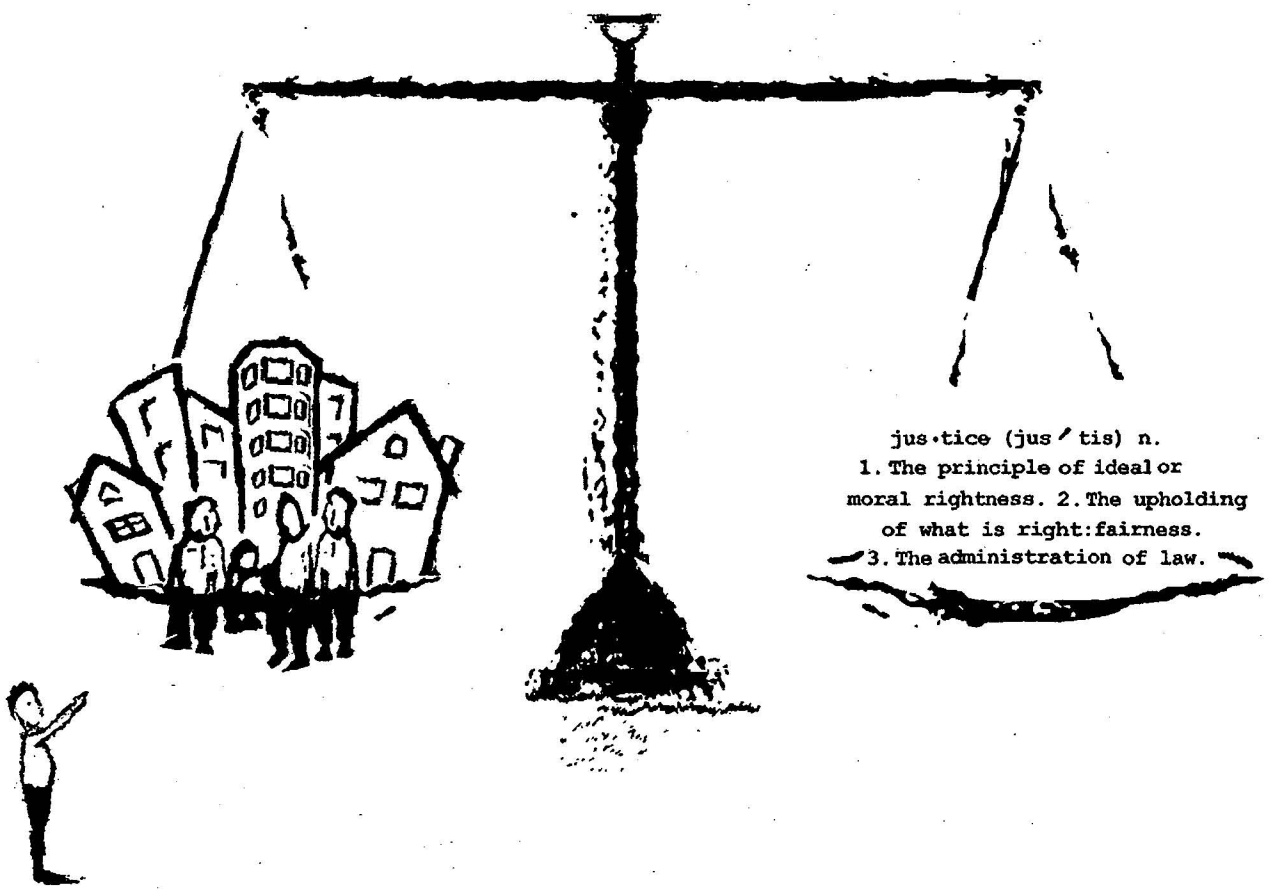
Between the Lines

A Question and Answer Guide on Legal Issues in Supportive Housing

California Edition



Prepared by:
Law Offices of Goldfarb & Lipman

CSh
CORPORATION *for* SUPPORTIVE HOUSING

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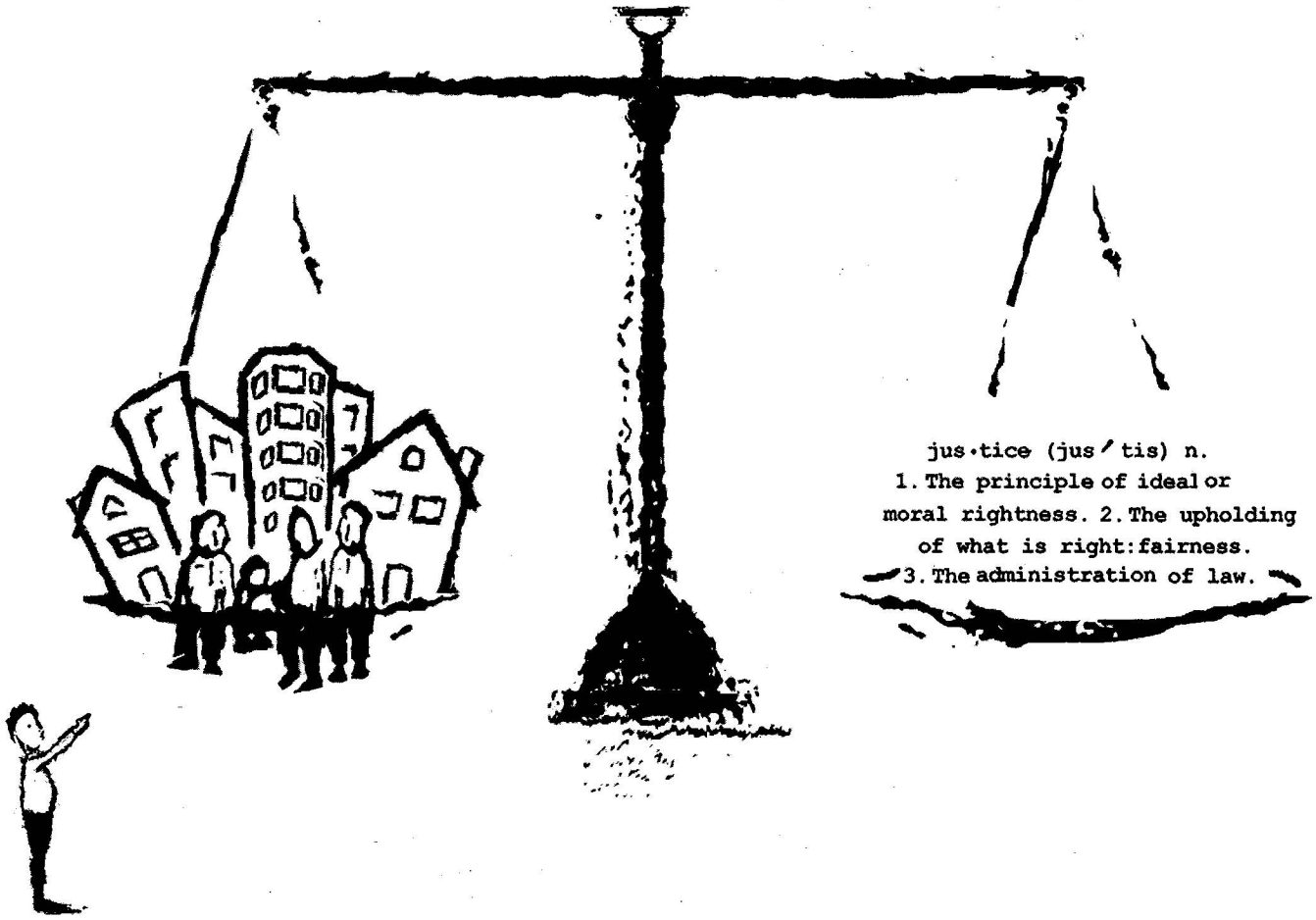

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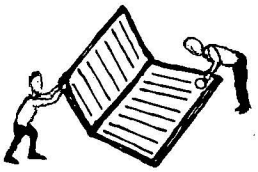

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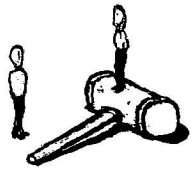

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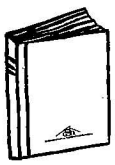
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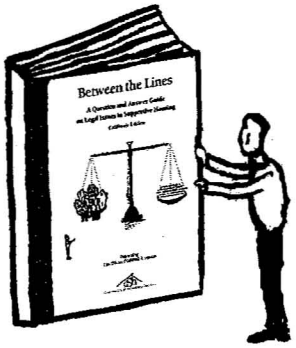


Chapter One

Why Read This Guide?

Between The Lines is a hands-on guide that offers insight into and information about the myriad laws and regulations that govern McKinney Act and other supportive housing. The guide clarifies how McKinney Act and other supportive housing providers can achieve the goal of providing stable housing for as many people as possible, while complying with the laws that govern their work.

The rewards and risks in developing and operating supportive housing, like any other venture, are significant. By understanding the legal and regulatory issues, you will be able to make more informed decisions about the implications of the policies and practices your agency establishes to accomplish its mission. This guide intends to give the reader information and analytical tools to make—for specific issues—sound and reasonable assessments and decisions that serve the interests of housing stability for tenants.

For purposes of this guide, supportive housing is defined as housing that offers support services on and off-site to homeless people and others with special needs, including those with mental illness, substance use and other chronic health and physically disabling conditions, in order to help them maintain decent and stable housing.

Section A: The Dilemma of Finding the "Right Answer"

Because supportive housing affirmatively seeks out and houses those who are traditionally discriminated against—for example people with mental illness or other disabilities—it sits squarely in the middle of the legal and political confusion that characterizes the debate about civil rights policies in this country. And because supportive housing affirmatively seeks out and houses those who

are poor or in need of assistance—for example homeless people—it sits squarely in the middle of another legal and political debate about the minimum standards of shelter, food and healthcare we, as a society, ensure our citizens.

For decades, people fought hard to establish laws to protect the individual rights of groups of people who have traditionally been discriminated against on the basis of race, color, religion, national origin, sex, familial and disability status, among others. These laws essentially mandate **fair treatment of every person**. Legal efforts have focused on prohibiting housing discrimination through enforcement of fair housing and other anti-discrimination policies. These laws are the strongest tools we have to combat discrimination and ensure fair treatment in housing, employment and other arenas.

With the enactment of the Americans with Disabilities Act (ADA) in 1990, the concept of "fair treatment" of those with disabilities expands the requirement to "reasonably accommodate" people with disabilities in housing, employment and all other aspects of civic life. With reasonable accommodation as the key principle for realizing fair treatment, the ADA promotes the integration of people with disabilities into all aspects of mainstream society and, with certain narrow exceptions, prohibits segregation or "separate but equal" treatment.

Meanwhile, many people have also fought for years to "level the playing field" by establishing programs targeting people who are poor, in need of special assistance and those who have traditionally been discriminated against so that they could access housing and jobs. These programs **affirmatively seek out and offer assistance to people based on their demonstrated need and/or because they are members of groups that face discrimination**. The Federal Department of Housing and Urban Development (HUD) administers the majority of these programs focused on providing access to affordable housing, including McKinney Act Homeless Programs which target people who are homeless and may also have disabilities, the Section 811 program for people with disabilities, the Section 202 program for the elderly and the Housing Opportunities for Persons with AIDS program.

Those who implement supportive housing programs run directly into the contradictions among the letter and spirit of the laws that seek to establish equal protection and fair treatment for all, and those that seek to affirmatively assist people who are in need or those who have experienced discrimination.

In addition to this basic set of sometimes conflicting laws, another confusing factor is the process by which laws come to life. Borne out of **statutes** that legislatures draft and chief executives sign off on, laws are then set forth in **rules**

that regulate programs by laying out the parameters of what can and can't be done. In addition, program administrators and attorneys who work for various agencies that enforce the particular law or administer the government funding program make **interpretations** about day-to-day issues. Understanding the implications of different laws and funding programs is even more daunting when you consider that different people from a single agency, or multiple agencies, are interpreting the same laws and regulations in different ways. Needless to say, it is sometimes hard for providers to figure out where the "right answer" lies—with the law, the regulation, or the person interpreting the law and regulations.

Because it is difficult to balance all the seemingly competing interests involved in developing and operating supportive housing and to identify what must be done to actually meet the requirements of the various laws and implementing regulations, it is important for providers to make the most informed decisions they can. ***Between the Lines*** offers a framework to analyze specific issues and situations, thereby helping providers to make the best decisions possible in light of all of the applicable laws, regulations, and interpretations, while keeping their goal of providing stable housing to those with the greatest barriers firmly in mind.

