Many of these “retirees” even remain active in the workforce.<sup>26</sup> The effects of aging will not really begin to influence their housing choices until age 75 or older.<sup>27</sup> For now, the housing needs of many baby boomers continues to be a matter of personal choice. Because health (as opposed to age) is the better metric for senior housing needs,<sup>28</sup> most baby boomers will not enter the senior housing market until 2021.

---

<sup>14</sup> See JCHS, *supra* 4, at 2. The Centers for Disease Control and Prevention (CDC) define “aging in place” as “the ability to live in one’s own home and community safely, independently, and comfortably, regardless of age . . . .” *Healthy Places Terminology*, CDC, <http://www.cdc.gov/healthyplaces/terminology.htm> (last updated Aug. 14, 2013).

<sup>15</sup> Patricia E. Salkin, *Where Will the Baby Boomers Go? Planning and Zoning for an Aging Population*, 32 REAL ESTATE L. J. 181, 183 (2003).

<sup>16</sup> *Naturally Occurring Retirement Communities: Hearing Before the Subcomm. on Ret. Sec. & Aging of the S. Comm. on Health, Educ., Labor, & Pensions*, 109th Cong. 4 (2006) [hereinafter *NORCs Hearing*] (statement of Elinor Ginzler, Director of Livable Communities, AARP).

<sup>17</sup> JCHS, *supra* note 4, at 2.

<sup>18</sup> DAVID IHRKE, U.S. CENSUS BUREAU, REASON FOR MOVING: 2012 – 2013 4 (2014), *available at* <https://www.census.gov/prod/2014pubs/p20-574.pdf>.

<sup>19</sup> JCHS, *supra* note 4, at 2.

<sup>20</sup> Mark D. Bauer, “Peter Pan” as Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to Be Exempt from Civil Rights Laws and Substantive Federal Regulation, 21 U. ILL. ELDER L. J. 33, 36 (2013).

<sup>21</sup> *Id.*

<sup>22</sup> JCHS, *supra* note 4, at 4.

<sup>23</sup> Bauer, *supra* note 20, at 43.

<sup>24</sup> *Id.*

<sup>25</sup> David A. Brennan, *The Commerciality Doctrine as Applied to the Charitable Tax Exemption for Homes for the Aged: State and Local Perspectives*, 76 FORDHAM L. REV. 833, 840 (2007).

<sup>26</sup> JCHS, *supra* note 4, at 2.

<sup>27</sup> LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER AND DISABLED CLIENTS 2 (2008); *id.* at 12 (“Poor health, frailty, and concern about physical safety increase significantly after age 75.”).

<sup>28</sup> See M. SCOTT BALL, LIVABLE COMMUNITIES FOR AGING POPULATIONS 136 (2012) (For the Social Security Act, “[t]his age threshold had the effect of ushering large amounts of healthy and able-bodied workers into retirement.”).

Unfortunately, when baby boomers eventually do enter the senior housing market, they will often do so on a fixed income stream. This raises serious concerns about affordability. For one thing, the fixed nature of retirement income provides little protection against the gradual increases in cost of living which arise from the ordinary course of inflation and rising energy prices, let alone against extraordinary events (e.g., health emergencies).<sup>29</sup> For most seniors, retirement income is also substantially less than income in pre-retirement years.<sup>30</sup> In fact, almost half of adults age 65 and over are likely to have “low income” (i.e., below 50 percent of area median income).<sup>31</sup> In 2011, the U.S. Department of Housing and Urban and Development reported that 37 percent of elderly very low-income renters either paid *more than half* of their income on rent or lived in severely inadequate conditions.<sup>32</sup> If seniors did not save for retirement during their earning years, their distributions are almost certainly insufficient for the added costs of long-term medical care. With the challenges to accessibility and affordability that come with old age, today’s baby boomers need to consider alternatives to aging in place.

