RESIDENTIAL OCCUPANCY REGULATIONS

OCCUPANCY	DEFINED	APPLICABLE LAW	LICENSED BY STATE	CITY REGULATION	CUP/ MCUP	DISTANCE REQUIREMENTS
Community Care Facilities:	**Nonmedical residential care for children and/or adults defined in Health & Safety sec. 1502**					
Group Homes:	**Defined in RMC sec. 19.04.162**					
Minor Children	24-hour care and supervision of children 22 CCR 80001(g)(1)	H&S sec. 1500, et. seq. H&S sec. 1566.3,1567.1 22 CCR 80001; 84000-84808	Yes*	Transitional shelter housing requires minor CUP for 6 or less RMC 19.07.030Q Group homes permitted in RA & RA2 but not RA5 unless mandated by state law RMC 19.08.020G Group homes not permitted in RC zone RMC 19.09.020	CUP for more than 6 occupants RMC 19.64.040S 19.07.030Q 19.08.020G 19.10.020G 19.12.020D 19.16.020A 19.18.030L	State licensing requires a 300' separation between group homes to avoid overconcentration (State may approve less than 300" with approval of City) H&S sec. 1520.5 State does not consider foster family homes, residential care faciliites for the elderly or transitional shelter care faciliites in determining overconcentration H&S sec. 1520.5(f), (g) RMC 19.07.030Q2g 300' separation between group homes, except as stated above. See other distance requirements under parolee/probationer section
Adult Community Care: (Adult Residential)	24-hour nonmedical care and supervision of adults, except elderly 22 CCR 80001 (a)(4) and (5)	H&S sec. 1500, et. seq. H&S sec. 1566.3 22 CCR 80001; 85000-85091.4	Yes*			
(Social Rehabilitation)	24-hour nonmedical care and to adults recovering from mental illness 22 CCR 81001s.(2)	H&S sec. 1500, et. seq. H&S sec. 1502(a)(7); 1566.3 22 CCR 81000-81088	Yes*			
Small family home	24-hour care for foster children with mental, developmental or physical disorders H&S sec. 1502(a)(6)	H&S sec. 1500, et. seq.	Yes*			
Transitional Housing	Persons in placement under supervision of county dept. H&S sec. 1502(a)(12)	H&S sec. 1500, et seq.	Yes*			
Mentally/Physically Disordered	Persons with mental or physical disabilities	W&I sec. 5115, et. seq.	Yes*			
Family Care Home	24-hour care	W&I sec. 5115-5120	Yes*			

* Community Care Licensing/Department of Social Services

**Department of Alcohol & Drug Programs

CA07-0734

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ATTACHMENT "A"

RESIDENTIAL OCCUPANCY REGULATIONS

OCCUPANCY	DEFINED	APPLICABLE LAW	LICENSED BY STATE	CITY REGULATION	CUP/ MCUP	DISTANCE REQUIREMENTS
Elderly Residential Care	Persons over age 60	H&S sec. 1569, et. seq. H&S sec 1569.85 22 CCR 87100-87731.4	Yes*	N/A - 6 or fewer occupants	CUP for more than 6 occupants 19.64.040S	State does not consider residential care facilities for the elderly in determining overconcentration H&S 1267.9(f)
Chronically Ill Care	Terminally ill persons who are under hospice care	H&S sec. 1568, et. seq. H&S sec. 1568.0831 22 CCR 87800-87924	Yes*			
Pediatric Day Health/ Respite Care Facilities	Day and limited 24-hour care to medically fragile and terminally ill children and their families H&S sec. 1760.2	H&S sec. 1760, et. seq.	Yes*	N/A - 6 or fewer occupants	CUP for more than 6 occupants 19.64.040S	State licensing requires a 300' separation between intermediate care facilities to avoid overconcentration H&S sec. 1267.9(b)(1)
Health Facilities: (Congregate Care)	Medical supervision/24-hour nursing care	H&S sec. 1250, et. seq. H&S sec. 1267.8, 1267.9, 1267.16	Yes*			State licensing requires a 1,000' separation between facilities for terminally ill or catastrophically and severely disabled H&S sec. 1267.9(b)(2)
Intermediate Care/DD Developmentally Disabled	24-hour personal care; primary need - developmental service; intermittent nursing	H&S sec. 1250, et. seq. H&S sec. 1267.8, 1267.9	Yes*			
Intermediate Care/DD-Habilitative	24-hour personal care for 4-15 persons; intermittent nursing	H&S sec. 1250, et. seq. H&S sec. 1267.8, 1267.9	Yes*			RMC 19.07.030Q2g 300' separation between group homes, except as stated above.
Intermediate Care/DD Nursing	24-hour personal care for 4-15 persons; nursing supervision	H&S sec. 1250, et. seq. H&S sec. 1267.8, 1267.9	Yes*			

* Community Care Licensing/Department of Social Services
**Department of Alcohol & Drug Programs

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RESIDENTIAL OCCUPANCY REGULATIONS