Section B: How *Between the Lines* Came About

Since the McKinney Act was passed into federal law in 1987 creating the Homeless Program, the Department of Housing and Urban Development (HUD) has administered this far-reaching endeavor which has inspired and funded hundreds of programs throughout the nation designed to put an end to homelessness. The public and private sectors have come together in community after community to plan and implement their unique version of the "Continuum of Care" offering the full range of outreach, emergency shelter, transitional and permanent supportive housing programs appropriate for each locality to effectively address homelessness. The success of the Continuum of Care is of course measured by the numbers of people who are no longer homeless. And it is service-linked affordable housing—funded by HUD homeless and housing programs—that has ultimately ended homelessness permanently for thousands of people.

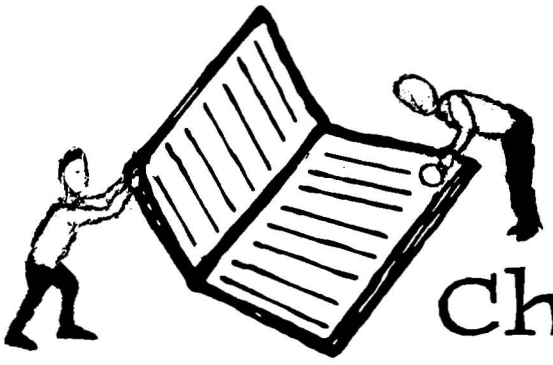
As these successful service-enriched housing programs have become more widespread, however, the local groups that run them have had to face more and more complicated questions about how to comply with the many laws and regulations under which they operate. Over the eight years of working with

developers, operators and tenants to increase supportive housing opportunities for homeless people and people at risk of homelessness, it became clear to the Corporation for Supportive Housing (CSH) that confusion about housing laws and regulations raises obstacles to tenant access to housing and housing stability, causes significant variation in the ways that housing providers operate, and opens some supportive housing providers to considerable legal risks which can threaten the long-term viability of their housing programs. In the course of providing technical assistance under HUD's SHP program, providers asked CSH to clarify many of these confusing issues.

CSH first tried to address these challenges by gathering experts in the field and representatives from different parts of the government regulatory agencies that oversee aspects of supportive housing, hosting an all day educational and skill building workshop on legal issues in San Francisco in November 1997. The day raised more questions than it answered. By the end of the day, participants at the workshop generated a list of legal questions and issues they regularly face as they try to develop and manage quality supportive housing to meet the needs of the residents.

In compiling the questions and framing the issues, we found that significant legal research and conversation between and among different regulatory and funding partners was needed before education and skill building could occur. The Corporation for Supportive Housing then engaged the services of Debbie Greiff Consulting and the law firm of Goldfarb and Lipman to develop and organize the project and perform the legal research.

Because the specific application of any law is dependent upon the particulars of any given situation, and the laws and regulations are often open to interpretation, we convened an Advisory Committee comprised of representatives of the various government regulatory agencies and supportive housing sponsors to discuss the legal research findings. Members of the Advisory Committee are a unique group—they understand the day-to-day challenges encountered in the course of developing and operating supportive housing, the intent of the various laws related to fair housing and civil rights law, as well as the many financing programs typically used to develop supportive housing. (Advisory Committee members are listed in the Credits and Thanks.) As representatives of the regulatory agencies charged with enforcement of the laws, and providers of supportive housing, the Advisory Committee deliberations offered significant guidance in developing the approaches and articulating the issues in ***Between the Lines***.



Chapter Two

How to Use This Guide

Section A: Who Should Read this Guide?

This guide was designed primarily to assist supportive housing providers—groups that develop, own, manage and provide services in supportive housing and their attorneys. ***Between the Lines*** will also be of use to staff of government agencies responsible for funding and monitoring supportive housing as well as tenants and advocates, although it has not been specifically tailored to addressing supportive housing legal issues from a tenant perspective. (Many useful tenant guides to fair housing and civil rights law exist, and some are referenced in **Appendix 12, Legal Reference Materials**.)

As the purpose of ***Between the Lines*** is to help supportive housing providers make informed decisions related to their policies, practices and legal positions, it will be most useful for executive directors, program managers, administrators and other policy makers within organizations whose responsibility it is to set policies and parameters within which project developers and front-line property management and services staff do their important work. The guide was not written to deal with specific situations, and as such the guidance provided may not always be of immediate use to line staff. Nonetheless, these staff are encouraged to review ***Between the Lines*** to help better identify the issues and inform management about particular situations that may have broader legal implications for their agency.

Section B: How the Guide Can Help with Decision-Making

This guide provides basic information needed to better understand the legal and regulatory issues and risks involved in key aspects of providing supportive housing so that you can make more informed decisions. While some readers may browse through the questions and answers, others may thoroughly review the entire guide, and yet others will first pick it up when there is a burning issue or problem at hand. We anticipate that the guide will be most useful to providers as you are contemplating and beginning to design programs and create policies and protocols to implement them, as well as when you are facing sticky, complicated and confusing legal issues in the midst of providing supportive housing.

Use this guide to find background information and to provide a framework for making good decisions by understanding the risks and tradeoffs involved. While written in a question and answer format, the guide provides principles to use for decision-making purposes, rather than the "right answer" to case-by-case situations. Expect to read the answers to several related questions that by example demonstrate how to analyze the underlying laws which impact your particular development or operating question.

Regardless of when and how you read ***Between the Lines***, the answers provided in and of themselves will **not** make for better decisions unless you can identify and are familiar with the legal issues involved in a situation. The process of making well-reasoned, legally defensible programmatic decisions is iterative and can be broken into four components: fact finding, issue identification, issue clarification and risk analysis.

Chapter Three

The material in Chapter Three: Legal Overview is critical to the decision-making process. It provides information that underpins the process of analyzing risk. In other words, if you don't know the laws and regulations impacting the specific issue, you won't know what you are really risking. The idea is not for you to become an expert in the law (that's the job of lawyers), but instead for you to have a solid conceptual framework of how laws are organized, the role of regulations and interpretations, and how to develop strategies to deal with inconsistencies within and among laws.

For that reason, we strongly encourage you to first read the material in Chapter Three: Legal Overview, as it will provide context and background to enrich your

understanding of specific questions and answers. This Chapter describes how the law is organized, introduces a helpful framework for analyzing the law (i.e., duties, rights and remedies) and provides a brief overview of the key fair housing laws that apply to supportive housing.

This guide does not provide and does not substitute for legal advice. While the guide does at times suggest reasonable approaches, this does not mean that the approach is one that would be upheld by a court of law in an individual case. Furthermore, the approaches are based on the laws, regulations and interpretations in-force at the time this publication went to print. **Readers should consult their government program representative and legal counsel for specific issues of concern and to receive proper legal opinion regarding any course of action.** For those who need lawyers, we hope you pass this guide on to them after you have read the criteria for choosing and working with a lawyer!

Section C: How the Guide Is Organized

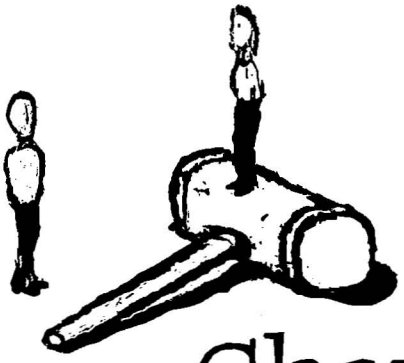
The guide is organized essentially chronologically from the perspective of how a supportive housing program is conceived and then developed. It begins with program planning issues especially related to setting aside targeted units, screening criteria, marketing, tenant selection, and reasonable accommodation in tenant selection. It goes on to discuss post-occupancy issues in the operation and management of housing including licensing, service provision and service participation requirements, clean and sober requirements, reasonable accommodation in occupancy, guest and overnight policies, and a myriad of other issues. The last part focuses on some crucial land use and zoning concepts and issues involved in siting of supportive housing.


Appendices

Between the Lines also offers additional resources in its appendices. **Appendix 1** supplements Chapter Three's overview of fair housing laws and provides similar briefings on other key categories of laws that apply to supportive housing—planning and zoning, siting, licensing, landlord-tenant, privacy, physical accessibility; **Appendix 2** and **Appendix 3** provide at-a-glance summaries of fair housing laws and supportive housing sources of funding; **Appendix 4** outlines the duties, rights and remedies of all the major categories of laws. Other appendices provide fair housing act regulations, citations for definitions of disability and other related terms, homelessness documentation requirements, a discussion of one-strike requirements and medical marijuana use, how to obtain HUD information and understand state and federal citations,

how to choose and work with a lawyer, a glossary of commonly used legal terms and legal reference materials.

While there is no single right way to read ***Between the Lines***, we hope that you will take the time to read it! We recognize that the material in this guide is dense and will require time to digest. The information will save you time and money in the long run, and we hope will improve access to and the quality of supportive housing so that all people with chronic heath challenges who are homeless or at risk of homelessness can live with stability, autonomy and dignity.



Chapter Three

Legal Overview

This Guide was developed to answer legal questions asked by McKinney Act Supportive Housing Program grantees and other supportive housing providers and to provide other guidance concerning siting of supportive housing facilities, tenant selection, and occupancy issues, including termination of tenancy. While fair housing law is the dominant consideration with many of these issues, providers must also comply with state and local land use laws, licensing statutes, and landlord-tenant law. In addition, if a provider receives funds from a government agency, the federal, state, or local law which authorized the funding will impose requirements on the provider, as will the state or federal regulations that were adopted to implement the funding program. Furthermore, a provider must comply with its contracts with project funding sources. Given all these sources of law, a provider will sometimes face conflicting legal requirements. This Guide is intended to assist providers in understanding the legal issues they face as they operate their programs, and to provide practical guidance whenever possible. However, as with many issues in the legal realm, clear and uncomplicated answers to providers' questions are not always available.

This Chapter Three describes how the law is organized and outlines the major fair housing laws affecting supportive housing projects. This Chapter of the Guide focuses on fair housing law because fair housing issues are a central theme throughout the Guide. Other laws relevant to supportive housing are outlined in **Appendix 1** to this Guide. Both this Chapter Three and **Appendix 1** provide important background for the individual questions and answers included in Chapters Four through Seven.

Section A: How the Law Is Organized

Lawyers share a common framework for analyzing the law. Under this analytical framework, a law is simply a rule that is established by the government and that can be enforced by either the government or a private party in accordance with a process established by the government.

The three key concepts for analyzing a law are duties, rights, and remedies. Regardless of the situation addressed by a governmental rule, a lawyer's analytical framework will always involve the duties, rights, and remedies established by the rule.

When a law imposes a **duty** on a person (defined broadly to include a governmental actor, a private artificial person such as a corporation, or a natural, living, breathing person), the law requires the person to act in a specified way or to refrain from acting in a specified way. For example, fair housing laws impose a duty on housing providers not to discriminate based on certain personal characteristics.

When a law grants a **right** to a person, the law permits that person to obtain a certain benefit. One person's right to obtain a certain benefit usually matches another person's duty to provide that benefit. In other words, when a law grants a right to one person and permits that person to obtain a certain benefit, the law usually imposes a duty on another person to provide the benefit by acting in a specified way or refraining from acting in a specified way. For example, fair housing laws grant individuals the right to obtain housing without discrimination based on certain personal characteristics, and this is the flip side of the duty that fair housing laws impose on housing providers not to discriminate based on those personal characteristics. Similarly, the federal Social Security Act gives most elderly and disabled residents of the United States a right to receive financial assistance from the government, and the Social Security Act imposes a corresponding duty on the government to provide the financial assistance.

Rights also include rights to be free from governmental interference in a specified area. For example, the federal Constitution establishes a freedom from interference in the practice of one's religion. Stated differently, this freedom is a right to cause the government to refrain from interfering in one's religious practice. This constitutional right, freedom of religious practice, imposes a corresponding duty on the government not to interfere in one's religious practice.

The last key concept in analyzing laws is the law's mechanism to make victims whole and to punish wrongdoers, or the **remedy** imposed by the law. Remedies are sometimes the payment of money damages, and sometimes governmental orders for remedial actions to be undertaken. An example of money damages is that fair housing laws allow victims of illegal discrimination to recover money damages from a discriminating housing provider to compensate for the injury caused by the violation of their rights. An example of governmental remedial orders is that fair housing laws allow victims of illegal discrimination to be admitted into a housing project from which they were wrongfully excluded. The remedy process is administered by the government, either through administrative agencies or courts.