## II. THE CONTINUING CARE MODEL

The continuing care retirement community is one of the more promising alternatives to aging in place.<sup>33</sup> First, continuing care communities are designed to provide increasing levels of accessibility and care over time. The traditional “brick-and-mortar CCRC,” for instance, provides “flexible accommodations that are designed to meet . . . health and housing need as these needs change over time,”<sup>34</sup> including basic accessibility features, housing assistance, and medical supportive services. A more recent development is the “no-walls CCRC,” (or “at-home CCRC”) which provides “local support services extension” (i.e., “services to go”) to seniors who remain in their homes.<sup>35</sup> Second, continuing care communities are also premised on affordability and “meeting the needs of low to moderate-income seniors.”<sup>36</sup>

### A. History

The continuing care community emerged from the “traditional religious and community-based models” of the nineteenth century.<sup>37</sup> At that time, daughters (or daughters-in-law) were often the primary caregivers for elderly parents and grandparents.<sup>38</sup> The first almshouses to provide housing and care for the aging generally reserved their charity for the poor and destitute.<sup>39</sup> Likewise, the earliest versions of the nursing home provided skilled nursing services, but only for injured, sick, or disabled seniors.<sup>40</sup> In the

<sup>29</sup> Patrica E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 GEO. J. ON POVERTY L. & POLICY 285, 293 (2009).

<sup>30</sup> Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 131–32 (2004).

<sup>31</sup> SENIORS COMMISSION, *supra* note 1, at 14.

<sup>32</sup> U.S. DEP’T OF HOUS. & URB. DEV., WORST CASE HOUSING NEEDS 2011 1, 6 (2013)

<sup>33</sup> *But see* BALL, *supra* note 28, at 14 (“Continuing Care Retirement Communities (CCRCs) have become the cutting edge of community-based medical care provision . . . . If this evolution toward community-like forms continues, senior housing developments could . . . be considered an extension of community-based aging in place rather than an alternative to it”).

<sup>34</sup> *CCRCs Hearing*, *supra* note 5, at 75–76 (summary of committee investigation).

<sup>35</sup> P. Annie Kirk, *Naturally Occurring Retirement Communities: Thriving Through Creative Retrofitting*, in RE-CREATING NEIGHBORHOODS FOR SUCCESSFUL AGING 115, 135 (Pauline S. Abbott et al. eds., 2009); *see also* Anne Tergesen, *Joining a Community by Staying at Home*, WALL ST. J. (Apr. 9, 2012), <http://www.wsj.com/articles/SB10001424052970204571404577253821107409372>.

<sup>36</sup> SENIORS COMMISSION, *supra* note 1, at 100.

<sup>37</sup> LEADINGAGE, TODAY’S CONTINUING CARE COMMUNITY (CCRC) 2 (Jane E. Zarem ed., 2010), *available at* [https://www.leadingage.org/uploadedFiles/Content/Consumers/Paying\\_for\\_Aging\\_Services/CCRCcharacteristics\\_7\\_2011.pdf](https://www.leadingage.org/uploadedFiles/Content/Consumers/Paying_for_Aging_Services/CCRCcharacteristics_7_2011.pdf).

<sup>38</sup> Mandy, *supra* note 7, at 93.

<sup>39</sup> BALL, *supra* note 28, at 133; *see also* Brennan, *supra* note 25, at 834.

<sup>40</sup> Schwemm & Allen, *supra* note 30, at 138–39.

twentieth century, however, after World War II ushered large numbers of women into the American workforce, the need for institutional caregivers became increasingly apparent.<sup>41</sup> The response was the development of “old age homes.”<sup>42</sup>

Like almshouses, the earliest continuing care models began as religious or fraternal organizations, but provided lifetime housing and care for the elderly in return for all, or substantially all, of their assets.<sup>43</sup> The popularity of these communities was, in part, an outgrowth of the public opposition to nursing homes, which were typically patterned after hospitals, with multi-bed wards, centralized lavatories, and public bathing facilities to facilitate full-time monitoring.<sup>44</sup> The result was an “overtly institutional atmosphere,”<sup>45</sup> which led to an unfortunate reputation for nursing homes, associating them with the “institutionalized warehousing of old people.”<sup>46</sup>

Not surprisingly, senior housing developers endeavored to disassociate senior living facilities from the negative connotations of institutionalization.<sup>47</sup> The demand for greater privacy led to the development of quad- and double-occupancy rooms.<sup>48</sup> The next step was the development of congregate housing and assisted living facilities, which combined the benefit of private, single-occupancy bedrooms with housing-related assistance and medical supportive services in shared common areas (e.g., kitchen, dining, or bathing facilities).<sup>49</sup> Today, the trend continues to move away from the “institutional care model” of nursing homes, favoring increasingly neighborhood-like developments, which provide recreation facilities and medical supports in suburban-type settings.<sup>50</sup> The modern, purpose-built CCRC is the “cutting edge of community-based medical care provision, representing a significant extension of the medical model into the daily life carried out in neighborhood settings.”<sup>51</sup>

### B. Structure

The CCRC model is basically a “long-term care insurance model”<sup>52</sup>; a “multi-phase retirement communit[y]”<sup>53</sup> which offers a “continuum of housing, health care, supportive services, amenities and activities” in a single-campus setting, from independent living units to assisted living facilities and skilled nursing services.<sup>54</sup> An *independent living unit* may take any number of forms (e.g., a cottage, a townhouse, or an apartment in a high-rise building).<sup>55</sup> The *assisted living facility* generally provides studio- or single-bedroom apartments, which offer personal assistance with daily activities, like dressing, eating, medication administration, and bathing.<sup>56</sup> *Skilled nursing services* are either provided on-site or at an accessible

---

<sup>41</sup> Mandy, *supra* note 7, at 93.