OCCUPANCY	DEFINED	APPLICABLE LAW	LICENSED BY STATE	CITY REGULATION	CUP	DISTANCE REQUIREMENTS
Abuse Recovery/ Treatment	Residential nonmedical services to persons recovering from problems related to alcohol/drug use H&S 11834.02 H&S 11834.09	H&S sec. 11760, et. Seq. H&S sec. 11834.02 H&S sec. 11834.20-11834.30 Gov't sec. 12900, et. seq. 42 U.S.C. sec. 3601, et. seq. 42 U.S.C. sec. 12101, et. seq. 9 CCR 10500-10631	Yes, if treatment and counseling is included**	19.04.026 19.04.027 19.64.040S	CUP Required with more than 6 occupants	All group homes with more than 6 occupants to be separated by at least 300' to avoid overconcentration RMC 19.64.040S.2.f.
Sober Living	2 or more persons recovering from problems related to alcohol/drug use w/o treatment services on site RMC 19.04.026	Gov't Code sec. 65000 Gov't Code sec. 12900, et. seq. Gov't Code sec. 12955(l) 42 U.S.C. sec. 3601, et. seq. (Fair Housing Act) 42 U.S.C. sec. 3604(f). 41 U.S.C. 12101, et. seq. (Americans with Disabilities Act) 24 CFR 100.201(a)(2) 28 CFR 35.104(4)(l)(ii) 28 CFR 35.131(a)(2)	N/A	Subject to the zoning requirements in the zone where the group home is located	N/A	N/A
Boarding Houses	Housing provided for compensation for more than 6 but less than 15, excluding rest homes	Allowed in the R-2 and R-3 zones Allowed in the R-1 zone but rentals limited to 4	N/A	RMC 19.04.050 RMC 19.12.020 RMC 19.16.020 RMC 19.10.020k	N/A	N/A

* Community Care Licensing/Department of Social Services

**Department of Alcohol & Drug Programs

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RESIDENTIAL OCCUPANCY REGULATIONS

OCCUPANCY	DEFINED	APPLICABLE LAW	LICENSED BY STATE	CITY REGULATION	CUP	DISTANCE REQUIREMENTS
Probationer/Parolee	2 or more parolees or probationers residing in any residential structure RMC 19.04.398 Except parolees or probationers residing in alcohol and/or drug free residential recovery homes and recovering from substance abuse RMC 19.04.026	Subject to terms of probation/ parole	N/A	RMC 19.04.397 19.04.398 19.07.030Q 19.08.020U 19.10.020W 19.12.020O 19.18.030W 19.64.040O	CUP required with more than 6 occupants MCUP required with six or fewer	RMC 19.07.030 requires 1000 feet from: Schools/Universities Student Housing Senior Housing Child Care Facilities Public Parks Liquor stores and/or businesses licensed for sale of alcohol, transitional shelter housing, permanent emergency shelter or drop-in center, or other group housing RMC 19.07.030Q.2.f requires 5000 feet from: Another parolee/ probationer home 19.08.020U 19.10.020W 19.12.020O 19.64.040(O)

*-Community Care Licensing/Department of Social Services
**Department of Alcohol & Drug Programs

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Sacramento, California
June 18, 1997

Honorable Bill Morrow
5164 State Capitol

Sober Living Homes: State and Local Regulation: Concentration, Licensing, and Zoning Restrictions - #14445

Dear Mr. Morrow:

QUESTION

May a state or local governmental entity regulate "sober living homes" through dispersal or distance requirements, conditional use permits or business licenses, or zoning restrictions such as a prohibition against locating sober living homes in areas zoned for residential use?

OPINION

A state or local governmental entity may not regulate "sober living homes" through dispersal or distance requirements, conditional use permits or business licenses, or zoning restrictions such as a prohibition against locating sober living homes in areas zoned for residential use, unless the regulation benefits the protected class, or responds to legitimate safety concerns raised by the individuals affected rather than being based on stereotypes.

ANALYSIS

We are informed that a "sober living home" is an unlicensed alcohol and drug-free house that does not provide alcohol or drug recovery or treatment services. However, the house provides a facility for the residency of persons who are typically, but not necessarily, coming from a licensed nonmedical residential alcohol or other drug recovery or treatment facility. We are informed that the three things that sober living homes have

in common is (1) they provide to a person who is in recovery a place to live free from alcohol and drug use, (2) residents themselves reinforce their recovery through support with other recovering persons, and (3) residents are free to voluntarily pursue activities to support their recovery, either alone or with others.

By way of background, the so-called Fair Housing Act was contained in Title VIII of the federal Civil Rights Act of 1968, and was originally enacted by Public Law 90-284 (see Sec. 801 and following of the Civil Rights Act of 1968 (42 U.S.C.A. Sec. 3601 and following)).[1] Section 801 of the Civil Rights Act of 1968 (42 U.S.C.A. Sec. 3601) provides:

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

Prior to the Fair Housing Amendments Act of 1988, the Fair Housing Act prohibited various discriminatory practices concerning the rental and sale of housing, as well as financing and brokerage services, when based upon race, color, religion, sex, or national origin (see Secs. 804-806, incl., of the Civil Rights Act of 1968 (42 U.S.C.A. Secs. 3604-3606, incl.)).

In general, the Fair Housing Amendments Act of 1988 (see Sec. 1, P.L. 100-430) extends these prohibitions to discriminatory practices based upon handicap and familial status.[2] Section 804 of the Civil Rights Act (42 U.S.C.A. Sec. 3604), provides, in part, as follows:

> "Sec. 3604. ... it shall be unlawful--
>
> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> "(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental

---

[1] This law, pursuant to Section 4 of the Fair Housing Amendments Act of 1988 (P.L. 100-430), is now formally known as the Fair Housing Act (see 42 U.S.C.A. Sec. 3600).

[2] This opinion does not consider the constitutionality of the federal Fair Housing Amendments Act of 1988.

of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

"(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

"(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

"(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

"(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

"(A) that buyer or renter;

"(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

"(C) any person associated with that buyer or renter.

"(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

"(A) that person; or

"(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

"(C) any person associated with that person.

"(3) For purposes of this subsection, discrimination includes--

"(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;

"(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling ... .

