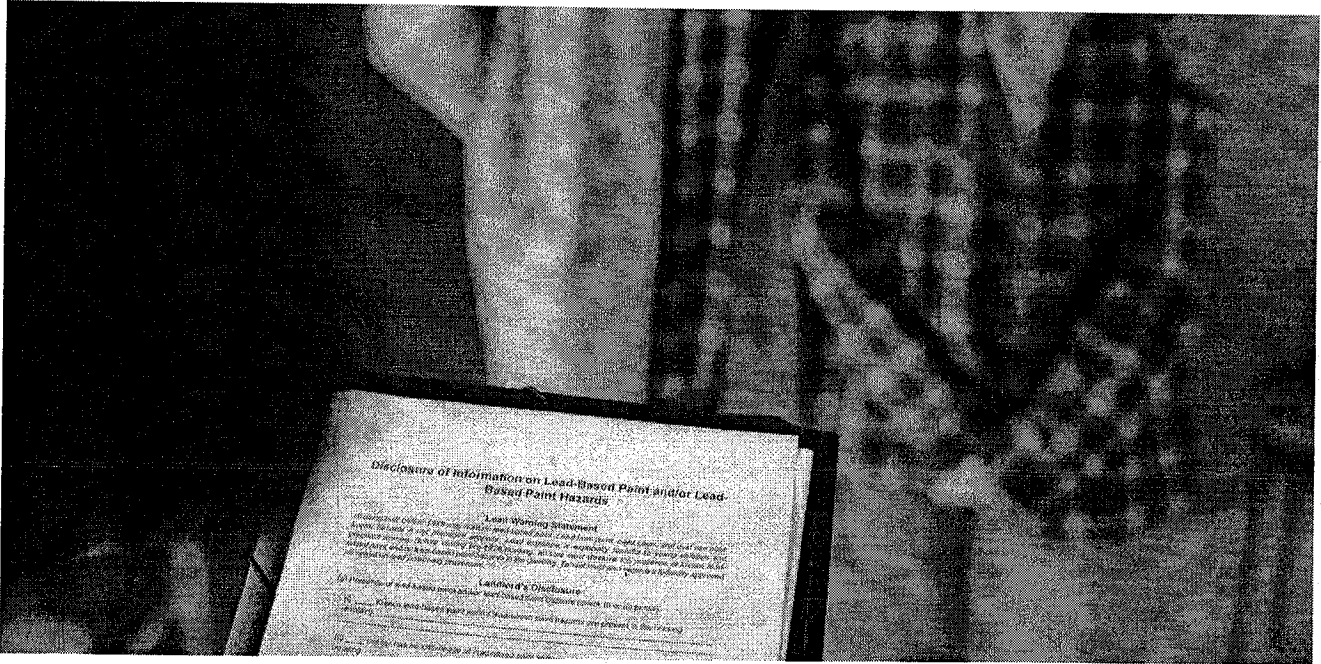


# In Defense of Maintaining a Two Person Per Bedroom Occupancy Limit by Sandra E. Clark

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February 1, 2026



The Federal Fair Housing Act of 1968 prohibits discrimination in housing because of race, color, national origin, religion, sex, and disability. The Fair Housing Amendment Act of 1988 added Familial Status as a protected class to make sure that families with children are not treated differently in housing transactions ([www.hud.gov](http://www.hud.gov), [www.justice.gov](http://www.justice.gov), [cnyfairhousing.org](http://cnyfairhousing.org)).

To target landlords for housing discrimination, housing councils routinely use "testing" or "shopping" programs, where trained persons act as prospective renters to gather evidence of discriminatory practices.

The following article illustrates a winning strategy to combat a Federal familial status discrimination complaint. This complaint was brought by a private non-profit entity, The Fair Housing Center of Central Indiana, Inc. against a long-established, family-owned developer and management company that provided high-quality affordable housing in central Indiana. The subject properties are three low-rise buildings located in suburban areas with sprawling beautifully landscaped grounds. The smallest property is 164 units and the largest is 342 units.

Through the common use of a vacancy "shopper", the Fair Housing Center of Central Indiana, Inc. contacted leasing representatives at the defendant's properties. The shopper claimed to represent a family of five: a husband and wife with three children looking for a two bedroom apartment. All of the leasing agents consistently confirmed that the occupancy policy of the buildings did not allow more than four persons in their two bedroom units, regardless of age, but alternately offered the prospects three bedrooms units, if available. The Fair Housing Center of Central Indiana, Inc. subsequently filed a lawsuit against M & J Management Company, LLC DBA the Sexton Companies for being in violation of federal and state Fair Housing laws.

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Citing the Court's ruling, "Plaintiff's lawsuit alleges that Defendants' occupancy standard discriminates against families with children because it limits occupancy of Defendants' rental units to two persons per bedroom, regardless of the age of the occupants. Plaintiff is not pursuing a claim for intentional discrimination. Rather, Plaintiff accuses Defendants of creating a disparate impact on families with minor children through Defendants' occupancy policy limiting to two persons per bedroom."

During the trial, The Fair Housing Center argued that the Sexton apartments should be able to accommodate two-to-three extra occupants, and therefore the housing provider was discriminating against families. They were promoting increasing occupants per bedroom and also using dens, dining areas, and living rooms as sleeping quarters. Fair Housing also attempted to argue that infants and small children do not utilize substantial resources.