<sup>42</sup> LEADINGAGE, *supra* note 37, at 6.

<sup>43</sup> GAO, *supra* note 6, at 3.

<sup>44</sup> BALL, *supra* note 28, at 130–31.

<sup>45</sup> *Id.* at 130.

<sup>46</sup> See *id.* at 133 (“The comparison has been made often between the architectural form of a prison and that of a nursing home: Both prioritize security and close supervision from central hubs at the intersection of wings.”).

<sup>47</sup> See Julie T. Robison & Phyllis Moen, *Future Housing Expectations in Late Midlife: The Role of Retirement, Gender, and Social Integration*, in SOCIAL INTEGRATION IN THE SECOND HALF OF LIFE 158, 163 (Karl Pillemer et al. eds., 2000); see also JCHS, *supra* note 4, at 1.

<sup>48</sup> BALL, *supra* note 28, at 131.

<sup>49</sup> *Id.* at 135; see also Schwemm & Allen, *supra* note 30, at 137.

<sup>50</sup> BALL, *supra* note 28, at 12; see also FROLIK, *supra* note 27 (“Some of these developments [i.e., retirement towns and villages] appear to be typical suburban housing and blend into the surrounding neighborhood.”).

<sup>51</sup> BALL, *supra* note 28, at 14; see also *id.* at 11 (“CCRC developers have been designing and building neighborhoods, even if the end product does not always reflect a neighborhood aesthetic or the diversity that would normally be associated with a neighborhood environment.”).

<sup>52</sup> Preston, *supra* note 12.

<sup>53</sup> Schwemm & Allen, *supra* note 30, at 137.

<sup>54</sup> SENIORS COMMISSION, *supra* note 1, at 55.

<sup>55</sup> LEADINGAGE, *supra* note 37, at 10.

<sup>56</sup> *Id.* The assisted living facility primarily provides custodial care and housing-related services as opposed to health-related services. See Schwemm & Allen, *supra* note 30, at 137.

location nearby.<sup>57</sup> This nursing home care is available for seniors who require full-time treatment for illnesses or disabilities, but not the “acute care provided by hospitals.”<sup>58</sup> The CCRC model offers these services to older adults on a “progressive needs basis.”<sup>59</sup> In an ideal world, a resident would start in independent living, moving into assisted living or nursing home care either temporarily or permanently as needed.<sup>60</sup> Because the costs of housing residents in independent living units are generally lower than higher levels of assistance, an independent resident effectively subsidizes her future care.<sup>61</sup> This “prepayment” aspect of continuing care communities limits a resident’s “future exposure” to the rising costs of health services.<sup>62</sup>

## 1. Fee Structure

A continuing care community is financed primarily by two different resident payments: an initial entrance fee, and monthly service charges.<sup>63</sup> The initial entrance fee is a substantial one-time payment which provides the community with immediate cash reserves.<sup>64</sup> In 2010, the average entrance fee was \$248,000.<sup>65</sup> From the perspective of the resident, the entrance fee provides an opportunity to “convert home equity or other [retirement] assets into housing and to receive daily living services and health care in a way that keeps monthly expenditures more stable.”<sup>66</sup> An entrance fee, however, is not always equivalent to an ownership stake.<sup>67</sup> It only guarantees a right to lease (i.e., to live in the community according to specified contractual terms).<sup>68</sup> The monthly service charge, then, is analogous to a “type of rent payment for current uses.”<sup>69</sup> The amount of that payment—and the variability for current uses—depends the resident’s contract for services.