* * *" (Emphasis added.)

Section 5 of the Fair Housing Amendments Act of 1988, amends Section 802 of the Civil Rights Act (42 U.S.C.A. Sec. 3602), and defines "handicap" as follows:

"(h) 'Handicap' means, with respect to a person--

"(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

"(2) a record of having such an impairment or

"(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21."

For these purposes, persons with a "handicap" include recovering alcoholics and recovering drug addicts (City of Edmonds v. Washington State Bldg. Code Council (9th Cir.), 18 F. 3d 802

803; mot. granted, cert. granted, 130 L. Ed. 2d 332; U.S. v. Southern Management Corp. (4th Cir.), 955 F. 2d 914, 919).

The term "dwelling" is defined in subdivision (b) of Section 802 of the Civil Rights Act (42 U.S.C.A. Sec. 3602), as follows:

> "(b) 'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."

In United States v. Hughes Memorial Home (W.D. Va.), 396 F. Supp. 544, a boys' home operating pursuant to a private trust under which the home refused to permit black males to become residents was deemed to have engaged in racial discrimination in violation of the Fair Housing Act. In discussing the meaning of the term "dwelling," the court stated:

> ". . . The Fair Housing Act of 1968 is a constitutional exercise of Congressional power under the Thirteenth Amendment to bar discrimination in housing. United States v. Hunter, 459 F. 2d 205, 214 (4th Cir. 1972), cert. denied 409 U.S. 934, 93 S. Ct. 235, 34 L. Ed. 2d 189 (1972). The Act implements a policy to which Congress has accorded the highest national priority, and is to be construed liberally in accordance with that purpose. 42 U.S.C. Sec. 3601; Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211-212, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972); Mayers v. Ridley, 151 U.S. App. D.C. 45, 465 F. 2d 630 (1972) (en banc). Good faith is no defense to practices prohibited by the Act which have a racially discriminatory effect. Williams v. Matthews, 499 F. 2d 819, 826 (8th Cir. 1974) cert. denied, 419 U.S. 1021, 95 S. Ct. 495, 42 L. Ed. 2d 294 (1974); United States v. City of Black Jack, 508 F. 2d 1179, 1184-1185 (8th Cir. 1974); see Griggs v. Duke Power Co, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).
>
> "The defendant asserts that the Fair Housing Act does not apply. The Act makes it unlawful to make 'dwellings' unavailable because of race. The term 'dwelling' is defined by the Act as 'any building, structure, or portion thereof which is

occupied as, or designed or intended for occupancy as, a residence by one or more families.' 42 U.S.C. Sec. 3602(b). 'Family' includes a single individual. 42 U.S.C. Sec. 3602(c). Whether the Home is within the scope of the prohibition in section 3604(a) thus turns on whether it is 'occupied as ... a residence.'

"4. The term 'residence' is not specifically defined in the Act, and must be accorded its ordinary meaning. The applicable definition of the word in Webster's Third New International Dictionary is as follows:

"a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit[.]

"The record establishes that, as the very title of the institution implies, the Home is far more than a place of temporary sojourn to the children who live there, and that they are in fact, as the Home's officials refer to them, residents. The children go to school, outside the Home, Pollard deposition at 5, but live at the residential facilities provided by the Home. Executive Director Pollard described the Home in his deposition as a 'residential center' for dependent, neglected or needy children. Id., at p. 5. The Court therefore holds that the Home is a dwelling within the meaning of section 3602(b).

* * *" (United States v. Hughes Memorial Home, supra, at pp. 548-549.)

The Supreme Court has held that if a statute is silent or ambiguous with respect to a specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute. In this respect, the Court said "... [w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations" (Chevron U.S.A. v. National Res. Def. Council, 81 L. Ed. 2d 694, 704). Since the Fair Housing Act does not make clear whether a sober living home established to promote alcohol and drug abuse recovery constitutes a dwelling under the act, we look to the construction by the administrative agency charged with enforcement of the act.

We have been informed by officials of the United States Department of Housing and Urban Development that due to the inclusion by the Fair Housing Amendments Act of 1988 of discrimination based upon, among other things, handicap, land use and zoning laws concerning a variety of types of facilities ranging from foster homes to nursing homes fall within the scope of the act's prohibitions. We think that this construction is reasonable. Thus, in light of the current administrative construction, we think that land use and other laws that affect persons who would live in sober living homes would come within the ambit of the Fair Housing Amendments Act of 1988.

Therefore, to summarize, for purposes of the question presented, the Fair Housing Amendments Act of 1988 makes it unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any renter or buyer because of a handicap of any person, or to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with the dwelling, because of a handicap of any person.

In addition, Section 3615 of Subchapter I of Chapter 45 of Title 42 of the United States Code specifically provides that:

> "3615. Nothing in [Subchapter I] shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this Subchapter [Subchapter I] shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter [Subchapter I]; but <u>any law of a State</u>, a political subdivision, or other such jurisdiction <u>that purports to require or permit any action that would be a discriminatory housing practice under</u> this subchapter <u>[subchapter I] shall to that extent be invalid</u>." (Emphasis added.)

