Select California Laws Relating to Residential Recovery Facilities and Group Homes

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I. Introduction

This paper summarizes California statutes and case law regarding planning and zoning requirements applicable to group homes and supportive housing that impose limitations on local governments beyond those imposed by the federal Fair Housing Act and state Fair Employment and Housing Act. The paper first reviews state statutes that protect certain *licensed* group homes and describes provisions of State Planning and Zoning Law that are applicable more generally to both licensed and unlicensed homes. It then explains California case law relating to the right of privacy, which prevents local governments from discriminating between households containing related persons and those comprised of unrelated individuals. It concludes by discussing local regulations that appear to be permissible under State law and fair housing law.

II. Statutes Protecting Licensed Facilities

A complex set of statutes requires that cities and counties treat small, licensed group homes like single-family homes. Inpatient and outpatient psychiatric facilities, including residential facilities for the mentally ill, must also be allowed in certain zoning districts.

A. California Licensing Laws

California has adopted a complicated licensing scheme in which group homes providing certain kinds of care and supervision must be licensed. Some licensed homes cannot be closer than 300 feet to each other, while other licensed homes have no separation requirements. All licensed facilities serving six or fewer persons must be treated like single-family homes for zoning purposes.

While this section discusses some of the most common licensed facilities, it does not include every type of license or facility regulated in this complex area of law.

1. Community Care Facilities

Community care facilities must be licensed by the California Department of Social Services (CDSS).[1] A "community care facility" is a facility where non-medical care and supervision are provided for children or adults in need of personal services.[2] Facilities serving adults typically provide care and supervision for persons between 18-59 years of age who need a supportive living environment. Residents are usually mentally or developmentally disabled. The services provided may include assistance in dressing and bathing; supervision of client activities; monitoring of food intake; or oversight of the client's property.[3]

CDSS separately licenses residential care facilities for the elderly and residential care facilities for the chronically ill. Residential care facilities for the elderly provide varying levels of non-

[1] Cal. Health & Safety Code 1500 *et seq.*
[2] Cal. Health & Safety Code 1502(a).
[3] 22 Cal. Code of Regulations 80001(c)(2).

medical care and supervision for persons 60 years of age or older.[4] Residential care facilities for the chronically ill provide treatment for persons with AIDS or HIV disease.[5]

2. Drug and Alcohol Treatment Facilities

The State Department of Drug and Alcohol Programs ("ADP") licenses facilities serving six or fewer persons that provide residential non-medical services to adults who are recovering from problems related to alcohol or drugs and need treatment or detoxification services.[6] Individuals in recovery from drug and alcohol addiction are defined as disabled under the Fair Housing Act.[7] This category of disability includes both individuals recovering in licensed detoxification facilities and recovering alcoholics or drug users who may live in "clean and sober" living facilities.

3. Health Facilities

The State Department of Health Services and State Department of Mental Health license a variety of residential health care facilities serving six or fewer persons.[8] These include "congregate living health facilities" which provide in-patient care to no more than six persons who may be terminally ill, ventilator dependent, or catastrophically and severely disabled[9] and intermediate care facilities for persons who need intermittent nursing care.[10] Pediatric day health and respite care facilities with six or fewer beds are separately licensed.[11]

B. Protection from Land Use Regulations for Certain Licensed Facilities

Small facilities licensed under these sections of California law and serving six or fewer residents must be treated by local governments identically to single-family homes. Additional protection from discrimination is provided to certain psychiatric facilities. However, some group homes may be subject to spacing requirements.

1. Limitations on Zoning Control of Small Group Homes Serving Six or Fewer Residents

Licensed group homes serving six or fewer residents must be treated like single-family homes or single dwelling units for zoning purposes.[12] In other words, a licensed group home serving six or fewer residents must be a permitted use in all residential zones in which a single-family home is

[4] Cal. Health & Safety Code 1569.2(k).
[5] 22 Cal. Code of Regulations 87801(a)(5).
[6] Cal. Health & Safety Code 11834.02.
[7] 24 C.F.R. 100.201.
[8] Cal. Health & Safety Code 1265 – 1271.1.
[9] Cal. Health & Safety Code 1250(i).
[10] Cal. Health & Safety Code 1250(e) and 1250(h).
[11] Cal. Health & Safety Code 1760 – 1761.8.
[12] This rule appears to apply to virtually all licensed group homes. Included are facilities for persons with disabilities and other facilities (Welfare & Inst. Code 5116), residential health care facilities (Health & Safety Code 1267.8, 1267.9, & 1267.16), residential care facilities for the elderly (Health & Safety Code 1568.083 - 1568.0831, 1569.82 – 1569.87), community care facilities (Health & Safety Code 1518, 1520.5, 1566 - 1566.8, 1567.1, pediatric day health facilities (Health & Safety Code 1267.9; 1760 – 1761.8), and facilities for alcohol and drug treatment (Health & Safety Code 11834.23).

permitted, with the same parking requirements, setbacks, design standards, and the like. No conditional use permit, variance, or special permit can be required for these small group homes unless the same permit is required for single-family homes, nor can parking standards be higher, nor can special design standards be imposed. The statutes specifically state that these facilities cannot be considered to be boarding houses or rest homes or regulated as such.[13] Staff members and operators of the facility may reside in the home in addition to those served.

Homeowners' associations and other residents also cannot enforce restrictive covenants limiting uses of homes to "private residences" to exclude group homes for the disabled serving six or fewer persons.[14]

The Legislature in 2006 adopted AB 2184 (Bogh) to clarify that communities may fully enforce local ordinances against these facilities, including fines and other penalties, so long as the ordinances do not distinguish residential facilities from other single-family homes.[15]

Because there are no separation requirements for drug and alcohol treatment facilities, ADP has in practice been willing to issue separate licenses for 'small' drug and alcohol treatment facilities whenever a dwelling unit or structure has a separate address. For instance, ADP has issued a separate license for each apartment in one multifamily building, for each single-family home in a six-home compound, and for each cottage in a hotel, in each case creating facilities that in fact serve many more than six residents. No local effort to regulate these facilities as 'large' residential care facilities has been successful in a published case; in other contexts, the courts have determined that the State has completely preempted local regulation of small residential care facilities.[16]

2. Facilities Serving More Than Six Residents

Because California law only protects licensed facilities serving six or fewer residents, many cities and counties restrict the location of facilities housing seven or more clients. They may do this by requiring use permits, adopting special parking and other standards for these homes, or prohibiting these large facilities outright in certain zoning districts. While this practice may raise fair housing issues, no published California decision prohibits the practice. Some cases in other federal circuits have found that requiring a conditional use permit for large group homes violates the federal Fair Housing Act.[17] However, the federal Ninth Circuit, whose decisions are binding in California, found that requiring a conditional use permit for a building atypical in size and bulk for a single-family residence does not violate the Fair Housing Act.[18]

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[13] For example, *see* Health & Safety Code 1566.3 & 11834.23.
[14] Government Code 12955; Hall v. Butte Home Health Inc., 60 Cal. App. 4th 308 (1997); Broadmoor San Clemente Homeowners Assoc. v. Nelson, 25 Cal. App. 4th 1 (1994).
[15] Health & Safety Code 1566.3; Chapter 746, Statutes of 2006.
[16] City of Los Angeles v. Department of Health, 63 Cal. App. 3d 473, 479 (1976).
[17] ARC of New Jersey v. New Jersey, 950 F. Supp. 637 (D. N.J. 1996); Assoc. for Advancement of the Mentally Handicapped v. City of Elizabeth, 876 F. Supp. 614 (D. N.J. 1994).
[18] Gamble v. City of Escondido, 104 F.3d 300, 304 (9th Cir. 1997); *see also* United States v. Village of Palatine, 104 F.3d 300, 304 (9th Cir. 1997).

A city or county cannot require an annual review of a group home's operations as a condition of a use permit. The Ninth Circuit has held that an annual review provision adopted as a condition of a special use permit was not consistent with the Fair Housing Act.[19]

In 2006, the Legislature passed a bill (SB 1322) sponsored by State Senator Cedillo that would have required all communities to designate sites where licensed facilities with seven or more residents could locate either as a permitted use or with a use permit. It was motivated by newspaper reports of suburban communities' "dumping" the mentally ill and homeless in big cities. Although SB 1322 was vetoed by the Governor, changes were later made in Housing Element law to protect certain transitional and supportive housing, as discussed further below.

3. Siting of Inpatient and Outpatient Psychiatric Facilities

Cities must allow health facilities for both inpatient and outpatient psychiatric care and treatment in any area zoned for hospitals or nursing homes, or in which hospitals and nursing homes are permitted with a conditional use permit.[20] "Health facilities" include residential care facilities for mentally ill persons. This means that if a zoning ordinance permits hospitals or nursing homes in an area, it must also permit all types of mental health facilities, regardless of the number of patients or residents. This is important because most cities are supportive of hospitals and nursing zones and may allow them in areas where they would normally not wish to allow large facilities for the mentally ill.

In one case, a residential care facility for 16 mentally ill persons was refused a permit in an R-2 zoning district where "rest homes" and "convalescent homes" were permitted, but not "nursing homes." Since the zoning district did not permit "nursing homes" or hospitals, the City believed that it was able to forbid the use in that zoning district. However, the court found that the City's definitions of "rest homes" and "convalescent homes" were very similar to its definition of "nursing homes"—rest homes and convalescent homes were, in effect, nursing homes—and so held that the City must allow the residential facility for mentally ill persons within that zoning district.[21]

4. Separation Requirements for Certain Licensed Facilities

CDSS must deny an application for certain group homes if the new facility would result in "overconcentration." For community care facilities,[22] intermediate care facilities, and pediatric day health and respite care facilities,[23] "overconcentration" is defined as a separation of less than 300 feet from another licensed "residential care facility," measured from the outside walls of the structure housing the facility. Congregate living health facilities must be separated by 1,000 feet.[24]

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[19] Turning Point, Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996).
[20] Cal. Wel. & Inst. Code 5120.
[21] City of Torrance v. Transitional Living Centers, 30 Cal. 3d 516 (1982).
[22] Cal. Health & Safety Code 1520.5.
[23] Cal. Health & Safety Code 1267.9.
[24] Cal. Health & Safety Code 1267.9(b)(2).

These separation requirements do *not* apply to residential care facilities for the elderly, drug and alcohol treatment facilities, foster family homes, or "transitional shelter care facilities," which provide immediate shelter for children removed from their homes. None of the separation requirements have been challenged under the federal Fair Housing Act, although separation requirements have been challenged in other states.[25]

CDSS must submit any application for a facility covered by the law to the city where the facility will be located. The city may request that the license be denied based on overconcentration or may ask that the license be approved. CDSS cannot approve a facility located within 300 feet of an existing facility (or within 1,000 feet of a congregate living health facility) unless the city approves the application. Even if there is adequate separation between the facilities, a city or county may ask that the license be denied based on overconcentration.[26]

These separation requirements apply only to facilities with the same type of license. For instance, a community care facility would not violate the separation requirements even if located next to a drug and alcohol treatment facility.