In general, there are four different contractual arrangements available. *Type A*, or “extensive contracts,” include housing, supportive services, amenities, and unlimited use of health care services at a flat monthly rate.<sup>70</sup> An extensive agreement represents a pure insurance arrangement.<sup>71</sup> The community completely assumes the resident’s risk of illness or disability and the costs of assisted living and skilled nursing care.<sup>72</sup> *Type B*, or “modified contracts,” include the same housing and residential amenities as extensive arrangements, but only a limited range of health-related services (e.g., up to three weeks per year in assisted living).<sup>73</sup> Consequently, modified contracts initially charge lower monthly rates, but as a resident’s needs exceed the limited services included, the payments increase to reflect market rates.<sup>74</sup> *Type C*, or “fee-for-service contracts,” provide housing and residential amenities, but no long-term health-related services.<sup>75</sup> If a resident requires any medical supportive services, the resident is required to pay market

---

<sup>57</sup> LEADINGAGE, *supra* note 37, at 11.

<sup>58</sup> See Schwemm & Allen, *supra* note 30, at 138.

<sup>59</sup> Brennan, *supra* note 25, at 840.

<sup>60</sup> *Id.* at 841.

<sup>61</sup> GAO, *supra* note 6, at 9; see also FROLIK, *supra* note 27, at 172.

<sup>62</sup> FROLIK, *supra* note 27, at 166.

<sup>63</sup> Brennan, *supra* note 25, at 841.

<sup>64</sup> GAO, *supra* note 6, at 9; see also *id.* at 10 (“[Entrance] fees are used to maintain a certain level of liquidity, or cash on hand.”).

<sup>65</sup> *Id.* at 9; see also *id.* (Entrance fees are “strongly correlated to local housing prices.”).

<sup>66</sup> LEADINGAGE, *supra* note 37, at 2; see also Schwemm & Allen, *supra* note 30, at 132 (“For those with assets, one key financial challenge is how to convert the high value of the house into disposable income while maintaining a comfortable housing style.” (internal quotation marks omitted)).

<sup>67</sup> *Id.* at 9.

<sup>68</sup> FROLIK, *supra* note 27, at 167.

<sup>69</sup> Brennan, *supra* note 25, at 841.

<sup>70</sup> GAO, *supra* note 6, at 5.

<sup>71</sup> FROLIK, *supra* note 27, at 172.

<sup>72</sup> GAO, *supra* note 6, at 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

rates.<sup>76</sup> *Type D*, or “rental agreements,” provide housing and access residential amenities, but without the payment of an initial entrance fee.<sup>77</sup>

The feasibility of these different contractual arrangements depend on the degree of refundability of the initial entrance fee. A *fully refundable entrance fee*, for example, is more expensive at the outset, but provides a resident with the greatest degree of financial security: a full refund of the resident’s investment.<sup>78</sup> If a resident cannot afford the monthly service charges, she has the option of applying her entrance fee toward her expenses.<sup>79</sup> If a resident leaves, however, the continuing care community will likely require re-occupancy of the vacated apartment (i.e., receipt of a new entrance fee) before it pays out.<sup>80</sup> A *partially refundable entrance fee* permits only the return of a “certain percentage of the entrance fee within specified time limits.”<sup>81</sup> A *declining scale entrance fee* reduces the potential for a refund by a fixed amount or percentage over a specific period of time.<sup>82</sup> The option which costs the least is a *nonrefundable entrance fee*.<sup>83</sup> The effect, however, is that the resident commits a substantial amount of her retirement assets to the community, leaving her the least financial freedom to leave the facility.

## 2. Ownership and Management

Today, 82 percent of continuing care communities are sponsored by nonprofit entities, while only 18 percent are owned for profit.<sup>84</sup> The most common sponsors by far are nonprofit religious or fraternal organizations,<sup>85</sup> but sponsors frequently include “community organizations, universities, hospitals, and companies dedicated to the development and operation of senior-living communities.”<sup>86</sup> The principal difference between a nonprofit and for-profit community is that a nonprofit community is typically prohibited from evicting a resident who is incapable of paying her monthly service charge.<sup>87</sup> Generally, this takes a form of financial assistance, subsidized by the entrance fees of other residents, to enable the resident to continue enjoying her housing and health-related services.<sup>88</sup>

Regardless of whether a community is for-profit or nonprofit, the overwhelming majority of communities are self-managed, while only 15 percent employ outside management companies.<sup>89</sup> In many communities, residents have the opportunity to participate in management through a “residents’ council,” which serves as a “conduit through which residents can express their concerns to management.”<sup>90</sup>

## 3. Tax-Exempt Status

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 10 n.7.

<sup>79</sup> LEADINGAGE, *supra* note 37, at 21–22.

<sup>80</sup> *Id.* at 2.