The Fair Housing Act has long been held to apply to governmental, as well as private actions. In <u>United States</u> v. <u>City of Black Jack, Missouri</u> (8th Cir.), 508 F. 2d 1179; cert. den. 45 L. Ed. 2d 694, the court, addressing the issue of whether the Fair Housing Act applied to the actions of governmental entities, stated at pages 1183-1184:

> ". . . To hold that local government is immune from the proscriptions of Title VIII ... 'turns the old "state action" controversy on its head. . . . It is simply too late in the day now

> to say that judicial control is impossible for the very reason that the state is involved. Whatever one thinks of state action as a viable limiting principle on the constitutional command of equality, it should at least be clear that the most outrageous deprivations of equal rights are those perpetrated by the state itself. . . . We are unwilling to believe that the legislators who voted for [Title VIII] intended to exempt the most serious offenses from its coverage.' Mayers v. Ridley, 151 U.S. App. D.C. 45, 465 F. 2d 630, 635 (1972) (en banc) (J. Skelly Wright, J., concurring). See also Citizens Committee for Faraday Wood v. Lindsay, 362 F. Supp. 651, 653 (S.D.N.Y. 1973).
>
> * * *"

The supremacy clause of the United States Constitution (cl. 2, Art. VI, U.S. Const.) provides that the United States Constitution and the laws of the United States are the law of the land. Congressional intent to preempt state law may be explicitly stated in statutory language or implicitly contained in a federal statute's structure and purpose; in the absence of express congressional command, state law is preempted if it actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the state to supplement it (see Cipollone v. Liggett & Group, Inc., 120 L. Ed. 2d 407, 422-423). Even if a state law is not preempted under this test with respect to the Fair Housing Amendments Act of 1988, the law may still be invalid if it is discriminatory within the meaning of the Fair Housing Amendments Act of 1988 (Familystyle of St. Paul v. City of St. Paul (D. Minn.), 728 F. Supp. 1396, 1401; aff'd 923 F. 2d 91 (8th Cir. 1991); hereafter Familystyle). The courts have found this discrimination could be proved by showing that the enactment of the law was motivated by an intent to discriminate because of a handicap, or by showing the law has a discriminatory effect, even though it was enacted without discriminatory intent (Familystyle, supra, at p. 1401; see also Baxter, supra, at p. 732).

Therefore, a state law is invalid if it conflicts with the Fair Housing Amendments Act of 1988, or if its enactment has a discriminatory intent or effect. However, federal courts have differed with respect to the analysis used to determine whether a state law is invalid because it is in conflict with the Fair Housing Amendments of 1988 or has a discriminatory intent or effect. While the Ninth Circuit has not adopted a standard for this analysis, Familystyle, supra, at p. 1400 and Geraldine Larkin v. State of Michigan (E.D. Mich.), 883 F. Supp. 162, 178; aff'd 89

F.3d 285 (6th Cir. 1996); hereafter Larkin (see also Horizon House v. Township of Upper Southampton (E.D. Pa.), 804 F. Supp. 683, 695-697; hereafter Horizon House) represent contrasting approaches in this regard.

In Familystyle, the court upheld a Minnesota state statute that prohibited the state from granting an initial license to a program that provides residential services for people with mental illness and retardation if the residential program would be within 1,320 feet of an existing residential program.

The court found that Section 3615 of Title 42 of the United States Code does not constitute a preemption of the total field of law, because it invalidates only those state laws that conflict with federal law (Familystyle, supra, at p. 1400, n. 8). The court held that the statute did not conflict with the Fair Housing Amendments Act of 1988 and thus was not preempted, because the statute imposed regulations on residential programs for the mentally ill or retarded persons, and did not prohibit mentally ill persons from renting or buying a home within 1,320 feet of a residential facility (Familystyle, supra, at p. 1400; for similar holding see Plymouth Charter TP. v. Dept. of Soc. Serv. (Mich.), 501 N.W. 2d 186, 187-189; hereafter Plymouth).

The court acknowledged that language in House Resolution Report No. 711 (100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 2172, 2185; hereafter House Report; cited in Larkin, supra, at p. 178) discussed below shows an intent of Congress to invalidate the type of state and local laws at issue in the case. However, the court concluded that the Minnesota statute was not enacted with discriminatory intent, because the court found after examining the legislative history that the intent of the statute was to deinstitutionalize services for the handicapped through the dispersal of facilities for the mentally ill (Familystyle, supra, at p. 1402). The court found that "a few individuals did voice concerns over safety and property devaluation" but that those few comments could not stand as the true intent of the political bodies that passed the statute (Id., at p. 1403).

The appellate court reviewing Familystyle, disagreed with the appellant's argument that the dispersal requirements were invalid because they limited choices of the mentally handicapped and thus were in conflict with the language and purpose of the Fair Housing Amendments Act of 1988. The appellate court, instead, perceived the goals of "nondiscrimination and deinstitutionalization to be compatible" declaring that "Congress did not intend to abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards"

(Familystyle of St. Paul v. City of St. Paul, Minn. (8th Cir.), 923 F. 2d 91, 93-94).

Larkin, supra, involved a case in which a person was denied a license for an adult foster care home intended to care for handicapped individuals, and the United States District Court for the Eastern District of Michigan was required to determine whether a Michigan statute that prevented the issuance of a temporary license if it would "'substantially contribute to an excessive concentration' of community residential facilities" was preempted by the Fair Housing Amendments Act of 1988. The court found that, notwithstanding contrary decisions in Familystyle, supra, and Plymouth, supra, the regulation of residential facilities by the Michigan statute inherently regulated, and thereby discriminated against, handicapped individuals. The court explained that the House Report outlined the types of local zoning regulations that the Fair Housing Amendments Act of 1988 was intended to prohibit and thus the Michigan statutory scheme conflicted with and was preempted by the act (Larkin, supra, at pp. 178 and 179).

The House Report, supra, at page 2185, reveals the legislative intent of the Fair Housing Amendments Act of 1988 with regard to discrimination against persons with handicaps and reads in part as follows:

> "While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities. The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulation, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. Another method of making housing unavailable to people with disabilities has been the application

or enforcement of otherwise neutral rules and regulations of health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited."