C. Facilities That Do Not Need a License

Housing in which some services are provided to persons with disabilities may not require licensing. In housing financed under certain federal housing programs, including Sections 202, 221(d)(3), 236, and 811, if residents obtain care and supervision independently from a third party that is not the housing provider, then the housing provider need not obtain a license.[27] "Supportive housing" and independent living facilities with "community living support services," both of which provide some services to disabled people, generally do not need to be licensed.[28] Recovery homes providing group living arrangements for people who have *graduated* from drug and alcohol programs, but which do not provide care or supervision, also do not need to be licensed.[29]

The result is that many situations exist where persons with disabilities will live together and receive some services in unlicensed facilities. Because State law does not require that these facilities be treated as single-family homes, some communities have attempted to classify them as lodging houses or other commercial uses and require special permits. Distinguishing a "lodging house" from a "residence" is discussed in more detail in the next section. However, courts in other jurisdictions have found that when the state does not provide a license for a type of facility, cities cannot discriminate against facilities merely because they are unlicensed.[30] Although there is no case on point in California or the Ninth Circuit, ordinances requiring greater regulation for *unlicensed* homes with fewer services than *licensed* homes providing more services could raise fair housing issues, although an argument can also be made that unlicensed facilities are completely unregulated and hence require more local supervision. Some

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[25] Based on cases from other states, the 1,000-foot limit for congregate living health facilities is unlikely to be upheld. Spacing requirements that have been challenged have required 500-foot separations or more.
[26] *See, e.g.,* Cal. Health & Safety Code 1520.5(d).
[27] Cal. Health & Safety Code 1505(p).
[28] Cal. Health & Safety Code 1504.5.
[29] Cal. Health & Safety Code 1505(i).
[30] North-Shore Chicago Rehabilitation Inc. v. Village of Skokie, 827 F. Supp. 497 (1993).

communities have explicitly adopted ordinances stating that unlicensed group homes serving six or fewer clients are permitted in residential zones.[31]

Legislation was introduced in California in 2006 to make clear that communities *could* regulate *unlicensed* facilities with six or fewer residents. This provision was ultimately removed after receiving fierce opposition from advocates for the disabled and State agencies responsible for finding placements for foster children and recovering drug and alcohol abusers.

III. California Planning and Zoning Laws

California Planning and Zoning Law has long contained provisions prohibiting discrimination in land use decisions based on disability. Effective January 1, 2002, state housing element law was amended to require an analysis of constraints on persons with disabilities and to require programs providing reasonable accommodation. Additional protections for supportive and transitional housing became effective on January 1, 2008.

A. Protection from Discrimination in Land Use Decisions

California's Planning and Zoning Law prohibits discrimination in local governments' zoning and land use actions based on (among other categories) race, sex, lawful occupation, familial status, disability, source of income, method of financing, or occupancy by low to middle income persons.[32] It also prevents agencies from imposing different requirements on single-family or multifamily homes because of the familial status, disability, or income of the intended residents.[33]

In general, the statute serves the same purposes and requires the same proof as a violation of the federal Fair Housing Act.[34] However, federal fair housing law does not specifically limit discrimination based on *income level*,[35] and Section 65008 makes clear that discrimination based on disability is prohibited in local planning and zoning decisions.

B. Housing Elements

California requires that each city and county adopt a 'housing element' as part of its general plan for the growth of the community.[36] The housing element governs the development of housing in the community. It must identify sites for all types of housing, including transitional housing, supportive housing, and emergency shelters. Beginning in 2002, local housing elements were required to analyze constraints on housing for persons with disabilities and to include programs

[31] For instance, one community adopted zoning provisions stating that "residential service facilities" serving 6 or fewer clients could be permitted in any residential zone, defining such uses as: "A residential facility, other than a residential care facility or single housekeeping unit, designed for the provision of personal services in addition to housing, or where the operator receives compensation for the provision of personal services in addition to housing. Personal services may include, but are not limited to, protection, care, supervision, counseling, guidance, training, education, therapy, or other nonmedical care."
[32] Cal. Gov't Code 65008(a) and (b).
[33] Cal. Gov't Code 65008(d)(2).
[34] Keith v. Volpe, 858 F.2d 467, 485 (9th Cir. 1987).
[35] Affordable Housing Development Corp. v. City of Fresno, 433 F.3d 1182 (2006).
[36] Cal. Gov't Code 65580 *et seq.*

to remove constraints or to provide reasonable accommodations for housing designed for persons with disabilities.[37] The California Attorney General also sent a letter to local planning agencies in May 2001 urging them to adopt reasonable accommodation ordinances. As a consequence, many cities and counties in the State now have a separate reasonable accommodation ordinance that may be applicable to group homes serving disabled persons, whether licensed or unlicensed.

Amendments to housing element law effective January 1, 2008[38] specifically require cities and counties to include in their housing elements a program to remove constraints so that 'supportive housing,' as defined in the bill, is treated like other residences of the same type. This means that communities must revise their zoning so that the only restrictions that may be applied to supportive housing, as defined in the statute, are those that apply to other residences of the same type (single-family homes, duplexes, triplexes, or fourplexes) in the same zoning district; no conditional use permit or other permit is required unless other residences of that type in the same zone also must obtain the same permit.

However, to qualify for this protection, the supportive housing must meet the definition of "supportive housing" contained in Health & Safety Code Section 50675.14, which is housing that:

- Has no limit on the length of stay.
- Is linked to onsite or offsite services that assist residents in improving their health status, retaining the housing, and living and working in the community.
- Is occupied by the "target population," defined as adults *with low incomes* having one or more disabilities, including mental illness, HIV or AIDS, substance abuse, or other chronic health problems; and persons eligible for services under the Lanterman Development Disabilities Act, which provides services to persons with developmental disabilities that originated before the person turned 18.

Should a group home meeting this definition of "supportive housing" require a permit of any type, California's "Housing Accountability Act" will allow it to be denied only under very limited circumstances.[39]

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[37] Cal. Gov't Code 65583(a)(4); 65583(c)(3).
[38] Cal. Gov't Code 65583(a)(5).
[39] Cal. Gov't Code 65589.5(d). Local governments cannot deny supportive housing, or add conditions that make the housing infeasible, unless they can make one of five findings:

- The jurisdiction has met its low income housing needs.
- The housing would have a specific, adverse impact on public health or safety, and there is no feasible way to mitigate the impact.
- Denial is required to comply with state or federal law, and there is no way to comply without making the housing unaffordable.
- The housing is proposed on land zoned for agriculture and is surrounded on two sides by land being used for agriculture, or there is inadequate water or sewer service.
- The housing is inconsistent with both the zoning and the land use designation of the site and is not shown in the housing element as an affordable housing site.

Many privately operated group homes have limitations on the length of stay and are not occupied by adults with low incomes and so do not qualify as "supportive housing" under this definition; but many group homes funded under California's Mental Health Services Act do so qualify.

IV. Protections Provided by the California Right to Privacy

Unlike the federal Constitution, California's Constitution contains an *express* right to privacy, adopted by the voters in 1972. The California Supreme Court has found that this right includes "the right to be left alone in our own homes" and has explained that "the right to choose with whom to live is fundamental."[40] Consequently, the California courts have struck down local ordinances that attempt to control *who* lives in a household—whether families or unrelated persons, whether healthy or disabled, whether renters or owners. On the other hand, the courts will support ordinances that regulate the *use* of a residence for commercial purposes.

Consequently, communities that desire to regulate group homes have attempted to define them as commercial *uses* similar to boarding houses rather than restricting *who* lives there.

A. Families v. Unrelated Persons in a Household

In many states, local communities can control the number of unrelated people permitted to live in a household. However, based on the privacy clause in the State Constitution, California case law requires cities to treat groups of related and unrelated people identically when they function as one household.[41] Local ordinances that define a "family" in terms of blood, marriage, or adoption, and that treat unrelated groups differently from "families," violate California law. California cities cannot limit the number of unrelated people who live together while allowing an unlimited number of family members to live in a dwelling.

In the lead case of *City of Santa Barbara v. Adamson*, Mrs. Adamson owned a very large 6,200 sq. ft., 10-bedroom single-family home that she rented to twelve "congenial people." They became "a close group with social, economic, and psychological commitments to each other. They shared expenses, rotated chores, ate evening meals together" and considered themselves a family.

However, Santa Barbara defined a family as either "two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit," or a maximum of five unrelated adults. The court considered the twelve residents to be an "alternate family" that achieved many of the personal and practical needs served by traditional families. The twelve met half the definition of "family," because they lived as a single housekeeping unit. However, they were not related by blood. The court found that the right of privacy guaranteed them the right to choose whom to live with. The purposes put forth by Santa Barbara to justify the ordinance—such as a concern about parking—could be handled by neutral ordinances applicable to all households, not just unrelated individuals, such as applying limits on the number of cars to *all* households. "*In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users*."[42]

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[40] Coalition Advocating Legal Housing Options v. City of Santa Monica, 88 Cal. App. 4th 451, 459-60 (2001).
[41] City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 134 (1980).
[42] Adamson, 27 Cal. 3d at 133.

Despite this long-standing rule, a 2002 study found that *one-third* of local zoning ordinances, including that of the City of Los Angeles, still contained illegal definitions of "family" that included limits on the number of unrelated people in a household.[43] While most cities were aware that these limits were illegal and did not enforce them, interviews with staff members in the City of Los Angeles, for example, found that many did attempt to enforce the limits on the number of unrelated persons.[44]

If a group of people living together can meet the definition of a "household" or "family," there is no limit on the number of people who are permitted to live together, except for Housing Code limits discussed in the next section. By comparison, many ordinances regulate licensed group homes more strictly if they have seven or more residents, by defining such licensed facilities as a separate *use*.