<sup>81</sup> GAO, *supra* note 6, at 10 n.7.

<sup>82</sup> *Id.* The traditional declining-scale entrance fee fully amortizes in 4 to 6 years. LEADINGAGE, *supra* note 37, at 2; *see also id.* at 8 (“A declining-scale refund feature, for example, may reduce the entrance-fee refund by 2% per month, with a one-time 4% administration fee; after 48 months of residency, the refund is reduced to zero.”).

<sup>83</sup> GAO, *supra* note 6, at 10 n.7.

<sup>84</sup> LEADINGAGE, *supra* note 37, at 6; *see also* FROLIK, *supra* note 27, at 166 (“Over 95 percent of CCRCs are not-for-profit communities.”).

<sup>85</sup> *See CCRCs Hearing*, *supra* note 5, at 52 (prepared statement of David Erickson, Vice President for Legal Affairs, Covenant Retirement Communities). Approximately one-half of the total continuing care communities in the United States are affiliated with faith-based organizations. LEADINGAGE, *supra* note 37, at 6 (“[A]mong those affiliations, 21.1% are Lutheran, 17.6% are Methodist, 13.8% are Presbyterian, and 12.8% are Roman Catholic.”).

<sup>86</sup> LEADINGAGE, *supra* note 37, at 2; *see also id.* at 5 (“Roughly half are faith-based; a university, health system, military group, or fraternal organization may sponsor others; and a small number have emerged from interested citizens who have come together with the sole common interest of establishing a CCRC.”).

<sup>87</sup> Brennan, *supra* note 25, at 841–42.

<sup>88</sup> *Id.* at 842.

<sup>89</sup> LEADINGAGE, *supra* note 37, at 6.

<sup>90</sup> FROLIK, *supra* note 27, at 174–75.

Perhaps the greatest reason for a community to operate as a nonprofit is the availability of tax-exempt status. In the federal tax context, simply providing housing and care that satisfies the “unique needs of the elderly as a class” serves a “charitable” purpose—even if the actual recipients are not financially distressed.<sup>91</sup> In fact, a resident of a charitable elder care facility is often financially on par with residents of for-profit facilities.<sup>92</sup> Nevertheless, senior housing will qualify for tax-exempt status so long as it “operates in a manner designed to satisfy the three primary needs of aged persons for housing, health care, and financial security.”<sup>93</sup> Here, the term “financial security” refers to “protection against financial risks associated with advanced years.”<sup>94</sup> In order to qualify for tax-exempt status, a community must “commit[] to a written or in-practice policy of not evicting persons who become unable to pay regular charges after being granted admission” and “operate[] so as to provide its services to the elderly at the lowest cost possible.”<sup>95</sup>

In the state and local context, however, tax authorities are taking another look at the issue. After all, naturally occurring retirement communities (e.g., a neighborhood with a predominately senior age composition) have traditionally been “positive taxpayers,” drawing on fewer services than they pay for through local property taxes.<sup>96</sup> Elder housing and care facilities impose almost no added burden on local school systems, emergency health services, or, if the community is gated, even the local police force.<sup>97</sup> In the absence of tax-exempt status, senior housing provides all the “perks of additional tax revenue without a great deal of service expense.”<sup>98</sup> Not surprisingly, state and local tax authorities are beginning to construe the “charitable” exemption more narrowly.<sup>99</sup> Continuing care communities—which often cater to more affluent seniors—are increasingly labeled as “non-deserving institutions.”<sup>100</sup>

### C. *A Decline in Popularity*

The chief lesson of the Great Recession for prospective residents of continuing care communities is that the CCRC model is “particularly vulnerable during economic downturns.”<sup>101</sup> After the collapse of the housing bubble in 2006, slow real estate markets prevented many older homeowners from selling their homes, or forced them to accept substantially lower prices.<sup>102</sup> Without sufficient cash on hand, many seniors simply could not afford the initial entrance fees.<sup>103</sup> As the replacement rate and occupancy levels fell, there were fewer independent residents to subsidize the more service-intensive assisted living and nursing facilities.<sup>104</sup> As continuing care communities lost financial viability, many were required to increase fees or reduce services and amenities.<sup>105</sup> Although bankruptcies, financial failures, and closures have remained

<sup>91</sup> Brennan, *supra* note 25, at 834–35.

<sup>92</sup> *Id.* at 835.

<sup>93</sup> *Id.* at 845–46.

<sup>94</sup> *Id.* at 846.

<sup>95</sup> *Id.* (internal quotation marks omitted); *see also supra* notes 87–88 and accompanying text.