We think that the finding in Familystyle that the Minnesota statute was not in conflict with the Fair Housing Amendments Act of 1988 was largely based on the court's perception that even though the statute affected the housing of handicapped persons, the intent of the statute to deinstitutionalize services for the handicapped was consistent with federal philosophy and for the benefit of handicapped persons. In contrast, rejecting the conclusion reached in Familystyle, the court in Larkin found that there was no rational legal basis for a similar Michigan dispersal statute, thus it was in conflict with the Fair Housing Amendments Act of 1988 and preempted (Larkin, supra, at p. 175). Furthermore, in Horizon House, supra, the court held that a "distance" requirement ordinance for group homes for mentally retarded persons intended to prevent the "clustering" of people with disabilities to promote their "integration" into the community was not an adequate justification under the Federal Fair Housing Amendments of 1988, citing United States v. Starrett City Associates, 840 F. 2d 1096 (2d Cir.) in which the court struck down a racial quota which was designed to maintain racial integration in an apartment complex to avoid the phenomenon of "tipping" or "white flight"). The results in these cases indicate that the issues of preemption and intent are not always neatly separated for purposes of analysis.

In Children's Alliance v. City of Bellevue (W.D. Wash.), 950 F. Supp. 1491, hereafter Children's Alliance, the court granted the plaintiff's motion for summary judgment on pleadings that sought to invalidate a City of Bellevue ordinance that regulated the establishment of group-care facilities that housed, among others, those who required treatment for drug or alcohol abuse. The ordinance contained a dispersal or distance requirement as well as occupancy limits and restrictions on locating certain group homes in neighborhoods zoned residential. Following the reasoning in Larkin, supra, the court analyzed the ordinance under a disparate treatment theory and concluded that the ordinance was facially discriminatory due to the effect its classifications had upon and the burdens it placed upon persons protected under the Fair Housing Act (Children's Alliance, supra, at pp. 1495-1497).

With regard to the intent to discriminate, the court, in Children's Alliance, supra, at page 1495, explained as follows:

> "In order to make out a prima facie violation of the FHA under disparate treatment theory, a plaintiff needs to show that the defendant expressly treats members of a protected group differently than others who are similarly situated. Differential treatment on the face of an ordinance demonstrates an intent to discriminate; additional evidence of discriminatory animus is not required."

In this regard, the court acknowledged that a finding of differential treatment can be rebutted in that the federal law permits restrictions on housing choices that impose reasonable occupancy limits and that limit individuals whose tenancy would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others (Children's Alliance, supra, at p. 1497; 42 U.S.C.A. Sees. 3604(f)(9) and 3607(b)(1)). The defendant in Children's Alliance, supra, argued that differential treatment should also be permitted based on general interests in public safety, stability, and tranquility (Id., at p. 1497). After noting that the Ninth Circuit had not adopted a standard for this purpose, the court rejected the defendant's argument and a similar rationale employed by the Eighth Circuit in Familystyle, supra, at page 94. Instead, the court followed the Sixth Circuit's decision in Larkin, supra, at page 290, indicating that the standard for rebutting facial discrimination requires a showing of "either (1) that the ordinance benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes" (Children's Alliance, supra, at pp. 1497 and 1498; see also Bangerter v. Orem City Corp. (10th Circuit), 46 F. 3d 1491, 1503-1504; hereafter Bangerter).

The courts have held that unfounded or stereotypical fear about the handicapped (Horizon House, supra, at pp. 695-697; Baxter, supra, at pp. 732-733) is not a valid basis for discriminating against the handicapped. However, courts have entertained evidence of the intent to protect members of the community from potential danger and to protect the residential character of a neighborhood, although credible evidence supporting this intent thus far has been generally absent or unpersuasive in the context of discrimination against the handicapped (Ass'n. for Advmt. of the Ment. Hndcap. v. City Elizabeth (D.N.J.), 876 F. Supp. 614, 622-624; see also Burstyn v. City of Miami Beach (S.D. Fla.), 663 F. Supp. 528, 534, in which the court held, for purposes of equal protection analysis, that the protection of

retail trade, preservation of commercial districts, and encouraging tourism are legitimate governmental goals).

Moreover, in Bangerter, supra, at pages 1503 and 1504, the court stated:

> "Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents. . . . Any special requirements placed on housing for the handicapped based on concerns for the protection of the disabled themselves or the community must be 'individualiz[ed] ... to the needs or abilities of particular kinds of developmental disabilities,' *Mabrunak, Inc. v. City of Stow, Ohio,* 974 F. 2d 43, 47 (6th Cir. 1992), and must have a 'necessary correlation to the actual abilities of the persons upon whom it is imposed,' *Potomac Group Home,* 823 F. Supp. at 1300."

A sober living home is a residence for the benefit of persons recovering from alcohol or drug abuse. Consistent with the above discussion of the scope of the term "handicap" for purposes of the Fair Housing Amendments Act of 1988, we think individuals at a sober living home would clearly be persons with a "handicap" pursuant to the Fair Housing Amendments Act of 1988 (42 U.S.C.A. Sec. 3602; City of Edmonds v. Washington State Bldg. Code Council, supra).