Since *Adamson*, the California courts have struggled to determine when zoning ordinances are focusing on the *occupants* of the home and when they are focusing on the *use* of the home. In particular, courts have struck down ordinances that:

- Limited the residents of a second dwelling unit to the property owner, his/her dependent, or a caregiver for the owner or dependent.[45]

- Allowed owner-occupied properties to have more residents than renter-occupied properties.[46]

- Imposed regulations on tenancies-in-common that had the effect of requiring unrelated persons to share occupancy of their units with each other.[47]

On the other hand, the courts have upheld regulations when they were convinced that the city's primary purpose was to prevent non-residential or commercial *use* in a residential area. In particular, the courts have upheld ordinances that:

- Regulated businesses in single-family residences ("home occupations") and limited employees to residents of the home.[48]

- Prohibited short-term transient rentals of properties for less than thirty days.[49]

B. Occupancy Limits

The Uniform Housing Code (the "UHC") establishes occupancy limits—the number of people who may live in a house of a certain size—and in almost all circumstances municipalities may

[43] Housing Rights, Inc., *California Land Use and Zoning Campaign Report* 27-28 (2002). Los Angeles is now considering amendments to its ordinance.
[44] Kim Savage, *Fair Housing Impediments Study* 37 (prepared for Los Angeles Housing Department) (2002).
[45] Coalition Advocating Legal Housing Options v. City of Santa Monica, 88 Cal. App. 4th 451 (2001).
[46] College Area Renters and Landlords Assn. v. City of San Diego, 43 Cal. App. 4th 677 (1996). However, this case was decided primarily on equal protection grounds, rather than on the right of privacy.
[47] Tom v. City & County of San Francisco, 120 Cal. App. 4th 674 (2004).
[48] City of Los Altos v. Barnes, 3 Cal. App. 4th 1193 (1992).
[49] Ewing v. City of Carmel, 234 Cal. App. 3d 1579 (1991).

not adopt more restrictive limits. The UHC provides that at least one room in a dwelling unit must have 120 square feet. Other rooms must have at least 70 square feet (except kitchens). If more than two persons are using a room for sleeping purposes, there must be an additional 50 square feet for each additional person.[50] Using this standard, the occupancy limit would be seven persons for a 400-sq. ft. studio apartment (the size of a standard two-car garage). Locally adopted occupancy limits cannot be more restrictive than the UHC unless justified based on local climatic, geological, or topographical conditions. Efforts by cities to adopt more restrictive standards based on other impacts (such as parking and noise) have been overturned in California.[51]

Similarly, the Ninth Circuit found that a local ordinance that limited the number of persons in a homeless shelter to 15, when the building code would allow 25 persons, was unreasonable, and found that allowing 25 persons in the shelter would constitute a reasonable accommodation.[52]

Based on these federal and state precedents, localities may not limit the number of people living in a dwelling below that permitted by the UHC.

V. Local Regulation of Group Homes

In the past decade, much local concern has been directed at sober living homes, which are typically unlicensed facilities designed to provide support to recovering substance abusers. Because privately operated sober living homes often desire to attract middle- and upper middle-income residents, and there is a high demand for such facilities, they have often been located in middle- and upper-class areas, and in some cases have experienced local opposition. The League of California Cities has sponsored legislation designed to require licensing or allow more local control, but those efforts have failed. Communities often view such facilities as businesses exploiting a loophole rather than as residences and so seek to be able to distinguish them from residences, often defining them as "lodging houses" or "boarding houses." Lodging houses typically require a conditional use permit and are not permitted in single-family residential zones. Conversely, sober living homes seek to be classified as "households" or "single housekeeping units" so they may locate in any residential neighborhood without requiring any public notice or needing any use permit.

A. Defining Unlicensed Facilities as Lodging Houses or Single Housekeeping Units

A 2003 opinion of the State Attorney General found that communities may prohibit or regulate the operation of a lodging house in a single family zone in order to preserve the residential character of the neighborhood.[53] The City of Lompoc defined a lodging house as "a residence or dwelling . . . wherein three or more rooms, with or without individual or group cooking facilities, are rented to individuals under separate rental agreements or leases, either written or oral, whether or not an owner, agent or rental manager is in residence." The Attorney General agreed

[50] Cal. Health and Safety Code 17922(a)(1). *See* Briseno v. City of Santa Ana, 6 Cal. App. 4th 1378, 1381-82 (1992) (holding that the state Uniform Housing Code preempts local regulation of occupancy limits).
[51] Briseno, 6 Cal. App. 4th at 1383.
[52] Turning Point, Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir. 1996).
[53] 86 Ops. Cal. Att'y Gen'l 30 (2003).

that a lodging house, while providing a 'residence' to paying customers, could be considered a *commercial* use and so could be prohibited in residential areas. ("There is no question but that municipalities are entitled to confine commercial activities to certain districts [citations], and that they may further limit activities within those districts by requiring use permits."[54])

The Attorney General further concluded that the ordinance was consistent with *Adamson* because it would allow any owner of property to rent to any member of the public and any member of the public to apply for lodging. The proposed ordinance would be directed at a commercial *use* of property inconsistent with the residential character of the neighborhood regardless of the identity of the users.

Based on the Attorney General's opinion and *Adamson,* then, cities have increasingly defined a "household" or "single housekeeping unit" to have these characteristics:

- One joint lease signed by all residents;
- Access by all to all common areas of the home; and
- Shared housekeeping and shared household expenses.
- No limits on length of residence.
- New residents selected by existing residents, not a manager or landlord.

For instance, the City of Los Angeles proposed an ordinance defining a "single housekeeping unit" as:

> One household where all the members have common access to and common use of all living, kitchen, and eating areas within the dwelling unit, and household activities and responsibilities such as meals, chores, expenses, and maintenance of the premises are shared or carried out according to a household plan or other customary method. If all or part of the dwelling unit is rented, the lessees must jointly occupy the unit under a single lease, either written or oral, whether for monetary or non-monetary consideration.

The same ordinance proposed to define a boarding or rooming house as:

> A one-family dwelling, or a dwelling with five or fewer guest rooms or suites of rooms, where lodging is provided to individuals with or without meals, for monetary or non-monetary consideration under two or more separate agreements or leases, either written or oral.

Under these and similar ordinance definitions, many sober living homes operated by private organizations, whether for-profit or nonprofit, are classified as boarding or lodging houses because residents do not sign a joint lease; new residents are selected by a manager; household expenses may not be shared (i.e., residents pay a set fee to the manager); and there may be limits

[54] *Id.*

on length of residence. In contrast, persons who desire to live together to support each other during recovery and rent a home together would be classified as a "single housekeeping unit."

Enforcement Issues. If a group home is challenged as not constituting a single housekeeping unit, the operator will likely assert that it is indeed operating as a single unit. Unless there is public information available showing that a residence is operated as a lodging house (e.g., web advertising), an investigation would be required to demonstrate otherwise. If complaints were based primarily on the disability of the occupants (which could include their status as recovering drug and alcohol abusers), then California privacy rights and fair housing laws might be implicated. In one Washington, D.C., case, a federal district court found a violation of the federal Fair Housing Act where the Zoning Administrator carried out a detailed investigation of a residence for five mentally ill men in response to neighbors' concerns, finding that the Zoning Administrator's actions were motivated in part by the neighbors' fears about the residents' mental illness.[55] In California, a similar challenge might be additionally based on rights of privacy and equal protection concerns.

B. Best Practices - Service Providers

We advise our nonprofit sponsors that if a facility can be considered a single housekeeping unit, the facility must be treated as a residence with one family residing in it. The most defensible structure for such a facility would be to:

- Have one rental agreement or lease signed by all *occupants*. If, instead, the provider signs the lease and each resident has a verbal or written agreement with the provider, then the facility could be considered a "lodging house" under the definition upheld by the Attorney General.

- Give all residents equal access to all living and eating areas and food preparation and service areas.

- Keep track of, and share, household expenses.

- Do not require occupants to move after a certain period of time, except for time limits imposed by the rental agreement or lease with the owner.

- Allow all existing residents to select new members of the household.

VI. Conclusion

In my own experience as a former city official, many group homes were invisible in the community and caused few problems. Most complaints about overcrowding and excessive vehicles did not involve a group home, but rather the poorest areas where space was rented out to the limits of the Housing Code.

The group homes that caused the most concern were sober living facilities which tended to concentrate in certain inexpensive single-family neighborhoods. In one case, all five homes on

[55] Community Housing Trust v. Dep't of Consumer & Regulatory Affairs, 257 F. Supp. 2d 208 (D.D.C. 2003).

one block face were purchased by a single owner. He was knowledgeable about his rights but unconcerned about his obligations, and sneered at the City's and neighborhood's concerns. Since the facilities were unlicensed, there was no regulatory oversight. When the occupant of one home was arrested for drug dealing, it caused an uproar.

Many providers are conscious of their position in neighborhoods and make an effort to accommodate community concerns. Others may be perceived as arrogant and dismissive of local concerns, viewing all neighbors as "NIMBYs." Providers who view themselves as part of the community and set house rules that encourage community involvement, restrict noise, control parking, and establish smoking locations not visible from the street can go a long way toward abating perceived problems.

Cities should modify their zoning ordinances to address unlicensed group homes and decide on a strategy for dealing with group homes with seven or more persons (use permit and reasonable accommodation). State legislation requiring some minimal licensing for sober living facilities would also be beneficial to set standards for minimal levels of care. Cities need also to avoid the kind of incidents that result in the Legislature's willingness to further constrain local control of these homes.

SUMMARY: GROUP HOME ANALYSIS UNDER CALIFORNIA LAW

IF LICENSED:

6 or fewer clients:

Must be treated like a single-family home for all zoning purposes, except for spacing requirements for certain licensed facilities (e.g., community care facilities). Community care facilities for the elderly and drug and alcohol treatment centers do not have spacing requirements.

7 or more clients:

Psychiatric facilities—both inpatient and outpatient—must be permitted in any zone that permits nursing homes or hospitals as conditional or permitted uses. (City of Torrance v. Transitional Living Centers)

Other licensed facilities are often subject to a use permit and may not be permitted in certain zones. Advocates may request a reasonable accommodation to avoid use permit requirements or to obtain modifications to traditional zoning requirements. But the Ninth Circuit has not found a use permit *per se* to violate the Fair Housing Act. (Gamble v. City of Escondido)

IF UNLICENSED:

Is it operated as a single housekeeping unit (household, family)?

If so, must be treated like a single dwelling unit.
Unlicensed homes are more likely to be considered as a single housekeeping unit if they meet the following tests:

- Physical access: all have access to common areas: kitchen, laundry, living & family rooms is free.
- No limits on term of occupancy
- All residents on lease or rental agreement [AG's opinion]
- Makeup of the household is determined by the residents rather than a landlord or property manager
- Normal household activities (meals, chores) and household expenses shared (*Adamson*)

There are different *local* definitions of "family" or a single housekeeping unit. (For instance, some localities do not use the existence of separate rental agreements as a test for a single housekeeping unit.) Advocates oppose some of the above characteristics.

Does it qualify as "supportive housing" under housing element law?

If so, must be treated like other residences of the same physical type [depending on date of adoption of housing element].

6 or fewer clients:

Fair housing argument if treated more strictly than licensed facilities; but no case in California holds this specifically.

Defined as a boarding house or another use?

Only the *use* can be regulated, not the *user*.
Group homes for the disabled cannot be treated in a discriminatory fashion from other group homes (boarding houses, dormitories, etc.).