There are three levels of government in the United States: federal, state, and local. Governments at all three levels establish laws. The interaction among the different levels is discussed below.

There are also three branches of government in the United States: legislative, executive, and judicial. All three branches establish laws: the legislative branch establishes statutes; the executive branch (through the different administrative departments of government) establishes regulations and executive orders, and enforces the laws; and the judicial branch issues judicial decisions interpreting and enforcing the laws, also known as "case law." Moreover, the United States and each of the fifty states have constitutions which establish the legal framework for all other laws adopted at that level of government. For example, a court can invalidate a federal statute adopted by Congress if the statute violates the United States Constitution. Many cities also have city charters which are mini-constitutions for the city.

Many of the laws affecting supportive housing are federal statutes that the United States Congress adopted to establish federal housing programs. These statutes require the United States Department of Housing and Urban Development ("HUD") to administer the housing programs. As part of this program administration, HUD adopts regulations, publishes handbooks, and issues notices.

With all these possible sources of law, it is often very difficult to determine whether there is a law that applies to a particular situation, or how the different laws that are known to apply should interact with one another. These are tasks for which the services of a lawyer are often required. However, there are several self-help tools available for legal research. For example, West Publishing Company publishes two excellent books by Morris Cohen, Robert Berring, and

Kent Olson on legal research, one a comprehensive book called *How to Find the Law*, the other an abridged edition called *Finding the Law*. In addition, some government agencies provide self-help tools.

Appendices

Self-help tools on many legal topics are available by publishers such as Nolo Press. This Guide is a self-help tool for working with the specific laws that affect supportive housing. The remainder of this Chapter Three provides background about several broad areas of law that are relevant for supportive housing. **Appendix 1** supplements Chapter Three's overview of fair housing laws and provides similar briefings on other key categories of laws that apply to supportive housing, planning and zoning, siting, licensing, landlord-tenant, privacy, and physical accessibility. **Appendix 2** and **Appendix 3** provide at-a-glance summaries of fair housing laws and supportive housing sources of funding. **Appendix 4** applies the duties, rights, and remedies framework described above to a number of laws relevant to the provision of supportive housing. **Appendix 5** is a copy of current federal Fair Housing Act regulations. **Appendix 6** provides citations for several terms used in laws related to disabilities. **Appendix 7** is a specific HUD bulletin that outlines homelessness documentation requirements. **Appendix 8** is a HUD General Counsel's memorandum discussing one-strike requirements and medical marijuana use. **Appendix 9** explains how to find federal and state statutes, how to find HUD's regulations and other publications, and how to understand the shorthand "citation" system for describing where federal and state laws are published. **Appendix 10** provides suggestions for choosing and working with a lawyer. **Appendix 11** defines many commonly used legal terms. Finally, **Appendix 12** lists relevant reference materials.

This Guide and other self-help tools are not a substitute for consulting a lawyer, nor are they a substitute for consulting the staff at the regulatory agencies involved in your project. This Guide was published in May of 2000, and should be accurate as of that time. However, the law described in this Guide is constantly changing and expanding, and this Guide does not address the laws of most state and local governments. A lawyer can assist in finding changes to the law since publication of this Guide, finding relevant state and local laws, and applying the law to specific situations.

This subsection on how the law is organized concludes with the following questions and answers:

Question 1: What is the relationship between federal housing statutes, federal legislative history, HUD regulations, HUD handbooks, HUD notices, and HUD NOFAs?

When Congress passes a federal housing statute to adopt a housing program, the history of the passage process is reported in congressional committee reports, hearing transcripts, and similar archival materials that are collectively known as "legislative history." When an administrative agency interprets and implements a statute, or when a court interprets a statute, the agency or court will often use legislative history to determine what Congress intended when it passed the statute.

Federal statutes that adopt housing programs usually call for HUD to administer the program, and they usually also call for HUD to adopt regulations to clarify the details of the program in a manner consistent with the statute. If HUD's regulations are inconsistent with the authorizing statute, then a court may invalidate the regulations as outside of HUD's authority (and the court's decision is part of "case law").

Statutes and HUD regulations are clearly "laws." Additional HUD publications sometimes state rules without rising to the level of enforceable laws. For example, HUD summarizes statutory and regulatory requirements by publishing "handbooks." HUD also issues "notices" announcing specific HUD interpretations of the law or new developments in HUD programs. Finally, HUD issues Notices of Funding Availability, or "NOFAs," to invite applications for individual projects to receive HUD program funds, and NOFAs often include special program requirements that are not found elsewhere in HUD regulations or the applicable authorizing statute. While HUD handbooks, notices, and NOFAs are not official parts of the law, they are given great weight by courts that interpret statutes and regulations, because they represent official HUD interpretations of the statutes and regulations.

Question 2: What is the relationship between federal law, state law, and local law?

In any given situation, the laws that apply might be federal law alone; state law alone; local law alone; or any combination of two or three of the above.

As a general rule (with several exceptions), there is a hierarchy among the three levels of government. The laws of the federal government are generally supreme

which have little discretion to refuse to consider an appeal); and courts of last resort, which consider appeals of appeals court decisions (and which have much discretion to consider an appeal).

Federal courts generally have jurisdiction to interpret federal statutes and regulations and the United States Constitution, while state courts generally have jurisdiction to consider issues of state and local laws. However, there are exceptions to these general rules.

The federal trial courts are called "district" courts, and each district court has jurisdiction over a small region of the country (known as a district). California has four federal districts, but many states have only one district.

What state trial courts are called depends on the state. In California, there are two categories of trial court, called "municipal" court and "superior" court, with jurisdictional coverage throughout a city and/or county (with minor differences in which court handles which type of dispute).

The federal appeals courts are called "circuit" courts, and each circuit court has jurisdiction over a region consisting of several districts (known as a circuit). California's four districts are part of the Ninth Circuit, and the Ninth Circuit includes not only California's four districts, but also all districts in Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Circuit court decisions are binding precedent only in their own circuits.

What state appeals courts are called depends on the state. In California, the appeals court is called the "court of appeal." There are six courts of appeal in California, each covering a district of several trial courts.

The federal court of last resort is the United States Supreme Court, located in Washington, DC. When the United States Supreme Court issues a decision, all circuit and district courts must adopt the interpretation articulated in the Supreme Court decision.

What state courts of last resort are called depends on the state. In California, the court of last resort is called the "California Supreme Court."

Section B: Fair Housing Laws

Fair housing law is a vast area of law involving the United States Constitution, executive orders, federal statutes and regulations, the constitutions and fair housing laws of individual states, local anti-discrimination ordinances, and a

myriad of federal and state court decisions interpreting these requirements. Most fair housing law developed around attempts to prevent housing providers from discriminating against protected groups of people, but this body of law now must be negotiated, interpreted, and complied with by supportive housing providers who seek to provide housing for designated populations. This Section B outlines the major provisions of fair housing law.

Question 1: What is the 14th Amendment to the United States Constitution?

The Equal Protection Clause of the 14th Amendment prohibits the government from denying to any person "the equal protection of the laws." The Equal Protection Clause applies to all "state action," which has been held in some situations to include actions by private parties receiving governmental assistance, including owners of housing receiving financial assistance from the government.

If a governmental agency or a private party acting in concert with a governmental agency (such as some owners of subsidized housing) distinguishes between people by creating a classification that is "suspect" (e.g., a classification based on race or national origin) or which violates a "fundamental right" (like the right to vote or the right to travel), and such action is challenged in court, a court will subject the action to "strict scrutiny." For example, a public assistance program that is made available only to people of a particular race will be subject to strict scrutiny. A classification can withstand strict scrutiny only if it is required to further a "compelling state interest" (such as national security) and if there is no less restrictive alternative means for the state to achieve its objectives. The strict scrutiny test is a difficult standard to satisfy.

Some classifications are "semi-suspect" (including gender, non-citizen status, or illegitimacy) and can be justified by an "important governmental interest," which is a lesser standard than a "compelling state interest." For example, courts may find the governmental interest in conserving limited public resources to be an "important government interest" that justifies programs that are available to citizens but not to noncitizens; however, this interest would not rise to the level of a "compelling state interest" that would justify a program that is available to one racial group but not to another.

All other state actions which distinguish between different groups of people but do not touch upon a suspect classification or a fundamental right need only be justified by a "rational basis," which means that the action need only be reasonably related to furthering a legitimate state interest. The rational basis test is a relatively easy standard to meet. For example, a welfare program that is

available only to homeless people can readily be shown to be reasonably related to the legitimate state interest of ending homelessness.

Proof that discriminatory motivation played some role in bringing about a discriminatory impact is required to show a violation of the Equal Protection Clause. A state action does not violate the Equal Protection Clause simply because it results in a discriminatory impact.

Section 5 of the 14th Amendment grants power to Congress to legislate against discriminatory conduct. It is pursuant to this section that Congress has adopted many civil rights laws, including the Fair Housing Act.

Question 2: What are the Fair Housing Act and the Fair Housing Act Amendments?

The Fair Housing Act (42 U.S.C. 3601) (also known as Title VIII of the Civil Rights Act) was passed in 1968 and prohibits discrimination in the sale, rental, financing, or advertising of housing on the basis of race, color, religion, or national origin. Gender was added as a protected classification in 1974, and handicap and familial status (covering discrimination against families with children, meaning persons under the age of 18 who reside with a parent, guardian, or other person with written permission of the parent or guardian, and discrimination against pregnant women) were added by the Fair Housing Act Amendments of 1988, which also significantly strengthened enforcement mechanisms. Housing for seniors that meets certain criteria is exempt from the Act's prohibition of discrimination against families with children.

The Fair Housing Act Amendments also imposed an affirmative duty on housing providers to provide "reasonable accommodation" to persons with disabilities. This duty requires a provider to make changes to its rules, policies, and procedures to allow persons with disabilities equal access to housing, with the limitation that a provider is not required to undergo undue financial and administrative hardship to provide an accommodation or to make a fundamental alteration in the nature of its program. (For example, courts have found that requiring installation of an elevator or requiring a landlord to accept a Section 8 voucher are unreasonable financial and administrative burdens.) The duty to provide reasonable accommodation also requires providers to allow tenants with disabilities to make reasonable, necessary physical modifications to their units at the tenant's expense. (42 U.S.C. 3604(f)(3)(A); 24 CFR 100.203)

The Fair Housing Act also imposes accessibility/adaptability requirements on the new construction or rehabilitation of all residential buildings of four or more units first occupied after March 13, 1991, 42 U.S.C. 3604(f)(3)(C); 24 CFR 100.205 (see **Appendix 1, Overview of Other Relevant Laws, Physical Accessibility Laws**).

The Fair Housing Act applies to projects receiving public funds, but also reaches the private housing market, and government funding is not required for the Act to apply. A number of federal circuit courts have held that a plaintiff bringing a challenge under the Fair Housing Act need only show **discriminatory effect** (or "disparate impact"), and not discriminatory motivation, in order to prevail; the Ninth Circuit, which encompasses California, has implied that it might reach the same conclusion in Fair Housing Act cases.[1] If discriminatory effect is shown, the housing provider then has the burden to justify the practice that causes the discriminatory effect. The standard to be met by the provider is described in different ways by different courts, but generally the provider must show that it has a "business necessity" for the practice and that the business necessity is advanced by the practice in question. For example, a mobilehome park owner's policy of prohibiting more than three occupants in each mobilehome in a park was challenged as having a discriminatory effect on families with minor children (because it operated to exclude such families from the park). The owner was able to justify the policy as a "business necessity" by producing a study that showed that the sewer system of the park was unable to accommodate a large population of residents. Plaintiffs can recover attorneys' fees and punitive damages under the Fair Housing Act, as well as other relief. Plaintiffs can also ask the court to appoint a lawyer for them.

The Fair Housing Act also applies to zoning and land use decisions by local governments that operate to restrict access to housing by people with disabilities and members of other protected groups. The Fair Housing Act prohibits the use of zoning for discriminatory purposes and, in some cases, prohibits zoning actions that have a discriminatory effect. Finally, the Fair Housing Act requires local governments to grant reasonable accommodations to disabled persons, for example, by granting a variance that would allow a group home to locate in an area where the facility does not meet a zoning requirement.

HUD has issued regulations implementing the Fair Housing Act, which are located at 24 CFR Part 100. These regulations include detailed provisions related to disability discrimination and should be reviewed regularly by all housing providers. A copy is included as **Appendix 5** to this Guide.

Question 3: What is Section 504 of the Rehabilitation Act of 1973?