Since sober living homes are not licensed residential programs or facilities providing treatment services, but, rather voluntary living arrangements subject to agreed upon house rules, a dispersal or distance requirement that would regulate the concentration of sober living homes in a community would have the effect of prohibiting persons recovering from alcohol or drug abuse from renting a home together with other similarly situated persons if it would result in the home being within a certain distance of another such home. Requiring a sober living home to obtain a conditional use permit or a business license would impose requirements upon the residences of "handicapped" persons protected under federal law that are not imposed upon residences composed of nonhandicapped persons. Placing zoning restrictions upon sober living homes or prohibiting them from locating and operating in an area zoned for residential use would treat persons recovering from alcohol or drug abuse who desire to rent a home together differently from other residents and renters.

Adopting the reasoning in Children's Alliance, supra, we think that these ordinances would impose differential treatment

upon persons protected by the Fair Housing Act and, thus, demonstrate an intent to discriminate. A court could find that such ordinances are legitimate if it can be shown that they benefit the protected class or respond to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes (Id., at pp. 1497 and 1498). When making these determinations, Children's Alliance, supra, would require the court to "assess whether the benefits of the requirement 'clearly' outweigh the burdens" (Id., at p. 1499) or whether specific individuals attempting to reside in a sober living home constitute a "direct threat" (Id., at p. 1499; see also Bangerter, supra, at pp. 1503 and 1504).

Accordingly, we think that a state or local governmental entity may not regulate "sober living homes" through dispersal or distance requirements, conditional use permits or business licenses, or zoning restrictions such as a prohibition against locating sober living homes in areas zoned for residential use, unless the regulation benefits the protected class, or responds to legitimate safety concerns raised by the individuals affected rather than being based on stereotypes.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By
Patricia R. Gates
Deputy Legislative Counsel

PRG:mfo

AMENDED IN SENATE MAY 23, 2008

AMENDED IN ASSEMBLY MAY 15, 2007

AMENDED IN ASSEMBLY MAY 1, 2007

AMENDED IN ASSEMBLY APRIL 19, 2007

AMENDED IN ASSEMBLY APRIL 12, 2007

AMENDED IN ASSEMBLY MARCH 26, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL No. 724

Introduced by Assembly Member Benoit
(Coauthor: Senator Wiggins)

February 22, 2007

An act to add Section 11834.255 to the Health and Safety Code, relating to residential facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 724, as amended, Benoit. Sober living homes.

Existing law provides for the licensure and regulation of various community care facilities by the State Department of Social Services. Existing law also provides for the licensure and regulation by the State Department of Alcohol and Drug Programs of alcoholism and drug abuse recovery and treatment facilities for adults.

This bill would provide that a sober living home, as defined, is exempt from licensure under these provisions. The bill also would provide that a residence housing those purporting to be recovering from drug and alcohol abuse would be presumed to be a sober living home if it has been certified, registered, or approved by a ~~governmental or~~ *recognized*

ATTACHMENT "C"

nonprofit organization that provides a credible quality assurance service for applicants or members.

~~The bill would become operative only if SB 992 is enacted and takes effect on or after January 1, 2008.~~

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 11834.255 is added to the Health and Safety Code, to read:

11834.255. (a) The purpose of this section is to provide a definition of a "sober living home" so as to give both those purporting to operate these facilities and local code and law enforcement agencies the ability to determine whether residences housing former drug and alcohol abusers are exempt from local regulation or exercise of local police powers.

(b) For purposes of this chapter, "sober living home" means a residential property that is operated as a cooperative living arrangement to provide an alcohol- and drug-free environment for persons recovering from alcoholism or drug abuse, or both, who seek a living environment in which to remain clean and sober, and that satisfies all of the following requirements:

(1) Residents of the facility, including live-in managers, operators, or owners, are living a sober lifestyle.

~~(2) Residents actively participate in legitimate programs, including, but not limited to, Alcoholics Anonymous or Narcotics Anonymous programs, and maintain current records of meeting attendance.~~

(2) Residents actively participate in legitimate recovery programs, including, but not limited to, outpatient treatment, 12-step recovery, and other recognized programs of recovery, and maintain current records of meeting attendance.

(3) Owners, managers, operators, and residents observe and promote a zero tolerance policy regarding the consumption or possession of alcohol or controlled substances, except for prescription medications obtained and used under direct medical supervision. The observation and promotion of this policy may take into account demonstrable efforts made by residents to respond to, and prevent additional violations of, the policy.

(4) Owners, managers, operators, and residents do not provide onsite any of the following services, as they are defined in paragraph (6) of subdivision (a) of Section 10501 of Title 9 of the California Code of Regulations:

(A) Detoxification.

(B) Educational counseling.

(C) Individual or group counseling sessions.

(D) Treatment or recovery planning.

(5) The number of residents who are subject to the sex offender registration requirements of Section 290 of the Penal Code does not exceed the limit set forth in Section 3003.5 of the Penal Code and does not violate the distance provisions set forth in Section 3003 of the Penal Code.

(6) Residents do not require nonmedical care or supervision, as those terms are defined in Section 1503.5 and in Title 22 of the California Code of Regulations.

(7) Owners, managers, operators, and residents ensure that the property and its use comply with applicable state and local law.

(c) A residence housing those purporting to be recovering from drug and alcohol abuse shall be presumed to be a sober living home if the residence has been certified, registered, or approved by a recognized nonprofit organization that provides a credible quality assurance service for applicants or members.

(d) A sober living home shall be exempt from licensure under Chapter 7.5 (commencing with Section 11834.01).

(e) Nothing in this section shall be construed to prohibit minor children who are dependents of a resident of the facility from also residing in the facility.

~~SEC. 2. This act shall become operative only if Senate Bill 992 is enacted and takes effect on or before January 1, 2008.~~

O

Chapter 19.350
Parolee/Probationer Home

19.350.010 Purpose

The purpose of regulating parolee/probationer homes is to ensure compatibility of such uses with surrounding uses and properties and to avoid any impacts associated with such uses.