Disclosure Issues Related to Residential Care Facilities

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March 7, 2014 (revised)

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I. Introduction

Current California law requires a broker to disclose to a buyer known facts materially affecting the value or desirability of the property offered for sale, when these facts are known or accessible to the broker but unknown to and unobservable by the buyer. (Easton v. Strassburger (1984) 152 Cal. App. 3d 90.)

Unless exempt, the seller is required to complete a statutorily-defined transfer disclosure statement which includes information relating to "neighborhood noise problems, or other nuisances." (Cal. Civ. Code § 1102.6 Question C11 on TDS.) Even if exempt from providing the transfer disclosure statement, the seller is still required by case law to disclose known facts materially affecting the value or desirability of the property or, potentially, be liable for misrepresentation. (Sweat v. Hollister (1995) 37 Cal. App. 4th 603; Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 977.)

Occasionally, despite the materiality of a certain known fact, the disclosure requirement may be overshadowed by other compelling interests such as the right of privacy and the prohibition against discrimination. Unfortunately, the real estate broker is sometimes stuck between a rock and a hard place

trying to determine whether the law requires the disclosure of a fact or the law requires the nondisclosure of the fact!

The intent of this legal article is to shed some light on these very conflicting legal requirements with respect to residential care facilities and day care homes. The issues are complicated by the fact that there are numerous state and federal laws which come into play depending upon the type of facility involved.

II. The Laws Impacting Residential Care Facilities and Day Care Homes

Q 1. ***What California laws impact residential care facilities and day care homes?***

A The following statutes deal with residential care facilities, day care homes, and the related disclosure issues: The California Community Care Facilities Act (Health & Safety Code §§ 1500-1567.9), Residential Care Facilities for Persons With Chronic Life-Threatening Illness (Health & Safety Code §§ 1568.01-1568.092), Residential Care Facilities for the Elderly (Health & Safety Code §§ 1569-1569.87), the California Adult Day Health Care Act (Health & Safety Code §§ 1570-1595), the California Child Day Care Act (Health & Safety Code §§ 1596.70-1596.895), Day Care Centers (Health & Safety Code §§ 1596.90-1597.21), Family Day Care Homes (Health & Safety Code §§ 1597.30-1597.621), Alcoholism or Drug Abuse Recovery or Treatment Facilities (Health & Safety Code §§ 11760 et seq.), the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code §§ 4500 et seq.; §§ 5115-5116), the California Fair Employment and Housing Act (Gov. Code §§ 12948, 12955 et seq.), and the Unruh Civil Rights Act (Civil Code §§ 51 et seq.).

In addition to statutes, several cases and California Attorney General Opinions deal with the subject: Broadmoor San Clemente Homeowners Ass'n v. Nelson (1994) 25 Cal. App. 4th 1; Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524; Welsch v. Goswick (1982) 130 Cal. App. 3d 398; 73 Ops. Cal. Atty. Gen. 58 (1990); and 79 Ops. Cal. Atty. Gen. 112 (1996); Hall v. Butte Home Health, Inc. (1997) 60 Cal.App.4th 308; U.S. v Scott (D. Kan. 1992) 788 F. Supp. 1555.

Q ***2. What federal laws impact the disclosure issues related to residential care facilities and day care homes?***

A The Fair Housing Act (42 U.S.C. §§ 3601-3631 and the regulations) and the Americans With Disabilities Act (42 U.S.C. §§ 12101 et seq. and the regulations).

III. California Community Care Facilities

Q ***3. What is a "Community Care Facility"?***

A A Community Care Facility is any facility, place, or building that is maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired persons, incompetent persons, and abused or neglected children. (Health & Safety Code § 1502(a).)

Q ***4. What was the intent of the legislature when it created the California Community Care Facilities Act regarding the location of these facilities?***

A The California legislature felt there was an urgent need to establish a coordinated and comprehensive statewide service system of quality community care for the mentally ill, developmentally and physically disabled, and children and adults who require organizational care or services. (Health & Safety Code § 1501.)

Furthermore, the legislature indicated that it was the state's policy that each county and city must permit and encourage the development of sufficient numbers and types of residential care facilities in accordance with the local needs. (Health & Safety Code § 1566.)

Q ***5. What is a "Residential Facility"?***

A A "Residential Facility" is any family home, group care facility, or similar facility determined by the Director of Social Services (California State Department of Social Services), for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual. (Health & Safety Code § 1502(a)(1).)

Q ***6. What is an "Adult Day Care Program"?***

A "Adult day program" means any community-based facility or program that provides care to persons 18 years of age or older in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of these individuals on less than a 24-hour basis. (Health & Safety Code § 1502(a)(2).)

Q ***7. What is a "Therapeutic Day Services Facility"?***

A A "Therapeutic Day Services Facility" is any facility that provides nonmedical care, counseling, educational or vocational support, or social rehabilitation services on less than a 24-hour basis to persons under 18 years of age who would otherwise be placed in foster care or who are returning to families from foster care. (Health & Safety Code § 1502(a)(3).)

Q ***8. What is a "Foster Family Home"?***

A A "Foster Family Home" is any residential facility providing 24-hour care for six or fewer foster children that is owned, leased, or rented and is the residence of the foster parent or parents, including their family, in whose care the foster children have been placed. (Health & Safety Code § 1502(a)(5).)

Q ***9. What is a "Small Family Home"?***

A A "Small Family Home" is any residential facility, in the licensee's family residence, that provides 24-hour care for six or fewer foster children who have mental disorders or developmental or physical disabilities and who require special care and supervision as a result of their disabilities. The Social Services department may also approve placement of children without special health care needs, up to the licensed capacity. (Health & Safety Code § 1502(a)(6).)

Q ***10. What is a "Social Rehabilitation Facility"?***

A A "Social Rehabilitation Facility" is any residential facility that provides social rehabilitation services for no longer than 18 months in a group setting to adults recovering from mental illness who temporarily need assistance, guidance, or counseling. (Health & Safety Code § 1502(a)(7).)

Q ***11. What is a "Community Treatment Facility"?***

A A "Community Treatment Facility" is any residential facility that provides mental health treatment services to children in a group setting and has the capacity to provide secure containment. (Health & Safety Code § 1502(a)(8).)

Q ***12. What is a "Transitional Shelter Care Facility" or "Transitional Housing Placement Provider"?***

A A "Transitional Shelter Care Facility" is any group care facility that provides for 24-hour nonmedical care of persons, under 18 years of age, in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual. (Health & Safety Code §§ 1502(a)(11), 1502.3.) These facilities are for the sole purpose of providing care for children who have been removed from their homes as a result of abuse or neglect, for children who have been adjudged wards of the court, and for children who are seriously emotionally disturbed. (Health & Safety Code § 1502.3(c).)

"Transitional Housing Placement Provider" means an organization licensed by the department to provide transitional housing to foster children at least 16 years of age and not more than 18 years of age, and nonminor dependents, as defined in subdivision (v) of Section 11400 of the Welfare and Institutions Code, to promote their transition to adulthood. A transitional housing placement provider shall be privately operated and organized on a nonprofit basis Cal Health & Safety Code § 1502(a)(12).

Q ***13. What is a "Runaway and Homeless Youth Shelter?"***

A "Runaway and Homeless Youth Shelter" means a group home licensed by the department to offer short-term, 24-hour, nonmedical care and supervision and personal services to youth who voluntarily enter the shelter. "Short-term" means no more than 21 consecutive days from the date of admission. The youths may be between 12 to 17 years of age, inclusive, or 18 years of age if the youth is completing high school or its equivalent, is in need of services and without a place of shelter. The maximum capacity for these types of shelters is 25. (Health & Safety Code §§ 1502(a)(13),(14) and 1502.35.)

Q ***14. Are there any residential care facilities which are not subject to the California Community Care Facilities Act?***

A Yes.

The Act does not cover residential care facilities for the elderly which are subject to the California Residential Care Facilities for the Elderly Act. (Health & Safety Code § 1502.5.) See Section V for more information.

The Act does not cover any health facility. (Health & Safety Code §§ 1505(a), 1250.)

The Act does not cover a clinic. (Cal. Health & Safety Code §§ 1505(b), 1202).

The Act does not cover any juvenile placement facility approved by the California Youth Authority or any juvenile hall operated by a county. (Health & Safety Code § 1505(c).)

The Act does not cover any place in which a juvenile is judicially placed after having violated the law. (Health & Safety Code § 1505(d), Welf.& Inst. Code § 727.)

The Act does not cover any child day care facility. (Health & Safety Code § 1505(e).) Those are subject to the California Child Day Care Act, Day Care Centers, or Family Day Care Homes. See Section VII for more information.

The Act does not cover any church facility providing care or treatment of the sick who depend upon prayer or spiritual means for healing. (Health & Safety Code § 1505(f).)

The Act does not cover any school dormitory. (Health & Safety Code § 1505(g).)

The Act does not cover any house, institution, hotel, or homeless shelter that supplies board and room only, or room only, or board only, without any element of care. (Health & Safety Code § 1505(h).)

The Act does not cover any recovery houses or other similar facilities providing group living arrangements for persons recovering from alcoholism or drug addiction where the facility provides no care or supervision. (Health & Safety Code § 1505(i).)

The Act does not cover any alcoholism or drug abuse recovery or treatment facility which is covered by the Alcoholism or Drug Abuse Recovery Act. (Health & Safety Code § 1505(j).) See Section VIII for more

information.
The Act does not cover any arrangement for the receiving and care of persons by a relative or any arrangement for the receiving and care of persons from only one family by a close friend of the parent, guardian, or conservator, if the arrangement is not for financial profit and occurs only occasionally and irregularly. (Health & Safety Code § 1505(k).)
The Act does not cover any home of a relative caregiver of children who are placed by a juvenile court, supervised by the county welfare or probation department (Health & Safety Code § 1505(l).)
The Act does not cover any supported living arrangement for individuals with developmental disabilities. (Health & Safety Code § 1505(m).) They are covered by the Lanterman Developmental Disabilities Services Act. For more information, see Section IX.
The Act does not cover any family home covered by the Lanterman Developmental Disabilities Services Act [Section IX]. (Health & Safety Code § 1505(n).)
The Act does not cover any facility in which only Indian children eligible under the federal Indian Child Welfare Act are placed. (Health & Safety Code § 1505(o).)