<sup>96</sup> *See* Kirk, *supra* note 35, at 121–22.

<sup>97</sup> *See* BALL, *supra* note 28, at 136.

<sup>98</sup> *Id.* at 136.

<sup>99</sup> Brennan, *supra* note 25, at 836.

<sup>100</sup> *Id.* at 837.

<sup>101</sup> *CCRCs Hearing, supra* note 5, at 1 (opening statement of Sen. Herb Kohl, Chairman, Special Committee on Aging).

<sup>102</sup> GAO, *supra* note 6, at 10.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 9–10. The importance of initial entrance fees is even more pronounced in the first years of operation, as developers “need to generate sufficient presales and deposits prior to construction . . . [and] to reach full occupancy as quickly as possible in order to generate income that will not only cover operational costs once built, but also help pay down construction loans.” *CCRCs Hearing, supra* note 5, at 7 (prepared statement of Alicia Puente Cackley, Director of Financial Markets and Community Investment, U.S. Government Accountability Office).

<sup>105</sup> *CCRCs Hearing, supra* note 5, at 1 (opening statement of Sen. Herb Kohl, Chairman, Special Committee on Aging).

“relatively rare,”<sup>106</sup> even in the event of bankruptcy, a new service provider will usually take over existing operations, residents will continue living in their apartments, and the facility carries on.<sup>107</sup>

That is not to say, however, that financial failures do not have consequences. If their initial entrance fee was fully- or partially-refundable, residents often lose the right to a refund.<sup>108</sup> Without the option for a refund, most of a resident’s retirement assets become permanently tied up in the community.<sup>109</sup> The ability of a dissatisfied resident to move away is severely limited.<sup>110</sup> In fact, a resident who attempts to leave may face fines or further reductions to the refundable portion of her entrance fee.<sup>111</sup> Financial distress may also result in significant delays for the processing of refunds, including re-occupancy requirements which, in the midst of an economic downturn, may take several years.<sup>112</sup> In effect, “their ability to support themselves in the long run is inextricably tied to the long-term viability of their CCRC.”<sup>113</sup>

Despite this exceptional degree of reliance on the community, the average CCRC resident is “unable to pierce the veils of elaborate structures” in order to receive financial information about the community.<sup>114</sup> Although a resident may participate in management through a residents’ council, these councils generally have no real authority other than to provide a venue for complaints to be heard.<sup>115</sup>

### III. THE HOUSING COOPERATIVE SOLUTION

The average CCRC resident would benefit immensely from an ownership stake in the community and housing cooperatives provide a ready framework. Sadly, in practice, equity-purchase arrangements and other ownership models are relatively rare, and even among them, cooperatives are uncommon.<sup>116</sup> A closer look, however, reveals that housing cooperatives and continuing care communities already share much in common.

A housing cooperative is “a corporation, formed pursuant to state statute, solely for the purpose of owning and operating real property for its residents.”<sup>117</sup> A resident joins a co-op by purchasing a share in this corporation, which gives the resident an interest in the corporation, and, by extension, in the real estate that the corporation owns.<sup>118</sup> Along with the purchase of her cooperative share, a resident also executes a proprietary lease, which “represent[s] the occupancy agreement between the resident and the cooperative corporation.”<sup>119</sup> The resident, therefore, becomes both an equity shareholder in the corporation and a tenant

---

<sup>106</sup> *Id.* at 7 (prepared statement of Alicia Puente Cackley, Director of Financial Markets and Community Investment, U.S. Government Accountability Office).

<sup>107</sup> LEADINGAGE, *supra* note 37, at 3.

<sup>108</sup> *CCRCs Hearing*, *supra* note 5, at 7 (opening statement of Sen. Herb Kohl, Chairman, Special Committee on Aging).

<sup>108</sup> *Id.* at 7 (prepared statement of Alicia Puente Cackley, Director of Financial Markets and Community Investment, U.S. Government Accountability Office).

<sup>109</sup> *Id.* at 2 (opening statement of Sen. Herb Kohl, Chairman, Special Committee on Aging).

<sup>110</sup> GAO, *supra* note 6, at 22.

<sup>111</sup> *Id.* at 22.

<sup>112</sup> *CCRCs Hearing*, *supra* note 5, at 2 (opening statement of Sen. Herb Kohl, Chairman, Special Committee on Aging); *see also* GAO, *supra* note 6, at 3 (“For CCRCs specifically, many use the proceeds from the sale of their homes and any retirement assets to pay for the housing and care arrangements.”).