19.350.020 Applicability and Permit Requirements

Parolee/Probationer homes, as defined in Article X (Definitions), are permitted as set forth in Article V, Base Zones and Related Use Provisions subject to the requirements contained in this Chapter.

19.350.030 Additional Application Requirements

The application for a discretionary permit for a parolee/probationer home shall include the following additional information:

A. Client profile (the subgroup of the population of the facility is intended to serve such as single men, families, etc.);

B. Maximum number of occupants and hours of facility operation;

C. Term of client stay;

D. Support services to be provided on-site and projected staffing levels; and

E. Rules of conduct and/or management plan.

19.350.040 Site Location, Operation and Development Standards

The standards set forth in Article V, Base Zones and Related Use and Development Provisions shall apply unless otherwise specified here.

A. Site Location Standards

1. The use shall be compatible with neighboring uses.

2. Establishment of the facility shall not result in harm to the health, safety or general welfare of the surrounding neighborhood and substantial adverse impacts on adjoining properties or land uses will not result.

3. The facility shall be located along or near a major arterial with ready access to public transportation.

4. The facility shall be accessible to necessary support services.

5. To avoid over-concentration of parolee/probationer, there shall be a 5,000-foot separation requirement between parolee/probationer homes as measured from the nearest outside building walls between the subject use and any other parolee/probationer housing.

6. A parolee/probationer home shall not be located within 1,000 feet of any other group housing, assisted living facility, a public or private school (pre-school through twelfth grade), university, college, student housing, senior housing, day care home and center, public park, library, business licensed for on- or off-site sales of alcoholic beverages or drop-in, permanent emergency, homeless or transitional shelter, as defined in Article X (Definitions) and as measured from any point on the outside walls of the parolee/probationer home to the nearest property line of the noted use.

7. The facility should be compatible with the character of the surrounding neighborhood.

B. Operation and Development Standards

1. Sufficient on-site parking shall be provided in accordance with 19.580. The precise number of parking spaces required will be determined based on the operating characteristics of the specific proposal.

2. Both indoor and outdoor common areas shall be provided on site.

3. All setback standards of the underlying zone shall be met.

4. On-site staff supervision shall be required during all hours of facility operation.

5. Individual client stays shall not exceed 180 days.

6. The facility's management shall participate in any formal residential crime prevention program (e.g., Crime Free Multi-Housing Program) provided by the City and as required under the discretionary permit. If the program offers certification then that certification shall be obtained and maintained in current status.

19.350.050 Special Noticing Requirements

All property owners within 1,000 feet of the proposed facility, as measured from the subject property lines, shall be notified of the proposed discretionary permit.

19.350.060 Existing Facilities Require a Permit

A. Any existing parolee/probationer housing that has not complied with these requirements is in violation of this Title and is subject to appropriate code enforcement action.

B. An existing parolee/probationer home in good standing may file a written request for an extension of time of up to one year in which to file for the required discretionary permit. The written request shall include the reason for the request, including budgeting and/or securing filing fees, subject to confirmation and approval by the Planning Division. A filing extension may be granted by the Planning Division when it is verified that good faith efforts to budget and/or secure funds are made, financial hardship exists and a favorable recommendation is obtained from the Police Department. The Police Department recommendation is based upon a review of calls for service and criminal history at the parolee/probationer home for the previous 12 months. This subsection shall sunset and no longer be effective after June 8, 2006.

19.350.070 Change in Operating Conditions

Any change in operating conditions from what was originally approved and imposed by the City, including, but not limited to, number of occupants or parolees/probationers or any modifications to the conditions of approval pursuant to the required discretionary permit shall require the immediate submittal of a request for revision of the required discretionary permit.

19.350.080 Abandonment of Use

An existing parolee/probationer home established pursuant to any permit discontinued for any period of time is deemed abandoned. Any subsequent establishment of a parolee/probationer home shall be required to first obtain a new discretionary permit.

Alcohol & drug free residential recovery home (sober living home)

"Alcohol and drug free residential recovery home" and "sober living home," shall mean the use of a residential, dwelling structure or unit for a cooperative living arrangement to provide an alcohol and drug free environment for persons recovering from alcoholism or alcohol and/or drug abuse who seek a living environment in which to remain clean and sober; and which demonstrates each of the following identifying characteristics that shall serve to distinguish the alcohol and drug free residential recovery home and sober living home, as a use of residential property, from similar land uses such as drug treatment facilities or community case facilities that are subject to state licensing requirements and from all other uses of residential property:

1. All residents, including live-in managers, operators, or owners, are recovering from alcohol and/or drug abuse;
2. All residents actively participate in legitimate programs, including, but not limited to, Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) programs, and maintain current records of meeting attendance;
3. All owners, managers, operators, and residents observe and promote a "zero tolerance" policy regarding the consumption or possession of alcohol and controlled substances, except for prescription medications obtained and used under direct medical supervision;
4. There is a written policy dealing with the use of drugs or alcohol;
5. Owners, operators, managers and residents do not provide on-site any of the following services as they are defined by Section 10501(a)(6) of Title 9, California Code of Regulations:
    a. detoxification;
    b. educational counseling;
    c. individual or group counseling sessions;
    d. treatment or recovery planning;

d. treatment or recovery planning;

6. The number of residents subject to the sex offender registration requirements of Penal Code Section 290 does not exceed the limit set forth in Penal Code Section 3003.5, and does not violate the distance provisions set forth in Penal Code Section 3003;
7. Residents do not require non-medical care and/or supervision as those terms are defined at Health & Safety Code Section 1503.5 and Section 80001(c)(3) of Title 22 of the California Code of Regulations;
8. The operators and/or residents maintain current membership in a recognized nonprofit organization of sober living homes that provide a credible quality assurance service for applicants or members or have received a sober living home certification from the State of California Department of Alcohol and Drug Programs; and
9. Owners, managers, operators, and residents ensure that the property and its use comply with all applicable state and local laws.