Q ***15. What is the impact of the California Community Care Facilities Act on local government?***

A A residential facility, which serves six or fewer persons, must not be subject to any business taxes, local registration fees, use permit fees, or other fees to which other family dwellings of the same type in the same zone are not likewise subject. (Health & Safety Code § 1566.2.) This restriction applies equally to any chartered city, general law city, county, city and county, district, and any other local public entity. (Health & Safety Code §§ 1566, 1566.2.)
Furthermore, a residential facility which serves six or fewer persons is not included within the definition of a boarding house, rooming house, institution or home for the care of minors, the aged, or the mentally infirm, foster care home, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the residential facility is a business run for profit or differs in any other way from a family dwelling. (Health & Safety Code § 1566.3.)
Whether or not unrelated persons are living together, a residential facility that serves six or fewer persons shall be considered a residential use of property for the purposes of this law. In addition, the residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property pursuant to this law (Health & Safety Code § 1566.3(a).)
In addition, neither the State Fire Marshal nor any local public entity may charge any fee for enforcing fire inspection regulations on a residential care facility serving six or fewer persons. (Health & Safety Code § 1566.2.)

Q ***16. What is meant by the term "family dwelling" in the previous question?***

A The term "family dwelling" includes, but is not limited to, single-family dwellings, units in multi-family dwellings, units in duplexes, apartments, mobilehomes, stock cooperatives, condominiums, townhouses, and units in planned developments. (Health & Safety Code § 1566.2.)

Q ***17. Does "six or fewer persons" include everyone in the facility?***

A No. To determine the "six or fewer," the following are not included: the licensee-care giver, the members of the licensee's family, or staff persons. (Health & Safety Code § 1566.)

Q ***18. Is there an affirmative duty to disclose the existence of a "Community Care Facility" serving six or fewer persons?***

A The intent of the legislature is not only to permit but to encourage the development of sufficient numbers of these facilities. Thus the law clearly promotes the existence of these facilities. Under Civil Code Section 3482, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Therefore, the existence of such a facility (assuming it is properly licensed and run) is not a nuisance which must be disclosed.

However, is the existence of such a facility a material fact which must be disclosed (even if it is not deemed a nuisance)?

According to a California Attorney General Opinion, "[T]he location of a licensed care facility [serving six or fewer persons] is not a material fact required to be disclosed under California law." (73 Ops. Cal. Atty. Gen. 58, 67.)

In addition, Health and Safety Code Section 1566.5 states, "For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, a residential facility which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary." (emphasis added). Case law has further eliminated this date limitation in regard to the handicapped (Hall v. Butte Home Health, Inc. (1997) 60 Cal. App. 4th 308.) (See Question 24).

The implication of this section is that a Community Care Facility serving six or fewer persons is to be treated like any property in which a single family resides. It certainly is not a material fact that a single family lives in a property.

California law prohibits arbitrary discrimination. Disclosing the existence of such a facility might discourage persons from purchasing a dwelling because of certain persons living in the Community Care Facility in the neighborhood. Disclosure intended to prejudice the selection of a site for a residential care facility or to prevent those living in such facilities from residing in the area of their choosing is forbidden." (73 Ops. Cal. Atty. Gen. 58, 67.)

Volunteering information concerning the presence of a licensed care facility may also violate state and federal law prohibiting discrimination based upon a person being handicapped. (Cal. Code Regs., tit. 10, § 2780; 24 C.F.R. §100.70(c)(1)(3).) See Question 19 for the definition of "handicap."

In conclusion, neither a licensee nor a seller need disclose the existence of a Community Care Facility in the neighborhood serving six or fewer persons.

Q ***19. What is the definition of "handicap" under California and federal law?***

A According to the HUD regulations pursuant to the Fair Housing Amendments Act of 1988, "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

As used in this definition, physical or mental impairment includes: (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy,

multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus (HIV) infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism. (24 C.F.R. § 100.201.)

Drug addiction is considered a disability (handicap). "Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs." (ADA Handbook; 42 U.S.C. §12211: 28 C.F.R. § 36.209.) Former substance abusers involved in counseling and therapy in a drug and alcohol abuse program are considered "handicapped" pursuant to the federal Fair Housing Law. (U.S. v. Southern Mgmt. Corp. (4th Cir. 1992) 955 F.2d 914.)

The description under California law of the meaning of "physical disability" and "mental disability" is extremely similar to the discussion above from the federal regulations.

Furthermore, California law has expanded its definition of "physical disability," and "physical handicap "to encompass all the meanings of "disability" provided under the federal law entitled the Americans with Disabilities Act of 1990. (Gov. Code § 12926(k).)

Q ***20. Is disclosure of the existence of any Community Care Facility, in response to any inquiry, permitted?***

A Yes, providing that the response is "factual, not intended to aid discrimination against or segregation of licensed care facilities within the community, and in fact does not have that effect." (73 Ops. Cal. Atty. Gen. 58.)

Q ***21. Is there a duty to disclose the existence of a Community Care Facility serving more than six persons?***

A There are no cases or attorney general opinions which address this issue at this time. A Community Care Facility serving more than six persons is not given the same level of protection under the law as those facilities serving six or fewer persons. For example, the law does not specifically consider those facilities a "residential use of property and a use of property by a single family...." (Health & Safety Code § 1566.5.)

In addition, the law protects only those facilities for six or fewer persons from additional local government regulation and taxation. (Health & Safety Code § 1566.5.) On the other hand, regardless of the number of residents in a facility, both federal and state law still prohibit discrimination on the basis of an individual's "handicap." And, undoubtedly, the disclosure of the existence of a Community Care Facility serving more than six persons in the neighborhood may very well chill sales of homes in the same neighborhood.

The safest course of action for a licensee under these circumstances is to provide the factual disclosure of the existence of the facility, without making any statements which could be perceived as intending to aid discrimination against the licensed Community Care Facility.

Q ***22. May an appraiser of real property take into consideration the existence of a Community Care Facility serving six or fewer persons in determining the price or value of real property?***

A No. According to a California Attorney General Opinion, a licensed care facility serving six or fewer persons is not a nuisance and its location in a neighborhood is not a material fact. (73 Ops. Cal. Atty. Gen. 58.) "[V]olunteering information about the price or value of property with respect to the presence or location of a nearby licensed care facility could violate state and federal law." (Id. at 67.)

Under both state and federal law, it is improper for an appraiser of property to take into consideration that handicapped persons may reside in a residence or in the neighborhood. (Cal. Code Regs., tit. 10 § 2780(y); 24 C.F.R. § 100.135(d).)

Q ***23. May the owner of a residential property refuse to lease the property to persons running a licensed Community Care Facility?***

A Generally, no. A Community Care Facility serving six or fewer persons is deemed to be a "residential use of property and a use of property by a single family." (Health & Safety Code § 1566.5.) An owner of property, therefore, must treat the care facility as any other single family property. The owner of the property may not discriminate against the care facility by refusing to lease the property to the prospective tenants based on the fact that the tenants are running a Community Care Facility.

On the other hand, a Community Care Facility serving more than six persons is not given the same level of protection under the law. Although there is no statute or case specifically addressing this issue, one conclusion may be that since these facilities were not mentioned in the statute as a residential use of property, they possibly may be treated as a commercial use of property. An owner of residential property may prohibit a commercial use of property.

In fact, properties located in subdivisions may be subject to CC&Rs which restrict commercial activity on any unit in the subdivision.

The problem with treating those facilities serving more than six persons as a commercial use of property is that the federal Fair Housing Law does not distinguish between facilities serving six or fewer and those serving more than six. In other words, it may still be considered unlawful discrimination to refuse to lease to any Community Care Facility regardless of the number of persons residing there.

"The Fair Housing Amendments Act of 1988 articulates the public policy of the United States as being to encourage and support handicapped persons' right to live in a group home in the community of their choice. This provision is intended to prohibit special restrictive covenants . . . which have the effect of excluding . . . congregate living arrangements for persons with handicaps." (Broadmoor San Clemente Homeowners Ass'n v. Nelson (1994) 25 Cal. App. 4th 1, 9 (however, the facts of this case dealt with a facility serving six or fewer persons).)

Additionally, the federal law would include any group home living arrangement where the occupants were "handicapped" under federal law. Thus the type of group home is not limited by the rather strict categories of the California Community Care Facilities Act. For example, the Act excludes sober living facilities for recovering alcoholics. (Health & Safety Code § 1505(i).) But under the federal Fair Housing Amendment Act of 1988 sober living recovery homes that offer no professional treatment nor have professional staff may be protected. (City of Edmonds v. Oxford House, Inc. (1995) 514 U.S. 725.)

Another issue to be considered is that ignoring restrictions in CC&Rs may be deemed an impairment of private contractual and property rights under the United States Constitution, Article I, section 10, as well as the California Constitution, Article I, section 16. (Broadmoor, 25 Cal. App. 4th at 9.) In other words, a licensee may be faced with conflicting constitutional issues.

But here too the federal fair housing laws will likely supersede any conflicting CC&Rs. In the case of U.S. v Scott (D. Kan. 1992) 788 F. Supp. 1555, subdivision residents brought suit to block the sale of a single family property to a company whose intended use of the property was to establish a group home for physically and mentally disabled individuals that would have violated the CC&Rs. The case was thrown out and the sale went through anyway. But afterwards, in response to a complaint filed with the department of Housing and Urban Development, the federal government brought a claim directly against the subdivision residents for violating the Fair Housing Act and the residents were made to pay damages. The judge said that it made no difference that the residents did not act in bad faith or out of any malice towards the handicapped individuals or whether they were motivated by animus, paternalism, or economic considerations. The fact is they tried to prevent handicapped people from buying property, and that was discrimination. Other cases have struck down zoning

limits that have the effect of discriminating against the handicapped. (See Jeffrey O. v. City of Boca Raton (S.D. Fla. 2007) 511 F. Supp. 2d 1339.) Even if zoning is not discriminatory, federal law may require a city reasonably accommodate six-person occupancy limits for residentially zoned areas. (Smith & Lee Assocs. v. City of Taylor, (6th Cir. 1996) 102 F.3d 781.) While no case has definitely determined that California's extensive state wide classification system conflicts with federal law, laws that limit the establishment of community care facilities under the fair housing laws may not necessarily be enforceable.
In conclusion, until a court clarifies the issue it may be prudent to permit the leasing of a Community Care Facility serving more than six persons in a residential dwelling subject, of course, to occupancy limits.