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) prohibits discrimination on the basis of disability in programs receiving federal funding, including the Community Development Block Grant, HOME, HOPWA, Section 202, Section 811, Section 8, and McKinney Act programs. Federal funding does not currently include low income housing tax credits or tax-exempt bond financing. HUD has issued implementing regulations found at 24 CFR Part 8 that apply to housing programs receiving federal financial assistance, whether publicly or privately owned. These regulations establish accessibility requirements for newly constructed or substantially rehabilitated housing and require access for people with disabilities to non-housing programs operated with federal funds, the integration of people with disabilities, and auxiliary aids and services necessary for communication with people with disabilities.

Section 504 states that a recipient of federal financial assistance may not discriminate on the basis of disability in providing housing and services in its programs or activities (24 CFR 8.4). Recipients of federal funds may not deny a qualified person with a disability the opportunity to participate in or benefit from the housing or services provided. Such discrimination occurs when a recipient's facilities are inaccessible or unusable by individuals with disabilities, thus denying them access to the housing or services provided (24 CFR 8.20). Consequently, Section 504 requires a specific percentage of accessible units for new construction and substantial rehabilitation (see **Appendix 1, Section F** for a discussion of physical accessibility laws).

The Section 504 regulations further state that existing non-housing and housing programs or activities must be operated so that when viewed **in their entirety** they are readily accessible by people with disabilities. Non-substantial alterations are required to be made to the maximum extent feasible. A recipient of federal funding is not required to make each of its **existing** facilities accessible or undertake alterations that would result in a fundamental alteration in the nature of its program, or be an undue financial and administrative burden (24 CFR 8.21 and 8.24).

When a supportive housing project receives some form of federal funding, Section 504 will apply. Section 504 imposes requirements that, in many instances, are more rigorous than Fair Housing Act requirements. For example, Section 504 prohibits a project receiving federal funds from limiting occupancy to people with disabilities or with one particular type of disability unless such a

restriction is authorized by a federal statute or executive order that applies to the project. (For example, the project receives funds under the Section 811 program, authorized by federal statute to serve people with disabilities, or a project receives funds under the HOPWA program, authorized by federal statute to serve people with HIV/AIDS). In addition, Section 504 is interpreted to impose a more demanding reasonable accommodation duty on owners receiving federal funds, requiring the owner to pay for physical modifications to a disabled tenant's unit under certain circumstances where the Fair Housing Act would only require the owner to permit the tenant to make physical changes at the tenant's own cost.

Section 504 was the first major federal statute to prohibit discrimination against people with disabilities and therefore many court rulings on disability discrimination interpret Section 504. Many of the definitions utilized in Section 504 have been carried forward into the Fair Housing Act Amendments and the Americans with Disabilities Act, and many of the court interpretations of Section 504 are useful in interpreting the Fair Housing Act and the Americans with Disabilities Act.

Question 4: What is the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA) (42 U.S.C. 12101 *et seq.*), adopted in 1990, gave broad federal civil rights protection to people with disabilities, extending far beyond activities of the federal government or programs receiving federal funds. Title I of the ADA prohibits discrimination against individuals with a disability in connection with employment. Title II and Title III of the ADA are of greatest relevance to supportive housing providers. The ADA has two other parts, or titles, that do not hold special relevance to supportive housing providers: Title IV addresses telecommunications issues, and Title V includes miscellaneous provisions.

Title II of the ADA prohibits discrimination against individuals with disabilities by state and local public entities (including all of their departments or agencies) in all government programs and services, whether or not federal funding is utilized by the public entity. Under Title II, discrimination against a person with a disability occurs when a public entity's facilities are inaccessible. A public entity must operate its services, programs and activities so that, when viewed in their entirety, they are readily accessible. Title II requires public facilities to be designed, constructed and altered (at the expense of the public entity) in compliance with certain accessibility standards. In addition, Title II requires reasonable modification to rules, policies, and procedures to allow persons with

disabilities equal access to public programs, unless the modifications would fundamentally alter the nature of the affected service, program, or activity.

The application of Title II to a private entity (like a nonprofit housing provider) that receives state or local funds under contract with a public entity is an unclear and evolving issue. While private entities are not directly subject to Title II, public entities must ensure that a facility receiving public funds is operated in a manner that enables the public entity to meet its Title II obligations. Therefore, many government funders of supportive housing require, in the loan or grant documents governing the funding, "compliance with the ADA." Under certain circumstances, "compliance with the ADA" means that the private recipient of government funds must act as though it were a government entity for ADA purposes. For example, one federal court found that a private housing development constructed with significant local redevelopment agency assistance should have been constructed in compliance with Title II accessibility requirements.[2] On the other hand, a federal circuit court found (in an unpublished opinion) that a private clinic receiving federal grant monies was not subject to Title II. Consequently, it is not yet clear where the line is drawn to separate a private entity that receives government funds and must act as though it were a government entity for ADA purposes from a private entity that receives government funds but has no duty to act as though it were a government entity for ADA purposes. Given this lack of clarity, it is prudent for a housing provider that is newly constructing or rehabilitating a building with public agency involvement to comply with Title II accessibility requirements (which generally overlap with Section 504 accessibility requirements) (see **Appendix 1, Section F** for a discussion of specific accessibility requirements under the ADA).

Title III of the ADA prohibits disability-based discrimination in commercial establishments and requires privately owned places of "public accommodation" and commercial facilities to be designed, constructed and altered in compliance with certain accessibility standards. "Public accommodation" includes the following privately-run activities, so long as their operation affects commerce: hotels and other places of lodging (except owner-occupied buildings of less than five rooms); restaurants and bars; movie theaters and other places of exhibition or entertainment; auditoriums and other places of public gathering; grocery stores and other sales establishments; laundromats, banks, professional offices, and other service establishments; stations used for public transportation; museums and other places of public displays; parks, zoos, and other places of recreation; nursery schools and other places of education; day care centers, homeless shelters, and other social service centers; and gyms, golf courses, and other places of exercise or recreation.

"Public accommodation" under Title III does not include the portions of privately owned rental housing used exclusively as residences, but does include areas within such facilities that are available to the general public, such as rental offices and community rooms available for rental or use by non-residents. Social service programs operated by a housing provider that are available to non-residents of the provider's facility would be considered a public accommodation subject to Title III of the ADA. However, even if social services are provided only to residents, but the level of services is significant, the services portion of the premises may be regarded as a social service center (which **is** a public accommodation) and therefore would be subject to Title III of the ADA. There is no clear guidance on what level of services is significant enough to cause resident-only services to be considered a "public accommodation."

Like Title II, Title III of the ADA requires a provider of a public accommodation to make reasonable modifications to its rules, policies, and procedures to allow persons with disabilities equal access to the public accommodation, unless the modification would fundamentally alter the nature of the provider's facilities or services. All architectural barriers in existing facilities must be removed at the owner's cost where such removal is readily achievable (that is, easily accomplished and able to be carried out without much difficulty). Examples of readily achievable removal of barriers include adding grab bars, ramping a few steps, and lowering telephones. If barrier removal is not readily achievable, then services must be made available through alternative methods, including relocating activities to accessible locations and providing home services to individuals.

The regulations implementing Title II and Title III of the ADA are issued by the United States Department of Justice. The Title II regulations are published at 24 CFR Part 35 and the Title III regulations are published at 24 CFR Part 36. The United States Department of Justice Civil Rights Division also publishes Technical Assistance Manuals that are useful in understanding the application of Title II and Title III of the ADA (and that are available at **www.usdoj.gov/crt/ada**).

Question 5: What are Fair Housing Executive Orders?

Before Congress passed the major civil rights laws in the 1960s, discrimination was prohibited in many federal programs by order of the President. Those orders are called "executive orders" and must be complied with by the affected federal agencies and any public or private entity receiving assistance from an affected federal agency. These include Executive Order No. 11,063, issued by President Kennedy in 1962 and prohibiting discrimination based on race, religion, or national origin in housing owned, operated or assisted by the federal government;

Executive Order No. 12,259, issued by President Carter in 1980, extending the first order to sex-based discrimination; and Executive Order No. 12,892, issued by President Clinton in 1994, extending the order to disability and familial status and creating a cabinet-level Fair Housing Council. The executive orders that were issued prior to 1973 have been rendered somewhat superfluous by the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973.

Question 6: What is the California Fair Employment and Housing Act?

The housing provisions of the Fair Employment and Housing Act (California Government Code Sections 12955 *et seq.*), a California statute that was adopted in 1980 (replacing the earlier Rumford Fair Housing Act), prohibit discrimination based on race, color, religion, sex, national origin, familial status, and disability (the same categories as the federal Fair Housing Act), and also on the basis of marital status, ancestry, and, as of January 1, 2000, sexual orientation and source of income. The Act applies to all housing accommodations except owner-occupied single-family homes with only one roomer or boarder, and also prohibits land use practices and decisions that make housing opportunities unavailable to members of protected classes. The requirements of the Act are substantially the same as the requirements of the federal Fair Housing Act, including both non-discrimination provisions and the affirmative duty to provide reasonable accommodations in rules, polices, practices, or services when necessary to permit a disabled person the equal opportunity to use and enjoy a dwelling.

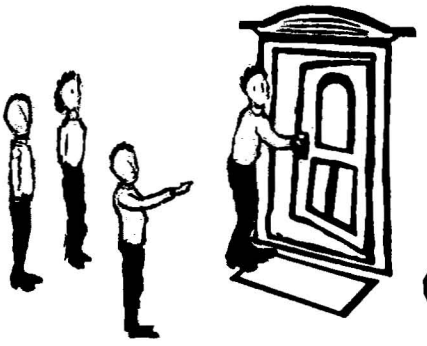
The Fair Employment and Housing Act prohibits both intentional discrimination and facially neutral policies that have a disparate adverse impact on a protected group (which is different from the federal Fair Housing Act, where the statute is silent on discriminatory impact and individual courts have come to different conclusions on this topic). If a discriminatory effect is shown in a private housing provider's actions, the housing provider must show that the practice causing the discriminatory effect is necessary to the operation of the business and effectively carries out the significant business need, and that no feasible less discriminatory alternative exists. No court has yet applied this test to a nonprofit housing provider whose mission is to serve a particular population. If a government agency's practice has a discriminatory effect, the government must show that the practice's purpose is sufficiently compelling to override the discriminatory effect, that the practice effectively carries out the purpose, and that no feasible alternative exists.

Question 7: What is the Unruh Civil Rights Act?

The Unruh Civil Rights Act (California Civil Code Sections 51 *et seq.*) is an earlier California statute which prohibits discrimination in all "business establishments" (including housing accommodations) on the basis of sex, race, color, religion, ancestry, national origin and disability. Furthermore, court cases in California have interpreted the law broadly to prohibit all arbitrary discrimination, regardless of whether the discrimination is based on one of the specifically enumerated bases. This conclusion was reached based on the Fourteenth Amendment to the United States Constitution, which prohibits irrational, arbitrary or unreasonable discrimination.[3] This broad interpretation of the Unruh Act has allowed courts to extend the Unruh Act's protection to homosexuals, persons with less than desirable character, students, individuals of a particular occupation, and children. The Unruh Act includes an exemption for senior housing meeting very specific requirements (Civil Code Sections 51.2-51.4). The Unruh Act senior housing exemption is more restrictive than the federal exemptions for senior housing and is not pre-empted by federal law.

Question 8: What are Local Housing Discrimination Ordinances?

Some cities and counties have adopted local ordinances prohibiting discrimination in housing, which include protections for groups that are not specifically protected by state or federal housing law. For example, some local ordinances prohibit discrimination based on sexual preference, gender identity, or source of income. The state Fair Employment and Housing Act pre-empts local jurisdictions from protecting additional groups not named in the Fair Employment and Housing Act or Unruh Act. Therefore, anti-discrimination protections for these additional groups of people are probably not enforceable against private owners of housing who are not receiving financial assistance from the local government. If a local government is providing financial assistance to a project, the local government will have additional authority to regulate the operation of the project and, in this context, may be able to impose non-discrimination requirements that protect additional classes of people who are not specifically protected under state law.



Chapter Four

Serving Designated Populations

Many supportive housing providers seek to serve a designated special needs population, such as people who are homeless, people with disabilities, or people with substance use problems. This Chapter Four discusses the legal issues related to limiting tenancy to a specific group of people.

In analyzing this issue, the following questions should be asked: (1) Which fair housing laws apply to this project? (2) What funding is received by the project and does the funding source either prohibit or authorize reserving the housing for a specific population of tenants? and (3) Is a disability issue involved? (See detailed discussion under the next questions regarding housing for persons with disabilities.)