Alcohol & drug treatment facilities — Any premises, place or building that provides 24-hour residential non-medical services to two or more persons, unrelated by blood, marriage or legal adoption, in exchange for monetary or non-monetary consideration, who are recovering from problems related to alcohol or drug misuse or abuse, and who need drug or alcohol recovery treatment or detoxification services. A license from the State of California is required.

Alcohol Sales – Off-site — The sale of beer and wine (off-sale beer and wine) or of all types of alcoholic beverages, including beer and wine (off-sale general), in their original, sealed containers for consumption off the premises.

Alcohol Sales – On-site — The sale of beer and wine (on-sale beer and wine) or of all types of alcoholic beverages, including beer and wine (on-sale general), for consumption on the premises.

Alley — A public or City approved private way permanently reserved as a secondary means of access to abutting property.

Block	An area of land within a subdivision entirely bounded by streets, or bounded in part by streets and in part by the exterior boundary of the subdivision. *See definition in Title 18.*
Boardinghouse	The rental of a residence/dwelling, other than a hotel/motel/long-term stay, wherein a room or rooms, with or without individual or group cooking facilities, are rented to five or more individuals under separate rental agreements or leases, either written or oral, or implied, with an owner; an owner's agent, representative or manager; a tenant; resident; or occupant; whether or not an owner, an owner's agent, representative or manager, or family thereof is in residence. The definition does not include assisted living facility where medical services are involved or group housing or homes.
Boarding of Animals	Any kennel where pet animals owned by another person are temporarily boarded for pay, trade, barter, commission or remuneration of any sort; provided, however, this definition shall not apply to zoos or to animal hospitals operated by veterinarian duly licensed under the law
Body piercing	The creation of an opening in the body of a human being for the purpose of inserting jewelry or other decoration. This includes, but is not limited to, piercing of an ear, lip, tongue, nose, naval or eyebrow. Body piercing does not include piercing an ear with a disposable single-use stud or solid needle that is applied using a mechanical device to force the needle or stud through the ear a method commonly used in jewelry and department stores to pierce ears.
Building	See the definition of "building" as defined in Title 16.
Building area	The sum in square feet of the ground area occupied by all buildings and structures on a lot.
Building coverage	A percentage figure referring to that portion of a lot covered only with principal and accessory buildings.
Building frontage	See frontage, building.

Parolee An individual as follows:

1) convicted of a federal crime, sentenced to a United States federal prison, and received conditional and revocable release in the community under the supervision of a federal probation/parole officer;

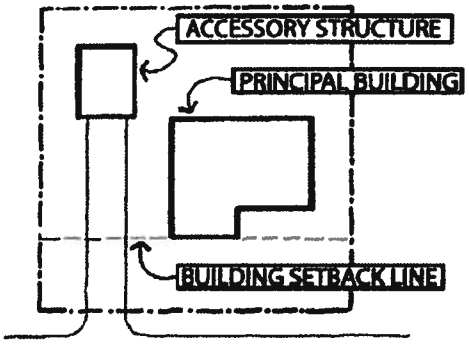
2) who is serving a period of supervised community custody as defined by State Penal Code 3000, following a term of imprisonment in a State prison, and is under the jurisdiction of the California Department of Correction, Parole and Community Services Division; or

3) an adult or juvenile individual sentenced to a term in the California Youth Authority and received conditional and revocable release in the community under the supervision of a Youth Authority parole officer.

Parolee/Probationer Home Any residential structure or unit, including any hotel or motel except as provided herein, whether owned and/or operated by an individual or for-profit or non-profit entity, that houses two or more parolees/probationers, unrelated by blood, marriage, or legal adoption, in exchange for monetary or non-monetary consideration given and/or paid by the parolee/probationer and/or any individual or public/private entity on behalf of the parolee/probationer, excluding parolees/probationers who reside in alcohol and/or drug free recovery home as defined in this Title. Notwithstanding this definition or any other provision of the Riverside Municipal Code, hotels and motels with fourteen rooms or less cannot provide transient lodging services or accommodations to more than three parolees during any thirty consecutive-day period regardless of the length of their respective stays; and hotels and motels with fifteen rooms or more cannot provide transient lodging services or accommodation to more than five parolees during any thirty consecutive-day period regardless of the length of their respective stays.

Principal, building

A building in which the primary use of the lot on which the building is located is conducted.



Private usable open space

Open areas devoted exclusively to the private recreation and leisure use of one dwelling unit, contiguous to the unit, delineated by a wall, fence, or as otherwise approved.

Probationer

A person who has been convicted of a felony or misdemeanor and who has received a suspension in the imposition or execution of their sentence and has received conditional and revocable release in the community under the supervision of a probationer officer, as provided under California Penal Code Section 1203 or any successor provision thereof.

Projecting sign

See sign, projecting.

Projection

The distance as established by this Code by which a sign extends beyond the building wall or the street property line. *See definition in the sign Design Guidelines.*

Public entertainment venue

See entertainment venue, public.

Public property

Land or other property owned by the City, or in that City holds the present right of possession or control, or land or other property that the City holds in trust, as well as all public rights-of-way.

Public, right of way

See right-of way.