Q ***24. Health and Safety Code Section 1566.5 states: "For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, a residential facility which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary." Does that statute mean that subdivisions with old covenants (CC&Rs) recorded before 1979 are not subject to the law?***

A Maybe. In Barrett v. Lipscomb, a 1987 California Court of Appeal (third district) case, the court held that the statute did not apply to pre-1978 covenants or deeds. (Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524.) On the other hand, in Welsch v. Goswick, a 1982 California Court of Appeal (fourth district) case, the court held that old covenants which restricted the commercial use of property could no longer be used to prohibit community care facilities serving six or fewer persons because the statute meant that those care facilities were to be treated as a residential use of property. (Welsch v. Goswick (1982) 130 Cal. App. 3d 398.)
In Broadmoor San Clemente Homeowners Association v. Nelson, a 1994 court of appeal (fourth district) case, a homeowners association brought suit to enjoin operation of a residential care facility for the elderly (serving six or fewer persons) which they claimed violated the CC&Rs, which had been recorded prior to the 1979 date mentioned in the statute. (Broadmoor San Clemente Homeowners Ass'n v. Nelson (1994) 25 Cal. App. 4th 1.) This time the fourth district court of appeal agreed that the statute did not apply to pre-1979 covenants; however, "the exclusion for pre-1979 covenants contained in section 1569.87 has been invalidated by Government Code section 12955.6." (Id. at 6.)
Government Code section 12955.6 brings California housing legislation in to full compliance with federal law: "Federal law (Fair Housing Amendments Act of 1988) prohibits enforcement of a restrictive covenant which has the effect of excluding group homes for the handicapped." It is the public policy of the United States legislature to encourage and support handicapped persons' right to live in a group home in the community of their choice. (Broadmoor, 25 Cal. App. 4th at 9.) Although Broadmoor is not a disclosure case and deals with residential care facilities for the elderly and not community care facilities, it clearly reveals the court's intent to "protect" these types of facilities from discrimination against the handicapped. The same rationale used by the court in discussing facilities for the elderly would apply to Community Care Facilities. See also the discussion of the broad definition of "handicapped" in Question 19. Additionally the case of Hall v. Butte Home Health, Inc. (1997) 60 Cal. App. 4th 308, found that retroactive application of this same government code to invalidate discriminatory restrictive covenants would not result in an unconstitutional impairment of contract, and thus permitted a residential care facility for the elderly disabled to remain despite restrictive covenants.

Q ***25. May a landlord require a Community Care Facility to purchase additional insurance as a condition of being a tenant?***

A There are no statutes or cases to provide an answer to this question. It is possible that requiring a Community Care Facility, serving six or fewer persons, to purchase additional insurance while other tenants are not required to do so might be deemed a form of discrimination. Section 1566.5 of the Health and Safety

Code requires that such facilities be treated as "a use of property by a single family.
For Community Care Facilities serving more than six persons, it probably would not be a violation to require additional insurance as a condition of the tenancy. However, this answer is speculative.
The only statute addressing the issue of liability insurance pertains to Family Day Care Homes (Health & Safety Code § 1597.531). See Question 45 for further information.

IV. Residential Care Facilities for Persons with Chronic Life-Threatening Illness

Q ***26. What does "Chronic Life-Threatening Illness" mean?***

A For the purposes of the Residential Care Facilities For Persons With Chronic Life-Threatening Illness Act, "Chronic Life-Threatening Illness" means HIV disease or AIDS. (Health & Safety Code § 1568.01(c).)

Q ***27. What does "Residential Care Facility" mean?***

A For the purposes of this law, "Residential Care Facility" means a residential care facility for persons who have a chronic life-threatening illness and who are 18 years of age or are emancipated minors, or for family units (at least one adult has HIV or AIDS or at least one child has HIV or AIDS, or both). (Health & Safety Code § 1568.01(j),(g).)

Q ***28. What is the impact of the Residential Care Facilities for Persons With Chronic Life-Threatening Illness Act on local government?***

A A residential care facility which serves six or fewer persons is considered a residential use of the property. In addition, the residents and operators of the facility are considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property. (Health & Safety Code § 1568.0831(a)(1).) Furthermore, a residential care facility which serves six or fewer persons is not included within the definition of a boarding house, rooming house, institution, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the residential care facility is a business run for profit. (Health & Safety Code § 1568.0831(a)(2).) The implication of this section of the law is that local government cannot impose any business taxes, registration fees, or any other fees to which other family dwellings would not be subject. The terms "family dwelling" and "six or fewer persons" have the same meaning as in the California Community Care Facilities Act. See Questions 16 and 17.

Q ***29. Is there an affirmative duty to disclose the existence of a Residential Care Facility for Persons with a Chronic Life-Threatening Illness serving six or fewer persons when the facility is located in the neighborhood?***

A No. The same rationale used in answering the question as it relates to California Community Care Facilities applies to Residential Care Facilities for Persons With A Chronic Life-Threatening Illness. See Question 18.
In particular, the law pertaining to these facilities contains a statute identical to the one in the California Community Care Facilities Act:
"For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, a residential care facility which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary." (Health & Safety Code §§ 1566.5, 1568.0831(c).)
Additionally, case law has further eliminated this date limitation with regard to the handicapped. (Hall v. Butte

Home Health, Inc. (1997) 60 Cal. App. 4th 308). (See Question 24).
The implication of this section is that a residential care facility serving six or fewer persons with a chronic life-threatening illness is to be treated like a single family.

Q ***30. May the owner of a residential property refuse to lease the property to a licensed Residential Care Facility for Persons with a Chronic Life-Threatening Illness***

A No. See the answer to Question 23 for the details. The rationale is exactly the same. (Health & Safety Code § 1568.0831(c).)

Q ***31. May a landlord require a Residential Care Facility for Persons with a Chronic Life-Threatening Illness to purchase additional insurance as a condition of being a tenant?***

A There are no statutes or cases to provide an answer to this question. It is possible that requiring a Residential Care Facility for Persons with a Chronic Life-Threatening Illness serving six or fewer persons to purchase additional insurance while other tenants are not required to do so might be deemed a form of discrimination. Section 1568.0831(c) of the Health and Safety Code requires that such facilities be treated as "a use of property by a single family."
For a Residential Care Facility for Persons with a Chronic Life-Threatening Illness serving more than six persons, it may not be a violation to require additional insurance as a condition of the tenancy. However, this answer is speculative. The only statute addressing the issue of liability insurance pertains to Family Day Care Homes (Health & Safety Code § 1597.531). See Question 45 for further information.

V. Residential Care Facilities For The Elderly

Q ***32. What is a "Residential Care Facility for the Elderly"?***

A "Residential care facility for the elderly" means a housing arrangement chosen voluntarily by persons 60 years of age or over, or their authorized representative, where varying levels and intensities of care and supervision, protective supervision, or personal care are provided, based upon their varying needs, as determined in order to be admitted and to remain in the facility. Persons under 60 years of age with compatible needs, as determined by the Department of Social Services, may be allowed to be admitted or retained in a Residential Care Facility for the Elderly. (Health & Safety Code § 1569.2(k).)

Q ***33. What is the impact of Residential Care Facilities for the Elderly on local government?***

A The California legislature has declared that it is the policy of this state that each county and city (whether a chartered city or general law city) must permit and encourage the development of sufficient numbers of Residential Care Facilities for the Elderly "as are commensurate with local need." (Health & Safety Code § 1569.82.)
A Residential Care Facility for the Elderly which serves six or fewer persons is not subject to any business taxes, local registration fees, use permit fees, or other fees to which other family dwellings of the same type in the same zone are not likewise subject. (Cal. Health & Safety Code § 1569.84.)
The term "family dwellings" includes, but is not limited to, single-family dwellings, units in multi-family dwellings, including units in duplexes and units in apartment dwellings, mobilehomes, including mobilehomes located in mobilehome parks, units in cooperatives, units in condominiums, units in townhouses, and units in planned developments. (Health & Safety Code § 1569.84.)
"Six or fewer persons" does not include the licensee or members of the licensee's family or staff persons. (Health & Safety Code § 1569.82.)

Furthermore, whether or not unrelated persons are living together, a residential care facility for the elderly which serves six or fewer persons is considered a residential use of property. In addition, the residents and operators of the facility are considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property. (Health & Safety Code § 1569.85.)

For the purpose of all local ordinances, a residential care facility for the elderly which serves six or fewer persons is not included within the definition of a boarding house, rooming house, institution or home for the care of the aged, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the residential care facility for the elderly is a business run for profit or differs in any other way from a family dwelling. (Health & Safety Code § 1569.85.)

Q *34. Is there an affirmative duty to disclose the existence of a Residential Care Facility for the Elderly serving six or fewer persons when the facility is located in the neighborhood?*

A No. The same rationale used in answering the question as it relates to California Community Care Facilities applies to Residential Care Facilities for the Elderly. See Question 18. Additionally, disclosure of the existence of a Residential Care Facility for the Elderly may be a violation of state law prohibiting discrimination in the sale or rental of housing based upon age. (Civil Code § 51.2.) In particular, the law pertaining to these facilities contains an almost identical statute to one in the California Community Care Facilities Act:

"For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, a residential facility for the elderly which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary." (Health & Safety Code §§ 1566.5, 1569.87.)

The implication of this section is that a residential care facility serving six or fewer elderly persons is to be treated like a single family property.

VI. California Adult Day Health Care Act

Q *35. What does "Adult Day Health Care" mean?*

A "Adult day health care" is an organized day program of therapeutic, social, and health activities and services provided to elderly persons with functional impairments, either physical or mental, for the purpose of restoring or maintaining optimal capacity for self-care. Provided on a short-term basis, adult day health care serves as a transition from a health facility or home health program to personal independence. Provided on a long-term basis, it serves as an alternative to institutionalization in long-term health care facilities when 24-hour skilled nursing care is not medically necessary or viewed as desirable by the recipient or his or her family." (Health & Safety Code § 1570.7(a).)

These facilities serve not only persons 55 years of age or older, but also other adults who are chronically ill or impaired and who would benefit from adult day health care. (Health & Safety Code § 1570.7(f).)

Q *36. What is the purpose of the California Adult Day Health Care Act?*

A The California legislature has determined that there exists a pattern of over utilization of long-term institutional care for elderly persons, and that there is an urgent need to establish and to continue a community-based system of quality adult day health care which will enable elderly persons to maintain maximum independence. (Health & Safety Code § 1570.2.)

One goal is to establish adult day health centers in the community that will be easily accessible to all participants. (Health & Safety Code § 1570.2(c).)

Q ***37. What are the disclosure obligations regarding an Adult Day Health Care facility?***

A This law does not specifically address the question of disclosure responsibilities. Furthermore, there are no special provisions in the Adult Day Health Care Act dealing with the treatment of facilities of six or fewer persons as there are under the other laws (e.g., California Community Care Facilities, Residential Care Facilities for Persons with Chronic Life-Threatening Illness, Residential Care Facilities for the Elderly, California Child Day Care Facilities Act, Family Day Care Homes, Alcoholism or Drug Abuse Recovery or Treatment Facilities). Nevertheless, prohibitions against discrimination based upon age or handicap need to be considered. The safest course of action for a licensee under these circumstances is to provide the factual disclosure of the existence of the facility, without making any statements which could be perceived as intending to aid discrimination against the facility. See also Question 21.

However, any operator of a community care facility can also be separately licensed to provide adult day health care in a separate portion of the community care facility. (Health & Safety Code § 1585.2.) In those instances, the law governing California Community Care Facilities would apply. See Section III for more information, in particular Questions 18, 20, and 21.