As the expert witness representing the defendants, the assigned task was to illustrate the reasons why it is essential to maintain the "two persons per bedroom limit" to protect the financial and operational integrity of the subject apartment complexes. These standards were utilized without violating federal and local non-discrimination laws when evenly applied. Working with a very skilled lead defense attorney, a winning plan was formulated. Prior legal precedent exists which shows that financial harm to a landlord is a sufficient reason to limit occupants.

The following points were addressed in the defense arguments, which included the numerous negative impacts of over-crowded living conditions:

- Consideration was made of local building codes and requirements for minimum construction requirements for bedroom sizes, living space requirements, and maximum occupancy limits. A detailed study of the square footage of the bedrooms and the overall apartments was conducted, paying special attention to what portions were considered the habitable spaces. Habitable spaces do not include kitchens, closets, hallways, and bathrooms. The bedrooms in the subject properties are generally small and do not meet the parameters for more than two occupants per bedroom. Many of the bedrooms do not even meet the requirement for more than one person. The majority of units do not have dens or bonus spaces.
- The kitchens in the subject properties are small with mostly compact stoves, smaller refrigerators, and also small individual hot water heaters. Surveying the size of the subject properties' appliances and comparing them with the recommendations of plumbers and appliance manufacturers, the Defense was able to illustrate that the existing design of the property would not support adding one-to-three additional occupants to a unit. There simply was no room to increase the size of the appliances without extensive remodeling to enlarge spaces to accommodate larger appliances, plus valuable square footage would be used up for any such additions. An especially strong argument was made to support the lack of sufficient hot water for denser occupancy.
- Most of the units only have one bathroom, and none of them have windows for ventilation, only exhaust fans. The defense was able to argue that the increase in occupants would create more frequent use of the showers and tubs. This would result in substantial wear and tear on the bathrooms, not allowing them to dry out between usage, and creating mold and mildew issues and deteriorating finishes. Generally, tenants do not make sufficient use of the furnished exhaust fans. Enlarging the small fan systems would require the purchase of new fan units and the enlargement of the existing exhaust shafts, and would result in costly construction.
- Higher density would result in more clogged sewer lines, higher plumbing maintenance costs, and the premature aging of pipes. Additionally, the maintenance costs for the common areas would increase due to increased wear and tear, all adding a financial burden onto the property owners.
- The parking ratios of the subject properties are below two parking spaces per unit and increased density would add substantial demand for additional parking. These properties are all located on streets that do not provide street parking. A lack of sufficient parking would decrease the rental value of these suburban units and negatively impact marketing efforts.
- The rubbish service provided to the subject properties is already maxed out at six days per week for pick-ups. There is no room for additional rubbish containers without reconfiguring the rubbish enclosures and thereby using up valuable parking spaces. Both of these factors would have a negative financial impact on the property.

- The defense also made the argument that infants and small children do have a measurable environmental and financial impact on apartment operations. For example, babies generate substantial rubbish with disposable diapers, and also use substantial water due to more frequent baths.
- Additional occupants would also require more storage for more possessions, leading to overcrowded conditions. Closets, cabinets, rooms and hallways crammed with an overabundance of personal possessions leads to fire safety and health issues due to poor air circulation. Clutter, mildew and a lack of routine housekeeping can snowball into vermin problems with roaches, ants and dust mites and unhealthy air quality.
- Too many people crammed into small spaces may also be emotionally difficult and create conflicts within a household, spilling over into the apartment community, creating noise issues and harming the quiet enjoyment of other residents.

The plaintiffs retained only one expert witness that they presented as a “Statistician”. The expert’s goal was to prove that the defendants’ properties’ minor occupancy counts did not align with the minor occupancy levels of the surrounding areas. Census data was presented to tabulate and analyze whether the defendant’s occupancy standard had a disproportionate effect on households with minor children. However, the court ruled that “this person did not rise to the level of a statistician nor an expert in statistics”. After careful review and detailed analysis of the presented data, the Court ultimately ruled that the plaintiff’s expert witness be excluded as his “methodology was not based on sufficient facts and data.” “The Plaintiff presented no evidence of statistically significant numbers of families who decided to live at defendants’ units but were denied the choice. And this is not the standard. The plaintiff must present reliable evidence showing that the defendant’s occupancy policy *caused* a disparity. They failed to do so.”

In summary, the Court ruled in favor of the defendants. They were not in violation of any federal or local housing codes.

Readers of this article should keep in mind that other jurisdictions may have more stringent occupancy discrimination rules and definitions of an “Occupant”.

The purpose of this article is to enlighten property owners to the options available as a defense if you are slapped with a rental housing discrimination lawsuit.

*Sandra E. Clark, CPM, RPA is the President of Prajna Real Estate Services, Inc., with over 40 years of property management experience, providing nationwide Expert Witness support in the real estate industry for the past 13 years. She successfully helps parties navigate the complexities of property management litigation to negotiate settlements and provide professional Expert Witness representation at trial. Her background includes the full-service management of residential, commercial, industrial and HOA properties. For information on Expert Witness services, please feel welcome to contact Sandra at [email protected] or (310) 490- 8701.*

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