Both the federal Fair Housing Act and the state Fair Employment and Housing Act prohibit discrimination in the renting, selling, and advertising of dwelling units on the basis of race, color, religion, sex, familial status, or national origin, or on the basis of the renter or buyer being disabled (the Fair Housing Act uses the term "handicap" rather than "disabled"). The Fair Employment and Housing Act also covers marital status, ancestry, sexual orientation and source of income. Additionally, both laws provide that it is unlawful to "make, print, publish or cause to be made, printed or published any notice, statement, 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" (42 U.S.C. 3601(c); California Government Code Section 12955(c)).

Section 504 of the Rehabilitation Act of 1973 prohibits programs receiving federal funding from discriminating against people with disabilities. Section 504 also prohibits reserving housing for people with disabilities in general, or people with particular disabilities, unless authorized by federal statute or an executive order. (This prohibition is described in detail under the next several questions.

The discussion in this Introduction must be supplemented with the analysis in the succeeding questions if a provider receives federal funding and seeks to limit occupancy to persons with disabilities.)

The Unruh Civil Rights Act (California Civil Code Section 51 *et seq.*), a California statute that prohibits discrimination in all "business establishments," also prohibits all arbitrary discrimination.[4] Arbitrary discrimination is discrimination against a group of people with similar personal characteristics for no legitimate reason. For instance, rejecting applicants because they have long hair would be arbitrary since their long hair bears no relation to their qualifications for tenancy. Finally, the 14th Amendment prohibits discriminatory "state action" (which includes the action of private housing providers receiving public funds): a compelling state interest is required to justify discrimination against a protected group and **all** distinctions between groups of people made by governmental programs must at least have a rational basis to be constitutional.

Both federal and state anti-discrimination laws explicitly prohibit discrimination against certain protected groups of people. Case law supports an interpretation of these laws that allows housing providers to establish reasonable criteria for occupancy, as long as the criteria are rationally related to the services performed and the facilities provided. In other words, if occupancy is limited to a designated group for a good reason, the limitation may not run afoul of fair housing laws. Although housing providers may establish reasonable criteria, there are no specific laws that say which criteria are acceptable. Each situation must be analyzed on its own facts.

For example, if housing was specifically designed and developed for people with chemical sensitivities (which is considered to be a disability), including installation of air filters and limits on the use of chemicals in the construction process, it would be reasonable and legal under the Fair Housing Act to limit occupancy to people with chemical sensitivities. In contrast, if a provider restricted occupancy in a housing development to people with multiple sclerosis, yet the housing did not include any special accessibility features or programs designed to serve this population, the restriction would not be reasonable under the Fair Housing Act and could subject the provider to liability for housing discrimination. (If either of these projects received federal funding, a limitation on occupancy to people with a particular disability would not be permitted under Section 504 unless specifically authorized by federal statute or executive order.)

The fact that a housing provider has a reasonable basis for limiting the housing to a set population may still not prevent the provider from violation of

antidiscrimination laws if the result of the limitation is that a certain protected segment of the population is excluded from the housing in disproportionate numbers. Restrictions which are not intended to discriminate against a protected class, but that result in a protected class being excluded, are considered to have a "disparate impact" which can result in a finding of discrimination. Thus, if the housing provider establishes a program that does not intentionally discriminate against a certain ethnic group but results in the exclusion of the vast majority of the members of the ethnic group from the housing, the program requirements have a disparate impact on that ethnic group and therefore may be illegally discriminatory.

Determining whether an occupancy restriction with a disparate impact on a protected class constitutes illegal discrimination is not easy, as evidenced by the lack of agreement among the federal courts on the standards to apply in such cases. Although the federal courts, in interpreting the federal Fair Housing Act, use a variety of tests to determine whether a restriction or preference with a disparate impact is illegally discriminatory, most of the tests boil down to whether the housing provider has a business necessity for the exclusionary rules and whether that business necessity will be advanced by the practice that results in the discriminatory impact.

Housing providers that desire to limit occupancy in a development to a targeted population that may result in a disparate impact on a protected group of people should consider whether the restrictions on occupancy will further a business purpose. For example, if a non-profit's mission is to provide services to mentally ill people, housing (that receives no federal funding that would trigger Section 504) that is restricted to mentally ill people and that provides services to assist people with mental illness would further the organization's business purpose and should meet the business necessity requirements, even if the restriction to people with mental illness operates to exclude members of a protected class of people (for example, people with other types of disabilities or members of a particular racial group). However, some federal courts apply more stringent standards for defeating a disparate impact claim, including a requirement that the provider prove that the challenged practice is the least discriminatory alternative to meet the purported business necessity. Additionally, there are no reported cases involving restrictions that limit occupancy to a special needs population (or on the "business necessity" of nonprofit organizations), so a definitive conclusion about whether such an occupancy restriction would survive a challenge is impossible.

Section A: Reserving Housing for People with Disabilities

Question 1: May housing be reserved for people with disabilities?

Housing may be reserved for people with disabilities. However, if a project receives federal funds it may be limited to people with disabilities only if this limitation is authorized by a federal statute or executive order.

If a project does not receive federal funding, the ability to reserve housing for people with disabilities is governed by the Fair Housing Act and state and local fair housing law and, if a state or local governmental housing program is involved, Title II of the ADA. The Fair Housing Act prohibits discrimination against disabled people in a section separate from the other anti-discrimination provisions. This separation of disability-based discrimination from other types of discrimination makes clear that the discrimination against disabled people that is prohibited is discrimination **against** people with disabilities. The preamble to the Fair Housing Act specifically states that a housing provider "may lawfully restrict occupancy to persons with handicaps."[5]

Additionally, the federal regulations which implement the federal Fair Housing Act imply that it is permissible to designate units or entire developments as available only for people with disabilities. This is implied by the provisions of the regulations that allow housing providers to ask questions to determine whether an applicant for housing meets the requirements for a disabled unit, including questions regarding whether the applicant has a particular type of disability if the unit or development is targeted to a specific population.

The state Fair Employment and Housing Act, unlike the Fair Housing Act, does not segregate the prohibition on discrimination against people with disabilities from the prohibition on other types of discrimination. Rather, discrimination on the basis of disability is prohibited. The broad prohibition could be used to argue that housing that excludes non-disabled people is illegal. However, for the reasons discussed in Section A of this Chapter, it is unlikely that a court would find such a practice illegal.

Under Title II of the ADA, a public entity is authorized to provide services, benefits or advantages to persons with disabilities or any class of people with disabilities, which are not provided to persons without disabilities. Public

entities are also permitted to provide different or separate benefits or services to people with disabilities, or any class of people with disabilities, if such action is necessary to provide people with disabilities with benefits or services that are as effective as those provided to others. Both of these provisions permit public entities to provide specialized housing serving only people with disabilities, or people with a particular class of disability, so long as people with disabilities are not then excluded from benefits or services available to the general public. (See 28 CFR 35.130 and Appendix A to 38 CFR Part 35.)[6]

If a project receives federal financial assistance, Section 504 of the Rehabilitation Act of 1973 applies. Section 504 permits federally funded housing to be limited to disabled persons **only** if the housing is limited by federal statute or executive order to serve people with disabilities. For example, a project funded under the Section 811, Shelter Plus Care, or Housing Opportunities for People with AIDS (HOPWA) programs may exclude people without disabilities. In contrast, housing funded with HOME or CDBG funds (and no other federal funds that authorize limiting the housing to people with disabilities) technically may not exclude those without disabilities or restrict occupancy to people with disabilities, although, in practice, many jurisdictions permit HOME and CDBG funds to be utilized for projects for people with disabilities. Low income housing tax credits or loans of the proceeds of tax-exempt bonds are currently not considered federal financial assistance for Section 504 purposes; therefore Section 504 will not affect projects utilizing these programs (and no other federal funds) (29 U.S.C. 794 (a)).

Question 2: May a provider reserve its facility for people with one particular disability?

In some circumstances housing may be reserved for people with one particular disability.

Answering this question always involves an analysis of the funding sources for the project.

Section 504 of the Rehabilitation Act of 1973 does not allow the exclusion of classes of individuals with specific disabilities unless the program is limited by federal statute or an executive order to a different class of disabled individuals. Thus Section 504 prohibits targeting to a specific disabled population in housing receiving federal funds, unless the targeting is specifically authorized in one of the ways described in the remainder of this answer.

As will be discussed later, several federal and state funding programs provide funding for housing with a requirement that the project sponsor restrict occupancy to a specific population. If a housing provider is mixing federal and state funding, the provider should not necessarily assume that a restriction in favor of persons with disabilities is legal simply because it is required by a funding source. If a project receives federal funding **and** state or local government funding, authorization to limit occupancy to disabled people or to one category of disabled people must appear in a federal statute. State or local authorization is not sufficient to overcome the prohibition in Section 504.

The statute authorizing HUD's Section 811 program, limits assistance to very low income persons with disabilities. The Section 811 statute further provides that, with the HUD Secretary's approval,[7] housing providers may limit occupancy of housing developed with Section 811 funds to people with similar disabilities who require a similar set of supportive services (42 U.S.C. 8013(i)(2)). The HUD regulations implementing this provision state, however, that even where the Secretary of HUD has approved limiting the housing to people with a similar set of disabilities, the housing provider must permit occupancy by **any** qualified person with a disability who could benefit from the housing and/or the services provided, regardless of the person's specific disability (24 CFR 891.410 (C)(2)(ii)). Note that the regulation is more restrictive than the statute. Consequently, a provider who has received the authorization of the Secretary to serve only one group of the disabled may be violating the regulation if it excludes a disabled person that is not a member of the authorized group. It is remotely possible that a court might find the regulation to be beyond the scope of the statute and therefore illegal, but this outcome is far from clear.

Certain federally funded programs allow or require housing providers to limit assistance to people with specific disabilities. For example, the Housing Opportunities for Persons with AIDS program targets assistance to people with AIDS or AIDS-related diseases and their families. Thus, under this program, housing providers are required to limit assistance to people with AIDS and their families (42 U.S.C. 12901, Section 853).

The Shelter Plus Care program is limited by statute to eligible persons, defined as "homeless persons with disabilities (primarily persons who are seriously mentally ill, have chronic problems with alcohol, drugs, or both, or who have acquired immunodeficiency syndrome and related diseases)" (42 U.S.C. 11403g). The regulations implementing the Shelter Plus Care program include the same definition of an eligible person, but also authorize housing providers to establish an admissions preference for one or more of the "statutorily targeted

populations" (e.g., seriously mentally ill, alcohol or substance abusers, or persons with AIDS and related diseases). However, the regulation also states that providers cannot prohibit other eligible disabled homeless persons who are not in the housing provider's narrower target group from residing in the housing unless the provider can demonstrate that there is a sufficient demand for the units from the targeted population **and** that other eligible disabled persons would not benefit from the primary supportive services provided (24 CFR 582.330). These conditions are extremely difficult to satisfy. Therefore, this rule is interpreted by HUD to permit **targeted marketing** to the seriously mentally ill, people who abuse drugs or alcohol, and/or persons with AIDS, but not to permit exclusion of any other disabled homeless person who is not a member of the targeted group.

If a local or state government is providing assistance to a supportive housing project, the local government must comply with Title II of the ADA. As described in the immediately preceding question, Title II permits public entities to provide specialized housing serving a particular class of people with disabilities so long as they are not then excluded from housing intended to be available to the general public.

Although the Fair Housing Act does not specify under what circumstances a housing provider could limit housing to people with a certain type of disability, it does allow providers to ask if the applicant has a certain disability to qualify for a unit. This allowed inquiry implies that specific limitations within the broad class of people with disabilities are allowed under the Fair Housing Act. However, compliance with the Fair Housing Act does not cause compliance with Section 504. If a project receives federal funds and therefore is covered by Section 504, a disability target may be illegal under Section 504, even though it is permitted by the Fair Housing Act.

Additionally, restricting occupancy to a population with a particular disability is allowed under the California Unruh Act if the restriction is not arbitrary. Housing providers need a reasonable basis for providing housing only to a certain type of population for a restriction to be reasonable and therefore not arbitrary. Thus, if the services to be provided to a particular population are unique to that population, or if the design features of a physical environment are particularly helpful to a certain population, the housing provider has a rational basis for excluding people outside the target population. However, once again, compliance with the Unruh Act does not cause compliance with Section 504. If a disability target is prohibited by Section 504, it is illegal, even if permitted by the Unruh Act.