VII. California Child Day Care Facilities Act and Family Day Care Homes

Q ***38. What is a "Child Day Care Facility"?***

A A "Child Day Care Facility" is a facility that provides nonmedical care to children under 18 years of age in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis. (Health & Safety Code § 1596.750.)

"Child Day Care Facility" also includes day care centers, employer-sponsored child care centers, and family day care homes. (Health & Safety Code § 1596.750.)

Q ***39. What is a "Family Day Care Home"?***

A A "Family Day Care Home" is a home which regularly provides care, protection, and supervision for 14 or fewer children, in the provider's own home, for periods of less than 24 hours per day, while the parents or guardians are away. (Health & Safety Code § 1596.78.)

A "Large Family Day Care Home" provides day care to 7 to 14 children, including any children under the age of 10 years who reside at the home. (Health & Safety Code § 1596.78(a).)

A "Small Family Day Care Home" provides family day care to 6 or fewer children, including children under the age of 10 years who reside at the home. (Health & Safety Code § 1596.78(b).)

Q ***40 Are there any special rules for a large family day care home that has care for more than 12 children?***

A Yes. A large family day care home may provide care for more than 12 children and up to and including 14 children, if all of the following conditions are met:

(a) At least one child is enrolled in and attending kindergarten or elementary school and a second child is at least six years of age;

(b) No more than three infants are cared for during any time when more than 12 children are being cared for;

(c) The day care provider notifies a parent that the facility is caring for two additional schoolage children and that there may be up to 13 or 14 children in the home at one time; and

(d) The day care provider obtains the written consent of the property owner when the family day care home is operated on property that is leased or rented.

Q ***40. What are the exemptions from the law governing Child Day Care Facilities and Family Day Care Homes?***

A The law, as set forth in Health & Safety Code section 1596.792 does not apply to:
" Any health facility,
" Any clinic,
" Any Community Care Facility (See Section III),
" Any Family Day Care Home providing care to the children of only one family in addition to the operator's own children,
" Any cooperative arrangement between parents for the care of their children where no payment is involved and other specified conditions are met,
" Any arrangement for the care of children by a relative,
" Any public recreation program or school extended day care program,
" Any child day care program operating only one day per week for no more than four hours,
" Any temporary child care facility where the services are offered only to parents or guardians who are on the same premises as the site of the day care program,
" And other facilities, as listed in Health and Safety Code, Section 1596.792.

Q ***41. What is the intent of the California legislature concerning the Family Day Care Homes Law?***

A It is the intent of the California legislature that Family Day Care Homes for children must be situated in normal residential surroundings so as to give children the home environment which is conducive to healthy and safe development. It is the public policy of this state to provide children in a Family Day Care Home the same home environment as provided in a traditional home setting. (Health & Safety Code § 1597.40(a).)
The legislature has declared this policy to be of statewide concern with the purpose of occupying the field to the exclusion of municipal zoning, building and fire codes and regulations governing the use or occupancy of Family Day Care Homes for children, and to prohibit any restrictions relating to the use of single-family residences for Family Day Care Homes for children except as provided by this law. (Health & Safety Code § 1597.40(a).)

Q ***42. May a seller refuse to sell a property to a provider of a Family Day Care Home for children or may a landlord refuse to rent a property to a provider of a Family Day Care Home for children?***

A No. The law states:
"Every provision in a written instrument entered into relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property for use or occupancy as a Family Day Care Home for children, is void and every restriction or prohibition in any such written instrument as to the use or occupancy of the property as a Family Day Care Home for children is void." (Health & Safety Code § 1597.40(b).)

Q ***43. May subdivision CC&Rs (new or old) prohibit Family Day Care Homes for children?***

A No. The law states:
"Every restriction or prohibition entered into, whether by way of covenant, condition upon use or occupancy, or upon transfer of title to real property, which restricts or prohibits directly, or indirectly limits, the acquisition, use, or occupancy of such property for a Family Day Care Home for children is void." (Health & Safety Code § 1597.40(c).)

Q ***44. What is the impact of the Family Day Care Homes law on local government?***

A The use of a single-family residence as a small Family Day Care Home is considered a residential use of property for the purposes of all local ordinances. (Health & Safety Code § 1597.45(a).)

No local jurisdiction may impose any business license, fee, or tax for the privilege of operating a small Family Day Care Home. (Health & Safety Code § 1597.45(b).)

Neither a city nor a county may prohibit large Family Day Care Homes on lots zoned for single-family dwellings, but instead must do one of the following:

(1) Classify these homes as a permitted use of residential property for zoning purposes.

(2) Grant a nondiscretionary permit to use a lot zoned for a single-family dwelling to any large Family Day Care Home that complies with local ordinances prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to such homes, and complies with subdivision (d) and any regulations adopted by the State Fire Marshal pursuant to that subdivision. Any noise standards must be consistent with local noise ordinances implementing the noise element of the general plan and must take into consideration the noise level generated by children. The permit issued pursuant to this paragraph must be granted by the zoning administrator, if any, or if there is no zoning administrator by the person or persons designated by the planning agency to grant such permits, upon the certification without a hearing.

(3) Require any large Family Day Care Home to apply for a permit to use a lot zoned for single-family dwellings. The zoning administrator, if any, or if there is no zoning administrator, the person or persons designated by the planning agency to handle the use permits must review and decide the applications. The use permit must be granted if the large Family Day Care Home complies with local ordinances, if any, prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to such homes, and complies with subdivision (d) and any regulations adopted by the State Fire Marshal pursuant to that subdivision. Any noise standards shall be consistent with local noise ordinances implementing the noise element of the general plan and shall take into consideration the noise levels generated by children.

The local government must process any required permit as economically as possible, and fees charged for review shall not exceed the costs of the review and permit process. Not less than 10 days prior to the date on which the decision will be made on the application, the zoning administrator or person designated to handle such use permits must give notice of the proposed use by mail or delivery to all owners shown on the last equalized assessment roll as owning real property within a 100 foot radius of the exterior boundaries of the proposed large Family Day Care Home. No hearing on the application for a permit issued pursuant to this paragraph may be held before a decision is made unless a hearing is requested by the applicant or other affected person. The applicant or other affected person may appeal the decision. The appellant must pay the cost, if any of the appeal. (Health & Safety Code § 1597.46(a).)

A Large Family Day Care Home is not subject to the California Environmental Quality Act. (Health & Safety Code § 1597.46(b).)

Large Family Day Care Homes are to be considered single-family residences for the purposes of the State Uniform Building Standards Code and local building and fire codes, except with respect to any additional standards specifically designed to promote the fire and life safety of the children in these homes adopted by the State Fire Marshal. (Health & Safety Code § 1597.46(d).) Small Family Day Care Homes must contain a fire extinguisher and smoke detectors that meet standards established by the State Fire Marshal. (Health & Safety Code § 1597.45(d).)

Q ***45. May a landlord require the operator of a Family Day Care Home to carry additional liability insurance?***

A All Family Day Care Homes are required by law to maintain in force either liability insurance covering injury to clients and guests in the amount of at least one hundred thousand dollars ($100,000) per occurrence and three hundred thousand dollars ($300,000) in the total annual aggregate, sustained on account of the negligence of the child care licensee or its employees, or a bond in the aggregate amount of three hundred thousand dollars ($300,000). (Health & Safety Code § 1597.531(a).)

In lieu of the liability insurance or the bond, the Family Day Care Home may maintain a file of affidavits signed by each parent with a child enrolled in the home. The affidavit must state that the parent has been informed that the Family Day Care Home does not carry liability insurance or a bond. (Health & Safety Code § 1597.531(a).)

Furthermore, if the provider is a tenant of the premises used as the Family Day Care Home, the affidavit also must state that the parent has been informed that the liability insurance, if any, of the owner of the property or the homeowners' association, as appropriate, may not provide coverage for losses arising out of, or in connection with, the operation of the Family Day Care Home, except to the extent that the losses are caused by, or result from, an action or omission by the owner of the property or the homeowners' association, for which the owner of the property or the homeowners' association would otherwise be liable under the law. (Health & Safety Code § 1597.531(a).)

Finally, a Family Day Care Home that maintains liability insurance or a bond, and that provides care in premises that are rented or leased or uses premises which share common space governed by a homeowners' association, must name the owner of the property or the homeowners' association, as appropriate, as an additional insured party on the liability insurance policy or bond if all of the following conditions are met:

(1) The owner of the property or governing body of the homeowners' association makes a written request to be added as an additional insured party;

(2) The addition of the owner of the property or the homeowners' association does not result in cancellation or nonrenewal of the insurance policy or bond carried by the Family Day Care Home;

(3) Any additional premium assessed for this coverage is paid by the owner of the property or the homeowners' association. (Health & Safety Code § 1597.531(b).)

Q ***46. Must a Family Day Care Home provider who plans to move to rented or leased property provide any notification to the landlord?***

A Yes. A tenant who plans to use the rental property for a Family Day Care Home must provide 30 days' written notice to the landlord or owner of the rental property prior to the commencement of operation of the Family Day Care Home of the fact that the tenant will be using the property for a Family Day Care Home. (Health & Safety Code § 1597.40(d)(1).) Under certain circumstances, the provider may give fewer than 30 days' notice. (Health & Safety Code § 1597.40(d)(2).)

Q ***47. Must a Family Day Care Home provider who currently lives in rented or leased property provide any notification to the landlord?***

A Yes. A Family Day Care Home provider in operation on rented or leased property must notify the landlord or property owner in writing at the time of the annual license fee renewal the fact that the operator is running a Family Day Care Home. (Cal. Health & Safety Code § 1597.40(d)(3).)

Q ***48. After a landlord has received written notification that the tenant is or will be using the property for a Family Day Care Home, does the landlord have any rights?***

A Unclear at this time. A landlord may require the tenant to pay an increased security deposit for the operation of the Family Day Care Home. The increase in deposit may be required notwithstanding that a lesser amount is required of tenants who do not operate Family Day Care Homes. (Health & Safety Code § 1597.40(d)(4).)

In no event may the total security deposit charges exceed the maximum allowable under existing law, which is the equivalent of two months' rent for an unfurnished unit or three months' rent for a furnished unit. (Health & Safety Code § 1597.40(d)(4); CC 1950.5.)

This provision does not apply to those child day care facilities which are exempt from licensing under the Family Day Care Homes law. See Question 40.

However, this state law may conflict with the existing federal Fair Housing Laws. (24 C.F.R. §100.65(b)(1).) According to the regulations, prohibited actions include "[u]sing different provisions in leases or contracts of sale, such as those relating to rental charges, security deposits...because of ...handicap, familial status...." Therefore, until this issue is clarified, it would be prudent not to charge a Family Day Care Home a higher security deposit than other tenants are charged. In fact, since the total security deposit charges cannot exceed the maximum allowable, a landlord can simply charge all tenants the same maximum amount.