<sup>113</sup> *CCRCs Hearing*, *supra* note 5, at 7 (prepared statement of Alicia Puente Cackley, Director of Financial Markets and Community Investment, U.S. Government Accountability Office).

<sup>114</sup> *Id.* at 42 (prepared statement of Professor Katherine C. Pearson, Dickinson School of Law, Pennsylvania State University).

<sup>115</sup> FROLIK, *supra* note 27, at 174–75.

<sup>116</sup> BALL, *supra* note 28, at 138.

<sup>117</sup> Julie D. Lawton, *Unraveling the Legal Hybrid of Housing Cooperatives*, 83 UMKC L. REV. 117, 118 (2014). The term “housing cooperative” is also defined as “an association whose members, by virtue of their ownership interest share in the cooperative corporation, are permitted to lease an apartment unit.” FROLIK, *supra* note 27, at 102.

<sup>118</sup> Lawton, *supra* note 117; *see also* FROLIK, *supra* note 27, at 170.

<sup>119</sup> Lawton, *supra* note 117.



of the corporation.<sup>120</sup> Structurally, a cooperative gives ownership and control to the consumer: residents.<sup>121</sup> The result is that “cooperative owners share a common interest in maximizing their returns from the patron relationship.”<sup>122</sup> This unification of interests “shift[s] the purposes and masters served by the firm from profit maximization and shareholder value to provision and the substantive interests of consumers.”<sup>123</sup>

According to the U.S. Department of Agriculture, a “cooperative” in the most general sense is “a user-owned, user-controlled business that distributes benefits on the basis of use.”<sup>124</sup> As such, a cooperative has the following core characteristics:

(1) It is owned and controlled by the people who use its services or buy its products (its “owner/customers”); (2) its primary focus is to provide its services or goods to its owner/customers and not to the general public; (3) it is demographically controlled by its owner/customers, and each owner/customer has one vote regardless of the amount of services or products it purchases from the cooperative; and (4) the primary objective of the cooperative is to maximize benefits to its owner/customers rather than profits.<sup>125</sup>

Certain “new generation cooperatives” more closely align with the traditional CCRC model, requiring a substantial equity investment from each member, with contractually fixed rights and obligations based on each member’s equity contribution.<sup>126</sup> In addition to an initial equity contribution, a new member may be required to pay an entrance fee.<sup>127</sup> The fee is normally nonrefundable, while the contribution (i.e., “buy-in”) becomes the member’s ownership stake in the co-op.<sup>128</sup> When that member leaves the co-op, she (or her estate) is only eligible to receive the amount in this capital account.<sup>129</sup> In a *market-rate co-op*, the account builds equity as the value of the cooperative corporation or the underlying property increases.<sup>130</sup> In an *affordable co-op*, however, there are often limitations on the amount in order to assure long-term affordability.<sup>131</sup> As a member of the co-op, a resident periodically pays rent for her proprietary lease, in addition to monthly maintenance payments to the cooperative for her share of the underlying property costs.<sup>132</sup>

“Resident ownership” or “resident control” aligns the interests of management with the residents.<sup>133</sup> The residents elect a board of directors to be responsible for the “maintenance and daily governance of the cooperative.”<sup>134</sup> The board, in most cases, enlists a professional management company to manage the day-

---

<sup>120</sup> Michael H. Schill et al., *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275 (2007); see also Lawton, *supra* note 117 (“This confluence creates the legal hybrid nature of housing cooperatives: a member is, at once, both a tenant of the cooperative corporation and a co-owner in the cooperative corporation.”).

<sup>121</sup> March Schneiberg, *Toward an Organizationally Diverse American Capitalism? Cooperative, Mutual, and Local State-Owned Enterprise*, 34 SEATTLE U. L. REV. 1409, 1422 (2011).

<sup>122</sup> Peter Molk, *The Puzzling Lack of Cooperatives*, 88 TUL. L. REV. 899, 911 (2014).

<sup>123</sup> Schneiberg, *supra* note 121, at 1422.

<sup>124</sup> CHARLES T. AUTRY & ROLAND F. HALL, *THE LAW OF COOPERATIVES* 8 (2d ed. 2009). The Internal Co-operative Alliance defines “cooperative” as “a voluntary association of persons united to meet their common economic, social, and cultural needs through a jointly owned and democratically controlled enterprise.” *Id.* at 7.

<sup>125</sup> *Id.* at 2.

<sup>126</sup> *Id.* at 20–21.