In determining whether housing can be limited to a specific disabled population, such as people with substance use problems or people with mental disabilities, the housing provider will need to analyze whether that population has a specific set of needs or symptoms that require a particular type of services or physical environment that is uniquely tailored to that population. If the disability the provider desires to serve does present unique characteristics that require particular services or a particular environment, then the restriction or targeting should survive a discrimination claim under the Fair Housing Act. This analysis applies regardless of the type of disability at issue, although it is important that the housing provider ensure that the targeted population qualifies as disabled under the Fair Housing Act (see **Appendix 6** for definitions of disabled). (However, each restriction should also be reviewed to determine whether the action unintentionally results in a protected class being excluded from the housing. For example, if the disability required for occupants were to primarily occur in Caucasians, the restriction may result in non-Caucasians being excluded, which would give support to a discrimination claim.) As discussed above in the Introduction to this Chapter, each restriction or preference should be carefully reviewed to ensure that there are legitimate justifications for the restriction or preference and that no less discriminatory method of achieving the goal is available. Finally, if a project receives federal funding, it may not be permitted under Section 504 to restrict occupancy to a particular disabled population unless authorized by federal statute.

Question 3: May a project be limited to occupancy by people with HIV or AIDS?

A project may be limited to occupancy by people with HIV or AIDS only under certain circumstances, depending on the funding received. Also, some federal programs require the persons with HIV or AIDS to meet additional disability requirements.

In 1998, the United States Supreme Court held that HIV infection, even when it has not progressed to the so-called "symptomatic stage," qualifies as a "disability" under the Americans with Disabilities Act.[8] The ADA's definition of disability as "a physical or mental impairment that substantially limits one or more of an individual's major life activities" is identical to the Fair Housing Act definition of "handicap." However, as explained below, the right of an individual to be free from discrimination because he or she has HIV or AIDS does not necessarily translate into the right of a project to limit occupancy to people with HIV or AIDS. Different funding programs treat this issue in different ways.

If a project receives no federal funds, and therefore is not subject to Section 504, the project may be restricted to people with HIV or AIDS under the Fair Housing Act if the provider can show that people with HIV or AIDS require a similar set of support services unique to that population. The existence of the federal Housing Opportunities for People With AIDS program, which limits eligibility to persons with AIDS and their families (42 U.S.C. 12901), lends support to the view that such people constitute a subset of people with disabilities with distinct needs that may be served in one project targeted to this group. This analysis applies to purely private housing under the Fair Housing Act. The same analysis also applies to housing that receives state or local funding that may classify it as a public agency program under Title II of the ADA.

However, if a project receives federal funds, Section 504 of the Rehabilitation Act of 1973 will apply. Section 504 does not permit a project to restrict occupancy to persons with a particular disability unless authorized by a federal statute or executive order. The HOPWA program is the only federal housing program that unequivocally authorizes (and requires) restricting occupancy to people with HIV or AIDS in projects receiving HOPWA funding. This statutory authorization is sufficient under Section 504 to authorize restricting a project to people with HIV or AIDS.

The Shelter Plus Care statute identifies persons with HIV/AIDS as one of the primary populations that is to be served by the Shelter Plus Care program, but also states that all homeless disabled persons are eligible for the program (42 U.S.C. 11403g). The Shelter Plus Care regulations permit housing providers to establish a preference for persons in one or more of the following groups: persons with AIDS and related diseases, the seriously mentally ill, and people who have chronic alcohol or drug problems. But the Shelter Plus Care regulations also state that a provider cannot exclude other homeless persons with disabilities who are not in the target population of people with AIDS from residing in the housing, unless the provider can demonstrate that there is sufficient demand for the units from people who have AIDS **and** that persons without AIDS would not benefit from the supportive services. The second half of this test regarding benefit from social services is difficult to meet. Thus, Shelter Plus Care authorizes targeting and marketing to people with one or more of the three disabilities described above, but does not permit exclusion of any disabled homeless person who may benefit from the program. While some Shelter Plus Care NOFAs have given priority to projects that intend to serve people with a dual diagnosis (that is, who have more than one of the targeted disabilities), HUD's current position is clear that no homeless person with a disability can be denied admission to a Shelter Plus Care funded project just because he or she does not have one or more particularly targeted disabilities.

As discussed under the preceding question, the Section 811 statute permits a project, with approval of the Secretary of HUD (now delegated by the Secretary to the regional offices), to limit occupancy to people with similar disabilities who require a similar set of supportive services, but the Section 811 regulations require owners to permit occupancy by any qualified person with a disability who could benefit from the services, even if he or she is not a member of the targeted group. The Section 811 regulations also provide that if a person's "sole" impairment is a diagnosis of HIV positive or alcoholism or drug addiction he or she will not qualify to be accepted to a Section 811 project unless he or she also meets the definition of "person with a disability" under the Section 811 statute (24 CFR 891.305). The statute defines a "person with a disability" to have a physical or mental impairment which is expected to be of long duration, substantially impedes his or her ability to live independently, and is of such a nature that such ability could be improved by more suitable housing conditions (42 U.S.C. 8013, Section 811(k)). None of these definitions of disability have been changed since the Supreme Court decision finding asymptomatic HIV infection to be a disability under the ADA. Consequently, a person with asymptomatic HIV is considered disabled under the ADA, but may not qualify to be admitted to a Section 811 project.

Initially, HUD refused to approve Section 202 funding for projects targeted to people with AIDS on the grounds that people with AIDS did not suffer from a "physical handicap" as defined in the Section 202 statute (this occurred before the institution of the Section 811 program, when Section 202 funded projects for both the elderly and people with disabilities). HUD was sued on this issue in 1989. After issuance by the court of a temporary restraining order requiring approval of the funding application, HUD entered into a settlement agreement permitting the project at issue to target persons with AIDS, so long as other people with disabilities were not excluded and so long as persons with AIDS admitted to the project were determined to also meet the Section 202 requirement that residents' disabilities cause a "functional limitation."[9]

Ironically, use of HOPWA funds by a Bay Area jurisdiction to provide assistance to a HUD Section 811 project recently produced conflicts between HUD (which prohibited limiting occupancy to persons with AIDS) and the local jurisdiction (which was required by the HOPWA regulations to impose such a limitation on a HOPWA-funded project). The conflict centered on the HUD position that other terminally ill people who did not have AIDS would also benefit from the services provided for tenants with AIDS and therefore should be included in the housing under the applicable Section 811 regulation, which prohibits owners from excluding **any** person with a disability who might benefit from the housing

or service provided. HUD also had a concern that a person might qualify for tenancy under the HOPWA regulations but might not meet the definition of "disabled" under Section 811. The San Francisco HUD regional office resolved this conflict and approved an HIV/AIDS specific Section 811/HOPWA project in this case, provided that all occupants qualify as physically disabled persons under Section 811 (that is, they are not asymptomatic). Since most housing sponsors and local jurisdictions wish to serve AIDS populations with the greatest need, the physical disability requirement is not viewed as a barrier to AIDS targeted projects. If Section 811 and HOPWA funds are to be used together in one project, it is important to contact HUD early to discuss and resolve potential conflicts in funding requirements.

Question 4: May housing be reserved for recovering alcoholics or drug users?

Housing reserved for recovering alcoholics or drug users can probably be supported in law.

The issue of whether housing can be reserved for recovering alcoholics or drug users requires an analysis of the reason for the reservation or limitation to these certain groups to determine whether the limitation is reasonable and not arbitrary. Additionally, if alcoholics and former drug users are considered disabled, the analysis set out in the answer to Question 2 regarding reserving housing for people with a particular disability applies; that is, do they qualify as a population with a specific set of needs that require a particular type of services or physical environment tailored to that population? And finally, if the housing receives federal funding, Section 504 will apply and prohibit limiting the housing to recovering alcoholics or former drug users unless specifically authorized by federal statute or executive order.

The first step in determining whether housing can be reserved for persons addicted to drugs or alcohol is to determine whether they are considered "disabled." Under the federal Fair Housing Act, disability is defined as a physical or mental impairment which substantially limits one or more of the person's major life activities, but does not include current, illegal use of or addiction to a controlled substance (42 U.S.C. 3602(h)(3)). Controlled substances are not limited to illegal drugs, but can include legal drugs such as narcotics when they are obtained or used illegally. The Americans with Disabilities Act also defines disability to include drug addiction, but excludes the current use of illegal drugs (42 U.S.C. 12114). The regulations implementing the Fair Housing Act clarify that a physical or mental impairment does not include current illegal use of a

controlled substance, but the broad definition of disability would include people who are addicted to drugs but are no longer using drugs (24 CFR 100.201).

Under both the Fair Housing Act and the Americans with Disabilities Act, alcoholism is considered a disability if it limits one or more of a person's major life activities. Neither law distinguishes between alcoholics in recovery and alcoholics who are still drinking. Although alcoholics who are still drinking are part of a protected class under the Fair Housing Act, behaviors exhibited by alcoholics while inebriated are a permissible reason to exclude alcoholics from housing on a case by case basis. This is discussed further in Chapter 5, Section A, Question 11.

Chapter Five

Given that former drug users and alcoholics can be considered disabled, a housing provider could limit housing to occupancy by these groups if the housing provides special features or programs designed specifically for the targeted population (See Introduction to this Chapter Four regarding serving designated populations and Question 2 above). However, if a project receives federal funds, such a limitation will be prohibited by Section 504, unless authorized by a federal statute or executive order.

Although the definitions of disability do not distinguish between alcoholics in recovery and those who are still drinking, limiting occupancy to alcoholics who are in recovery may also be allowed if the housing provider can show that the services provided are specifically targeted to alcoholics in recovery and that maintaining an alcohol-free environment is necessary to achieve the goals of the program. It should be noted that there is no case law supporting housing designated for alcoholics in recovery, so housing providers interested in this type of housing should be cautious. An argument can be made that housing limited to alcoholics in recovery excludes a protected class (those alcoholics that are not in recovery), since all alcoholics are considered disabled. In order to best counter such an argument, housing providers should have support for the premise that an alcohol-free environment is crucial to maintaining recovery, such as scientific studies showing better recovery results.

Question 5: What special accessible design requirements apply to supportive housing for people with disabilities?

Housing for people with disabilities is subject to the same design accessibility requirements as housing for the non-disabled.

As described in **Appendix 1, Section F**, which provides an overview of physical accessibility laws, various laws impose accessible design requirements in new

construction and rehabilitation. Even where no government funds are involved, the Fair Housing Act and state building codes impose certain accessible design requirements on all new construction of multifamily housing. However, there are no special accessible design requirements simply because the target population is people with disabilities.

When there is government involvement in the project, then there are additional special accessible design requirements; which special accessible design requirements apply depends on which accessibility-related laws apply, which in turn depends on the details of the government involvement (such as what level of government is involved—federal, state or local—and which government agency or funding program is involved, or the extent of governmental involvement). Because government involvement is almost always necessary to make supportive housing financially feasible, most supportive housing triggers those special accessible design requirements (which, again, vary depending on the details of the government involvement). Generally, if more than one set of accessibility requirements apply, all requirements must be satisfied (federal requirements do not pre-empt state requirements). Please refer to **Appendix 1, Section F** for an outline of the relevant law.

Section B: Economic Discrimination, Projects Serving Homeless People, and Discrimination Based on Source of Income

Question 1: May a landlord require potential tenants to have a minimum level of income?

A project that does not receive public funds may legally impose a minimum income requirement that is reasonably related to tenants' ability to pay the tenant's share of rent, including the income of all members of the household and includes income from all sources. However, several major federal housing programs prohibit a minimum income requirement.

Many landlords in the private market require tenants to have a minimum level of income (for example, gross income equal to three times the rent level) in order to rent an apartment. This practice is legal under California and federal law, if the minimum income standard relates to the portion of the rent paid by the tenant and takes into account the income of all members of the household.

However, if the project receives public funds, the particular funding program may prohibit use of a minimum income standard.

The federal Fair Housing Act prohibits discrimination in housing on the basis of race, color, sex, religion, national origin, disability, and familial status. In California, the Fair Employment and Housing Act and the Unruh Act prohibit discrimination in housing on the basis of similar categories, as well as any other "arbitrary discrimination" based on personal characteristics. The California Supreme Court has held that economic status is not "arbitrary discrimination" under the Unruh Act, and, moreover, that landlords have a legitimate business rationale for admitting tenants based upon their economic status or financial condition.[10]

Effective January 1, 2000, the California Fair Employment and Housing Act was amended to prohibit discrimination in housing based upon the source of income of a potential occupant. (Rental subsidies, such as Section 8, are not considered a source of income.) The amendments also make it illegal to use a financial or income standard in the rental of housing that fails to account for the aggregate income of all persons residing in the household whether or not they are married. Finally, if a potential tenant receives a government rent subsidy, the amendments specify that the landlord may only apply an income standard that is based on the portion of rent to be paid by the tenant. This means that a requirement that a tenant earn at least three times as much as the monthly rent amount must utilize only the tenant-paid portion of the rent in the calculation. The amendments were included in SB1098(Burton) and are found in Government Code Section 12955.