Q ***49. Is there an affirmative duty to disclose the existence of a Family Day Care Home or a Day Care Center?***

A There is currently no direct statutory, case law, or attorney general authority to answer this question. Clearly, the California legislature wants to encourage the proliferation of Family Day Care Homes in residential areas:

It is the intent of the Legislature that Family Day Care Homes for children must be situated in normal residential surroundings so as to give children the home environment which is conducive to healthy and safe development. It is the public policy of this state to provide children in a Family Day Care Home the same home environment as provided in a traditional home setting. (Cal. Health & Safety Code § 1597.40(a).)

One could make an argument that disclosure of the existence of such a facility might discourage persons from purchasing another dwelling next door or in the neighborhood which would be contrary to the legislative intent of promoting such facilities.

Furthermore, state and federal law prohibiting discrimination based upon familial status may prohibit disclosure of the existence of a Family Day Care Home or any Child Day Care Facility. The rationale is certainly quite similar to the one used for California Community Care Facilities. (See Question 18.)

In addition, Small Family Day Care Homes (six or fewer children) are "considered a residential use of property," but Large Family Day Care Homes (7 to 12 children) must apply for a permit to use a lot zoned for a single family dwelling. (Cal. Health & Safety Code §§ 1597.45(a), 1597.46(a).) These facts may lead one to conclude that Small Family Day Care Homes should be treated like Community Care Facilities for six or fewer persons for disclosure purposes.

The new California statute requiring landlord notification runs counter to the concept of nondisclosure. (Cal. Health & Safety Code § 1597.40(d)(3).) However, it may be significant that the statute does not deal with disclosure to a prospective buyer of the existence of a Family Day Care Home elsewhere in the neighborhood. Unfortunately, there is no clear answer to this question. A real estate licensee must use his or her own best judgment on this issue. The safest course of action for a licensee under these circumstances is to provide the factual disclosure of the existence of a Large Family Day Care Home, without making any statements which

could be perceived as intending to aid discrimination against the facility.
On the other hand, a licensee or seller need not disclose the existence of a Small Family Day Care Home elsewhere in the neighborhood to a prospective buyer.

VIII. Alcoholism or Drug Abuse Recovery or Treatment Facilities

Q ***50. What is an "Alcoholism or Drug Abuse Recovery or Treatment Facility"?***

A An "Alcoholism or Drug Abuse Recovery or Treatment Facility" is any premises, place, or building that provides 24-hour residential nonmedical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug misuse or abuse, and who need alcohol, drug, or alcohol and drug recovery treatment or detoxification services. (Health & Safety Code § 11834.02(a).)
These facilities may also have as residents mothers over 18 years of age and their children, emancipated minors (children under 18 years of age who have acquired emancipation status pursuant to section 7002 of the California Family Code), or adolescents upon the issuance of a waiver granted by the Department of Alcohol and Drug Programs. (Health & Safety Code § 11834.02(b).)

Q ***51. What was the intent of the legislature when it created the law governing Alcoholism and Drug Abuse Recovery or Treatment Facilities?***

A The California legislature declared "that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." (Health & Safety Code § 11834.20.)

Q ***52. What is the impact of the law related to Alcoholism and Drug Abuse Recovery or Treatment Facilities on local government?***

A An alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons must not be subject to any business taxes, local registration fees, use permit fees, or other fees to which other single-family dwellings are not likewise subject. (Health & Safety Code § 11834.22.)
Neither the State Fire Marshal nor any local public entity may charge any fee for enforcing fire inspection regulations pursuant to state law or regulation or local ordinance, with respect to alcoholism or drug abuse recovery or treatment facilities which serve six or fewer persons. (Health & Safety Code § 11834.22.)
Furthermore, whether or not unrelated persons are living together, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons must be considered a residential use of property for the purposes of this article. In addition, the residents and operators of such a facility must be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property pursuant to this article. (Health & Safety Code § 11834.23.)
For the purpose of all local ordinances, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons may not be included within the definition of a boarding house, rooming house, institution or home for the care of minors, the aged, or the mentally infirm, foster care home, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the alcoholism or drug abuse recovery or treatment home is a business run for profit or differs in any other way from a single-family residence. (Health & Safety Code § 11834.23.)
This law applies equally to any chartered city, general law city, county, district, or any other local public entity. (Health & Safety Code § 11834.20.)

Q ***53. Is there an affirmative duty to disclose the existence of a "alcoholism or drug abuse recovery or treatment facility" serving six or fewer persons?***

A No. As with Community Care Facilities the intent of the legislature is to encourage the development of sufficient numbers of these facilities. These facilities cannot be considered a "nuisance" by law, since the law states, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civil Code § 3482.)

According to a California Attorney General Opinion the location of a licensed Community Care Facility serving six or fewer persons is not a material fact required to be disclosed. (73 Ops. Cal. Atty. Gen. 58.) The exact same analysis would apply to alcoholism or drug abuse recovery or treatment facilities. Furthermore, alcoholism and drug addiction are both considered handicaps under federal law. (See Question 19.)

Therefore, volunteering information concerning the presence of an alcoholism or drug abuse recovery or treatment facility may violate state and federal law prohibiting discrimination based upon a person being handicapped. (Cal. Code Regs., tit. 10, § 2780; 24 C.F.R. § 100.70(c)(2)(3).) Finally, Health and Safety Code Section 11834.25 states:

"For the purposes of any contract, deed, or covenant for the transfer of real property executed on or after January 1, 1979, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property and a use of property by a single family, notwithstanding any disclaimers to the contrary."

Case law has further eliminated this date limitation in regard to the handicapped. (Hall v. Butte Home Health, Inc. (1997) 60 Cal. App. 4th 308.) (See Question 24). To the extent those suffering from alcoholism or drug abuse qualify as handicapped, any restrictive covenants would likely be unenforceable.

The implication of this section is that an alcoholism or drug abuse recovery or treatment facility serving six or fewer persons is to be treated like a single family. It certainly is not a material fact that a single family lives in a property.

In conclusion, neither a licensee nor a seller need disclose the existence of an alcoholism or drug abuse recovery or treatment facility in the neighborhood serving six or fewer persons.

IX. Lanterman Developmental Disabilities Services Act

Q ***54. What is the Lanterman Developmental Disabilities Services Act?***

A The Lanterman Developmental Disabilities Services Act promulgates California's policy that "mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability." (Welf. & Inst. Code § 5115(a).)

Q ***55. What is the impact of the Lanterman Developmental Disabilities Services Act on local government?***

A The use of property for the care of six or fewer mentally disordered or otherwise handicapped persons is a residential use of such property for the purposes of zoning. (Welf. & Inst. Code § 5115(b).)

A state-authorized, certified, or licensed family care home, foster home, or group home serving six or fewer mentally disordered or otherwise handicapped persons or dependent and neglected children, is considered a residential use of property for the purposes of zoning if such homes provide care on a 24-hour-a-day basis (Welf. & Inst. Code § 5116). Such homes shall be a permitted use in all residential zones, including, but not limited to, residential zones for single-family dwellings. (Welf. & Inst. Code § 5116.)

Q ***56. What is the implication of the Lanterman Developmental Disabilities Services Act to a seller or lessor of residential property?***

A An owner of residential property cannot discriminate against an individual wanting to purchase or lease the residential property as a licensed facility for the care of six or fewer mentally disordered or otherwise handicapped persons. (24 C.F.R. § 100.50(b)(1).) In the case of U.S. v Scott (D. Kan. 1992) 788 F. Supp. 1555, subdivision residents brought suit to block the sale of a single family property to a company whose intended use of the property was to establish a group home for physically and mentally disabled individuals which would have violated the CC&Rs. The case was thrown out, and the sale went through anyway. But afterwards, in response to a complaint filed with the department of Housing and Urban Development, the federal government brought a claim directly against the subdivision residents for violating the Fair Housing Act, and the residents were made to pay damages. The judge said that it made no difference that the residents did not act in bad faith or out of any malice towards the handicapped individuals or whether they were motivated by animus, paternalism, or economic considerations. The fact is they tried to prevent handicapped people from buying property, and that was discrimination.

Q ***57. What is the implication of the Lanterman Developmental Disabilities Services Act to a real estate licensee or real estate appraiser?***

A It is unlawful for any person whose business includes engaging in the selling, brokering or appraising of residential real property to discriminate against any person in making available such services, or in the performance of such services, based on the fact that handicapped persons will live or do live in the facility. (24 C.F.R. §100.135(a).)

Furthermore, a mortgage loan broker cannot discriminate against handicapped persons in the making of loans or when providing any financial assistance relating to the purchase, construction, improvements, repair or maintenance of dwellings. (24 C.F.R. §100.130(a); Cal. Code Regs., tit. 10, § 2780(y).)

Q ***58. Does the Lanterman Developmental Disabilities Services Act establish separate residential facilities?***

A No. The law anticipates that a developmentally disabled person will either be admitted or committed to a state hospital, or a health facility, or reside in a Community Care Facility (as discussed in Section III). (Welf. & Inst. Code § 4503.) Those facilities located in residential areas will generally be licensed under the Community Care Facilities Act and, thus, are subject to that law.

X. Miscellaneous

Q ***59. If I want to inquire as to the licensed status of a care facility, whom do I call?***

A For the following types of residential facilities:

" California Community Care Facilities;

" Residential Care Facilities for Persons With Chronic Life-threatening Illness;

" Residential Care Facilities For The Elderly;

" Child Day Care Centers;

" Family Day Care Homes; and

" California Adult Day Health Care Homes;

Contact the State Department of Social Services

744 P Street

Sacramento, CA 95814

916 651-8848
As of July 1, 2013 services relating to Alcoholism or Drug Abuse Recovery or Treatment Facilities were transferred to the Department of Health Care Services (DHCS), which can be contacted at 916 445-4171.

Q ***60. Where can I get more information?***

A The California Department of Social Services regulates and licenses residential care facilities. Additional information about the various residential care facilities is available on their website at **http://www.cdss.ca.gov/cdssweb/PG66.htm**. Information on the licensing of these facilities is also available at http://ccld.ca.gov/.

Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at (213) 739-8282, Monday through Friday, 9 a.m. to 6 p.m. and Saturday, 10 a.m. to 2 p.m. C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at (213) 739-8350 to receive expedited service. Members may also submit online requests to speak with an attorney on the Member Legal Hotline by going to http://www.car.org/legal/legal-hotline-access/. Written correspondence should be addressed to:

CALIFORNIA ASSOCIATION OF REALTORS®
Member Legal Services
525 South Virgil Avenue
Los Angeles, CA 90020

The information contained herein is believed accurate as of November 27, 2012. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney. Revised by Sanjay Wagle.

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