<sup>127</sup> JANELLE ORSI, *PRACTICING LAW IN THE SHARING ECONOMY* 189 (2012). See generally 26 U.S.C. § 501(c)(12) (2012).

<sup>128</sup> ORSI, *supra* note 127, at 194.

<sup>129</sup> *Id.* at 195.

<sup>130</sup> Jim Gray et al., *A Model Worth Considering for Affordable Homeownership and Strengthened Communities: Cooperative Housing*, 62 J. OF HOUS. & CMTY. DEV. 20, 21 (2005).

<sup>131</sup> *Id.*

<sup>132</sup> Schill et al., *supra* note 120, at 281.

<sup>133</sup> ORSI, *supra* note 127, at 469.

<sup>134</sup> Abraham Bell & Gideon Parchomovsky, *Governing Communities by Auction*, 81 U. CHI. L. REV. 1, 8 (2014).

to-day activities of hiring, staff supervision, and facility maintenance.<sup>135</sup> Prior to purchasing a share in a cooperative, a prospective resident may even be required to apply to the board of directors for admission.<sup>136</sup> Many cooperatives evolve from pre-existing networks or communities, such as a common religious group, where individual members care about the welfare of the entire group.<sup>137</sup> As a result, housing cooperatives have traditionally placed barriers on entry to prevent applicants “incompatible with the co-op’s ambience and purposes” from being admitted.<sup>138</sup>

A cooperative may also be entitled to tax-exempt status if it “operat[es] on a cooperative basis.”<sup>139</sup> In *Puget Sound Plywood v. Commissioner*,<sup>140</sup> the court determined that “operating on a cooperative basis” involves (1) “democratic control” by the members on a one-member-one-vote basis, (2) “operation at cost” so that any funds remaining after expenses are returned to the members, and (3) “subordination of capital,” which limits returns to investors.<sup>141</sup>

Continuing care communities stand to benefit from cooperative ownership structures in a number of ways. First, for many seniors—especially elder renters who have no home to convert (i.e., to sell) for the initial entrance fee—CCRCs are priced out of reach.<sup>142</sup> As a cooperative which caters to low- and middle-income seniors, a continuing care community would not only be entitled to beneficial tax treatment at the federal level, but would be more likely to receive tax benefits at the state and local levels. Second, a co-op would provide greater financial security to its residents than a traditional CCRC framework. By permitting residents the right to receive an amount from their capital accounts, a co-op provides residents with a source of equity against which they can borrow to finance housing and health-related services, or, in the event of an emergency, acute medical care. Third, a cooperative structure would provide residents—who have a tremendous financial stake in their retirement community—with a greater voice and the right to elect their board of directors. Even if the board contracts out for management services, the services provider will be accountable to the residents. Furthermore, as the owners, residents would have greater access to financial records and disclosures. Although there are undoubtedly costs to cooperative ownership, the benefits suggest that developers at least consider whether it is financially possible.

#### CONCLUSION

In conclusion, the continuing care retirement community offers both the accessibility and the affordability required by today’s aging baby boomers. Unfortunately, the collapse of the housing bubble in 2006 exposed serious defects in areas of residential control, accountability, and long-term financial security. The housing cooperative—an underutilized option among today’s retirement communities—already closely maps the traditional CCRC model, but the ownership stake provide residents with greater levels of protection. Continuing care cooperatives, therefore, deserve greater consideration as a framework moving forward.

---

<sup>135</sup> *Id.*; see also FROLIK, *supra* note 27, at 170 (“The CCRC is operated by the unit owner’s association, which contracts with a management firm to manage the community and supply the day-to-day services.”).

<sup>136</sup> Schill et al., *supra* note 120, at 282.

<sup>137</sup> Molk, *supra* note 122, at 935.

<sup>138</sup> Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1874 (2012).

<sup>139</sup> ORSI, *supra* note 127, at 194.

<sup>140</sup> 44 T.C. 305 (1965).

<sup>141</sup> See ORSI, *supra* note 127, at 189.

<sup>142</sup> See SENIORS COMMISSION, *supra* note 1, at 57. Continuing care communities today increasingly cater to middle- and upper-income seniors. Kelly Greene, *Continuing-Care Retirement Communities: Weighing the Risks*, WALL ST. J. (Aug. 7, 2010), <http://www.wsj.com/articles/SB10001424052748704499604575407290112356422> (Continuing care communities “have grown in popularity along with the aging of the population, particularly among the upper-middle class and affluent.”).