It may be asserted that use of a minimum income standard results in a disparate impact against protected classes of people, such as racial minorities or people with disabilities, who may be disproportionately excluded from a project by application of the minimum income standard. If an owner were sued on this basis, it could defend itself by showing that it had a legitimate business rationale for utilizing the standard. Because of the relationship between income and the ability to pay rent, this would be a fairly easy showing to make. If a potential tenant could show both a disparate impact and that the owner adopted the income standard with discriminatory **intent**, the practice may then be found to be illegal.

A requirement that a tenant have a "demonstrated ability to pay the rent" is an alternative to a minimum income standard with less harsh results. Under a "demonstrated ability" standard, a landlord admits a person who has been

paying more than a specified percentage of income on their rent so long as they can show that they have had similar rent-to-income ratios in the past and have consistently paid their rent in a timely manner in spite of an unfavorable ratio.

If a project is receiving governmental financial assistance, a minimum income standard may not be permitted. A number of HUD programs (including Section 202, Section 811, and McKinney Act programs) prohibit such practices, and providers should check their program regulations to see if minimum income requirements are prohibited.

Finally, "income" is usually defined by government funding programs to include the collective income of all members of a household. If a household has assets (like property, stock, or a savings account), an imputed interest rate is applied to the value of the asset and added to income. Most federal housing programs use the Section 8 definition of income found at 24 CFR 813, although the HOME program has its own definition found at 24 CFR 92.203(b)(i) (which provides several options for calculating income, including use of the Section 8 definition). Most state and local programs in California use the state law definition found at 25 California Code of Regulations Section 6914. If no government funds are involved, no official definition of income applies other than the requirement that the income of all co-tenants from all sources (including welfare payments received by the tenant) be included in any calculation.

Question 2: Is it legal to restrict a project to homeless people (i.e., to require that a person be homeless in order to be accepted as a tenant in a building)?

Yes, a project may legally be restricted to people who are homeless at the time of application for housing.

Homelessness is an economic and social condition that is not a prohibited classification under federal or state law or an arbitrary classification under state law. If a housing provider has a mission related to alleviating homelessness or assisting the poor, or if it receives funding which requires that homeless people be served in the project, it also has a legitimate business rationale for selecting tenants based on their homeless status.

Question 3: What is the definition of homelessness?

Each funding program that provides assistance to projects for homeless people may specify its own definition of "homeless."

The major federal programs utilize the definition of homeless set forth in Section 103 of the McKinney Act (42 U.S.C. 11403g). This section defines a homeless person as a person who lacks a fixed, regular nighttime residence and whose primary nighttime residence is: (1) a shelter for temporary accommodation, including welfare hotels, congregate shelters, and transitional housing for the mentally ill; (2) an institution providing temporary residence for individuals intended to be institutionalized; or (3) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. This definition specifically excludes any individual imprisoned or otherwise detained pursuant to state or federal law.

If funding is received only under a state or local program, the authorizing statute or ordinance may include a different definition of "homeless."

Question 4: How is homeless status verified?

HUD has issued a bulletin providing verification guidance, which is attached as ***Appendix 7*** *to this Guide.*

The Community Planning and Development Division of the San Francisco HUD office issued an information bulletin dated October 3, 1995, which offers detailed guidance for McKinney Act programs on verification of homeless status for people coming from the streets, emergency shelters, transitional housing, or institutions, and for people who are at imminent risk of homelessness because they face immediate eviction and do not have sufficient resources to find replacement housing. It is important to note that, pursuant to this bulletin, a person need not actually spend time on the streets in order to be verified as "homeless" for McKinney Act programs.

Question 5: Is it legal for landlords to refuse to rent to tenants who have Section 8 vouchers?

Generally, yes, unless a project receives funding that prohibits the owner from refusing to rent to Section 8 tenants.

Except in San Francisco, where special legislation prohibiting discrimination based on source of income (including Section 8 vouchers) passed in 1998 (see

discussion at the end of this answer), it is generally permissible for a private landlord to refuse to rent to Section 8 voucher holders (however, see discussion below regarding exceptions to this rule). Section 8 is a federal housing program, and participation in the program by owners is voluntary. Owners who do not want to participate can refuse to accept tenants who hold Section 8 vouchers, even if the owner has accepted other Section 8 tenants. The "take one, take all" federal requirement that an owner of a multifamily project that accepted one Section 8 tenant could not turn away other Section 8 applicants due solely to their Section 8 status was repealed in 1996.[11]

Refusal to rent to Section 8 voucher holders is not a violation of state or federal anti-discrimination law because certificate or voucher holders (or poor people in general) are not a specifically protected class, and discrimination based on economic status is not "arbitrary discrimination" under California state law (see discussion of economic discrimination under Section B, Question 1 of this Chapter regarding homelessness). The recent amendments to the California Fair Employment and Housing Act prohibiting discrimination in housing based on "source of income" described in Question 1 above in this Section, includes only income paid directly to the tenant and therefore does not cover tenants with Section 8 vouchers. An argument could be made that discrimination against Section 8 voucher holders has a disparate impact on certain racial or ethnic groups, or against people with disabilities, thus violating the Fair Housing Act and Fair Employment and Housing Act, but such a disparate impact is not unlawful if the landlord has no discriminatory intent and establishes a business necessity for the practice. A desire not to participate in a federal housing program with numerous regulatory requirements would likely be a sufficient business rationale to defeat a disparate impact discrimination claim under the Fair Housing Act and Fair Employment and Housing Act.

If an owner is participating in a government housing program, the program may include a requirement that the owner accept tenants with Section 8 vouchers on the same basis as it accepts all other applicants, and that such applicants cannot be rejected simply because they receive rental assistance through these programs. For example, the federal low-income housing tax credit program includes such a requirement for all units that are counted as low-income housing tax credit units (Internal Revenue Code Section 42(h)(6)(B)(iv)). Similarly, the government funder may impose such a requirement as a policy matter in the grant or loan documents.

In San Francisco, the housing discrimination prohibitions included in the Police Code (Article 33, Sections 3301 *et seq.*) were amended in 1998 to include

"source of income" in the list of illegally discriminatory classifications. Source of income is defined in the San Francisco Police Code to include all lawful sources of income or rental assistance from any federal, state, local or nonprofit-administered program, homeless assistance program, security deposit assistance program or housing subsidy program, and includes any requirement of any such program or source of income or rental assistance (i.e., the requirement that an owner sign a Housing Assistance Payments contract with the Housing Authority). The amendment also includes a prohibition against certain forms of "economic discrimination," making it unlawful to utilize an income standard for the rental of housing that fails to account for any rental payments or portions of rental payments that will be made by persons or organizations other than the tenant or that fails to account for the aggregate income of persons intending to reside together, or of a tenant and a cosigner, on the same basis as the aggregate income of married persons residing together. These prohibitions are intended to apply to all rental housing, whether purely private or publicly assisted. However, the enforceability of most of these new requirements is doubtful due to pre-emption language in the state Fair Employment and Housing Act.

Question 6: How does a housing provider comply in one project with different funding programs that have different or conflicting income and rent requirements?

The provider must comply with the most stringent requirements. If requirements conflict, the provider must consult with the administering agencies for guidance or resolution of the conflict. Not all conflicts can be resolved.

Generally, a provider must comply with all funding requirements and accomplishes this by complying with the most stringent requirements. For example, if one program requires tenants to have incomes below 50% of median income and another requires tenants to have incomes below 35% of median income, the provider can meet both requirements by renting to tenants with incomes below 35% of median income.

When using HUD Section 202 or Section 811 funding, a local requirement setting aside units for tenants below 50% of median income may be a problem (e.g., 35 % of median income). The Section 202 and Section 811 programs require tenants to be at or below 50% of median income. HUD may not permit a local government providing additional local funds to a Section 202 or Section 811 project to require deeper affordability. In some cases, local government funders have been required to waive local requirements that tenants meet a 35% of median income standard.

Federal programs also may conflict with each other. For example, in one project, the provider must provide Section 8 units to tenants at or below 80% of median income who have been displaced from a demolished public housing project. The administering housing authority is hesitant to permit tax credit units at 50% or 60% of median income to be used to satisfy this requirement, because tenants between 60% and 80% of median income will potentially be excluded. In such a situation, the provider's only option is to forego the funding or negotiate with the different federal and local agencies administering these programs to obtain a more flexible interpretation of the various requirements. Some federal programs include regulations permitting the Secretary of HUD to waive a requirement or approve a special arrangement. If an administering agency takes the position that it has no flexibility to provide an interpretation that will eliminate a conflict (either because the statute or regulations are inflexible or because the administering staff is inflexible), a change in the law may be required to enable two sources of funds with conflicting requirements to be utilized in one project.

State and federal programs often utilize different definitions of "income" and may require utilization of different household size assumptions for calculation of permissible rents. Some California programs have regulations that permit them to utilize the federal definitions if federal and state funding is utilized in the same project. For example, projects funded with redevelopment housing funds must utilize the state definition of "income" but may defer to federal programs that are providing funding to the same project on household size assumptions utilized in the calculation of maximum rent. Additionally, some state funding programs require termination of tenancy when a resident's income increases above the level required for initial occupancy. Federal programs usually do not permit the eviction of tenants when they become over-income, but permit (or require) the owner to raise the rent on such tenants.

Integration of separate or conflicting funding requirements can be extremely challenging. An attorney or other advocate who is familiar with the different funding programs is useful in this process. It is also important to know which public agencies administer each program and, sometimes, the particular department within the agency, since it is often necessary to speak to people within these departments in order to resolve conflicts between requirements. For example, at HUD, the Section 202 and Section 811 programs are administered through the Multifamily Housing Division, while McKinney Act, HOME, and HOPWA programs are administered through the Community Planning and Development Division.

Finally, providers need to identify possible conflicting requirements as early as possible, and avoid applying for funding from programs with truly incompatible requirements.

Section C: Restricting Housing to Other Groups

Question 1: May housing be designated as single-gender?

Generally, no.

Under both federal and state law, housing providers cannot discriminate on the basis of gender. Although there may be rational business reasons for limiting housing to a single gender, such as single mothers, and the services required by these individuals may be unique to this group, gender is a protected classification and any restriction based on gender most likely would be found to be unlawful. Currently, court cases are pending that challenge single-sex shelters and housing which may in the future provide some guidance. However, at this time, there are no reported cases to provide guidance on this issue. HUD has indicated that single-gender housing may not violate the Fair Housing Act if there are compelling privacy and/or security reasons for the gender segregation, but HUD also states that the legality of single-gender housing is still unsettled. Compelling privacy reasons are narrow, such as if the housing has only a single bathroom or there are shared sleeping facilities. HUD has only approved single-gender housing in limited situations. Although HUD's policy allows single gender housing in limited circumstances, a court may still not uphold a gender-based restriction.

Single gender housing may be more acceptable in situations like battered women's shelters, where the duration of a woman's stay is limited. There is an argument that shelters that allow only limited stays are not housing, and thus are not within the purview of the Fair Housing Act. However, a shelter provider would still be well-advised to establish occupancy criteria that are gender-neutral (i.e., permit on their face both men and women to be admitted). In this way, the provider may eliminate a claim of intentional discrimination against men. If the provider then, in practice, fails to admit any male occupants for safety reasons or due to the psychological impact of men on the women currently in the shelter, a discrimination claim would move to the realm of disparate impact. If a claimant proves the screening rules have a disparate impact on men, the provider may be able to establish a business necessity for its occupant screening rules, based on the security and psychological state of its other occupants. While this strategy is

not foolproof, it will allow a provider to assert a "business necessity" defense that is not available where discrimination is intentional.

Question 2: May housing be reserved for families with children? May housing be reserved for single parents with children?

Housing may be reserved for households with children, but housing for single parents with children may violate state and local fair housing laws that prohibit discrimination on the basis of marital status.

Under the federal Fair Housing Act, the state Fair Employment and Housing Act, and the Unruh Act, familial status is a protected class. "Familial status" is defined under these laws as a person under the age of 18 living with a parent or legal guardian or a designee of the parent or legal guardian. These laws are interpreted to prohibit discrimination **against** households with children but not to prohibit discrimination **in favor** of households with children (and therefore against households without children). Therefore, it is permissible to reserve units in a project for households with children under the age of 18.

Reserving housing for **single parent** households with children does not violate the Fair Housing Act, but may violate state and local fair housing laws. The Fair Employment and Housing Act, as well as many local non-discrimination ordinances, prohibits discrimination on the basis of marital status. This means that it is unlawful to require persons to be either married or unmarried in order to rent a unit in a project. Since discrimination in favor of single parent households necessarily requires exclusion of two parent households, and since "two parent" status is directly linked to marital status, single parent occupancy requirements are likely to violate these laws.

Question 3: Is it legal to have a tenant-selection preference for residents of a particular geographic locality?

Preference for residents of a particular city or county is legal under limited circumstances unless such preference is adopted to purposely exclude people who are members of a protected class or operates to disproportionately exclude such people. However, some funding programs prohibit local preferences.

A requirement that local residents receive preference for admission to a housing project may be legally vulnerable because it may operate to exclude certain

racial or ethnic groups from the project and thus have an illegal discriminatory effect. For example, in a predominately white community a tenant selection preference for people who are already residents of the community may result in a predominately white tenant population in the project, in the face of a larger regional community that may be more ethnically diverse. If a local preference is challenged as having a racially discriminatory impact, a court will compare the ethnic make-up of the preference community with the potential tenant pool from the larger community (such as the county, the region, or even the state). If the potential tenant pool from the larger community is considerably more diverse in ethnic or racial composition than the local community, the local preference could be found to have a discriminatory impact. Under the federal Fair Housing Act and the California Fair Employment and Housing Act, discriminatory impact, even without discriminatory intent, is illegal unless the project owner shows a legitimate business purpose for the practice and that this purpose is furthered by the practice. This standard can be difficult to meet in order to justify a geographic preference.

A preference for local residents required by a public agency may also be subject to challenge under the equal protection clauses of the state and federal constitutions. However, discriminatory **intent**, as well as discriminatory **impact**, would have to be found in order to invalidate the preference on constitutional grounds. Discriminatory impact alone is sufficient to challenge a local resident preference under the Fair Housing Act.

Finally, if a local preference were found to impact a "fundamental right," a court would subject it to a "strict scrutiny" test. This test requires a "compelling governmental interest" to justify the preference, which would be an extremely difficult standard to meet. The right to travel is one such fundamental right that courts have found to be affected by a durational residency requirement for admission to public housing (requiring not merely local residency, but residency for an extended period), although no court has examined the issue in the context of access to privately-owned but publicly-assisted housing. The United States Supreme Court has held that the right to housing is not a fundamental right that is specially protected by the Equal Protection Clause of the United States Constitution,[12] although no California court has ruled on this issue under the state constitution.

Generally, a preference for local residents is more defensible if it has a very short durational requirement (i.e., requires residency of only a few months), includes a preference for people who work in the jurisdiction and may not live there, does not operate to entirely exclude non-local residents, and is bolstered by

findings by the local government that the preference is necessary for important public policy reasons beyond a political desire to serve local residents. The smaller the geographic preference area (for example, a preference for residents of a particular neighborhood), the less defensible the preference generally will be, since it will be more likely to perpetuate racial or ethnic concentrations in the population. Finally, a local preference causing a disparate impact and imposed by a private owner without being required by a public agency would be much more vulnerable to challenge.

Question 4: What are the "federal preferences," and when do they apply?

Federal preferences were repealed in 1998 and no longer apply to federally funded projects unless voluntarily adopted by a local housing authority.

The "federal preferences" were tenant selection preferences published by HUD that in the past were required to be utilized by housing providers receiving certain federal housing funds. The preferences are described in HUD Handbook 4350.3, and granted priority to applicants for housing with the following characteristics: (1) people who are involuntarily displaced by governmental action; (2) people occupying substandard housing; and (3) people who are paying more than 50% of their income for rent and utilities.The federal preferences were repealed by the Quality Housing and Work Responsibility Act of 1998 (Title V, Section 501 of H.R. 4194, which was the HUD appropriation bill for FY 98-99), and replaced with a provision permitting local housing authorities to establish a local system of preferences for public housing and the Section 8 certificate and moderate rehabilitation programs. Housing providers participating in McKinney Act Section 8 Moderate Rehabilitation Program for SROs should check their Housing Assistance Payments Contract (HAP) and with both HUD and their local housing authorities to see if any preferences apply to their projects.

Individual federal programs may include other program-specific preferences which will be found in the statute or regulations governing the program.

Question 5: Is there a preference for people recently released from prisons? Can housing be reserved for recently released prisoners?

There is no preference for people recently released from prisons.

While the McKinney Act definition of "homeless" expressly excludes imprisoned individuals, this has not been interpreted to exclude people recently released from prisons from eligibility for McKinney programs. Although there is no preference for former prisoners, they are eligible to live in McKinney-funded projects if they otherwise meet the eligibility requirements.

Some housing providers may wish to restrict a project to people recently released from prison. Restricting a project to former prisoners should be permissible under fair housing laws if services are provided that are specially designed to assist this population. A sponsor should also analyze the targeting in the particular geographic location of the project to determine if it would have a disparate impact on a protected class of people. Given the gender, racial, and ethnic make-up of the prison population, a project targeting former prisoners may operate to exclude women and members of certain racial groups. If this is the case, the provider must be able to justify the preference as furthering a legitimate business purpose of the provider.

Finally, requirements of funding sources should also be examined, as a preference or restriction favoring former prisoners may not be permitted by the funder. For example, a McKinney Act-funded project could not exclude a homeless person who was not a former prisoner in favor of one who was.

Question 6: May a low-income housing tax credit project target specific tenant populations?

A tax credit project may give preference to designated populations of tenants so long as the preference does not violate HUD non-discrimination policies.

Only residential rental units that are for use by the general public are eligible for the Low-Income Housing Tax Credit under Internal Revenue Code Section 42. Treasury Regulation Section 1.42-9 provides that this requirement is met if the unit is rented in a manner consistent with HUD policy governing non-discrimination, as evidenced by HUD rules and regulations, and so long as the unit is not limited only to members of a particular social organization or provided by an employer for its employees.

Accordingly, the Internal Revenue Service has held that owners that give preferences to certain classes of tenants (e.g., people who are homeless, disabled and/or handicapped) will not violate the "general public" use requirement if such preferences would not violate any HUD policy governing non-discrimination expressed in HUD Handbook 4350.3.[13]

HUD Handbook 4350.3 sets forth complicated procedures for utilizing the HUD preferences in conjunction with other preferences that may be imposed at the local level. Although the HUD preferences have been repealed (and this is not yet reflected in the Handbook), the discussion of preferences in the Handbook, together with the extensive discussion of fair housing compliance issues in HUD multifamily programs (including some programs which are designed to serve special needs populations), can indicate whether a proposed preference is consistent with HUD policy. The prevailing view is that tenant targeting preferences may be utilized in low-income housing tax credit projects so long as they do not violate fair housing laws, as interpreted by HUD. If a HUD program authorizes a particular tenant preference (such as homelessness, AIDS, or disability), this fact will lend support to the argument that a particular preference may be permissible, since federal legislation has recognized these populations as having specialized housing needs, even if the HUD program is not being utilized in that tax credit project. Federal low-income housing tax credits are not considered federal financing or assistance, so Section 504 does not apply to tax credit projects unless a federal funding program is also involved.

In addition, most HUD programs do not permit housing providers to hold units open where no members of the targeted preference population are available to move in. This practice is also not permitted in a tax credit project.

Question 7: May a social service organization that owns housing provide a preference for its service clients?

Generally, no.

Some social service organizations that own housing seek to provide the housing for their service clients, either by denying housing to non-clients altogether, or by providing a preference that moves clients to the top of the list of prospective tenants. Such tenant selection policies are usually impermissible, for the reasons described below.

Fair housing and civil rights laws generally prevent a social service organization from favoring (or providing housing exclusively to) its own clients. Under these laws, a social service organization may limit its housing for its own clients, or provide a preference in its housing for its own clients, only if (a) there is no intentional exclusion of members of a protected class; (b) there is no disparate impact on members of a protected class, unless the disparate impact is caused by a facially neutral practice that furthers a legitimate business necessity of the organization; and (c) the tenant selection practice is not "arbitrary" under the California Unruh Act. These conditions are difficult to satisfy, as revealed by the examples analyzed in the following paragraphs. Moreover, **funding program and policy requirements** (such as affirmative fair marketing) also usually prohibit or discourage such tenant selection practices.

To understand application of these rules, consider three hypothetical organizations that provide both social services and housing, and that seek in their tenant selection process to favor (or provide housing exclusively to) their social service clients. Organization A provides social services to homeless persons with HIV. Organization B provides social services to homeless gay men with HIV. Organization C provides social services to all homeless people, regardless of their HIV status, sex, or sexual orientation.

The first step in the analysis is to examine intentional discrimination against members of a protected class. In their tenant selection process, both Organization A and Organization B intentionally disadvantage persons with a disability other than HIV infection. Such a practice may or may not be permissible, depending on the circumstances (see the discussion of limiting occupancy to people with a particular disability included in Chapter Four, Section A, Question 2 above).

In its tenant selection process, Organization B also intentionally disadvantages women and heterosexual men. Intentionally disadvantaging women is not permissible, as discussed in Chapter Four, Section C, Question 1 above. Intentionally disadvantaging heterosexual men is not permissible in California under both the Unruh Act, which prohibits "arbitrary" discrimination (which includes discrimination based on sexual orientation), and the Fair Employment and Housing Act (which as of January 1, 2000, prohibits discrimination in housing based on sexual orientation).

Finally, in its tenant selection process, Organization C intentionally disadvantages housed people. This is permissible, as discussed above in Chapter Four, Section B, Question 1.

The next step in the analysis is to examine the possibility of disparate impacts on members of a protected class. This step is unnecessary for Organization B, whose tenant selection process did not survive the first step. This step may be necessary for Organization A, depending on whether its tenant selection process survives the first step. This step is necessary for Organization C, whose tenant selection process clearly survived the first step.

In its tenant selection process, both Organization A and Organization C might have a disparate impact on members of racial and ethnic groups, depending on the demographic facts. For example, if persons of Asian descent comprise 20% of the local population but only 5% of the local HIV-infected population and 5% of the local homeless population, then the tenant selection process of both organizations would presumably have a disparate impact on persons of Asian descent. Such disparate impact is not permissible, unless caused by a facially neutral practice that implements a legitimate business necessity of the organization. Some courts also require the practice to be the least discriminatory alternative way to further the business necessity. The homelessness requirement would likely survive a challenge that it unlawfully discriminates against Asians if the organization shows that eliminating homelessness is a primary goal of the organization and that program funders require the organization to serve people who are homeless as a condition of financing.

The analytical process just described does not examine every possible fair housing and civil rights law that might prevent the practice of favoring clients; it is intended merely to demonstrate the complexity of complying with fair housing and civil rights laws when favoring an "insider" subpopulation in the tenant selection process. Any social services organization seeking to favor, or provide housing exclusively to, its own clients should consult a lawyer to ensure conformity with fair housing and civil rights laws.

Even where there is no violation of fair housing or civil rights laws, funding program and policy requirements sometimes prevent a social service organization from favoring (or providing housing exclusively to) its own clients. For example, many funding programs have affirmative fair housing marketing requirements, as discussed below in Question 12 of this Section. The marketing requirements usually prohibit a housing provider from giving advantages to a select group of insiders, such as the clients of the housing provider's social services arm. Similarly, many funding programs have specific rules on preferences, and these preference requirements may prohibit a housing provider from giving advantages to clients of the housing provider's social services arm. HUD programs generally prohibit participating providers from granting special

preference to clients of the provider. For the foregoing reasons, any social services organization seeking to favor, or provide housing exclusively to, its own clients should confirm that the tenant selection process is consistent with program regulations governing project subsidies, as well as the informal policies and contract provisions of project funding sources.

Question 8: Is it legal to have floors for different populations (i.e., women's floor, clean and sober floor)?

Single-gender floors may be legal if there is a compelling privacy interest. Floors for people with a particular disability may be legal if specific services or environments are required by that population and Section 504 does not apply.

As discussed above under Chapter Four, Section C, Question 1, housing providers cannot discriminate on the basis of gender. However, if the housing provider has a compelling privacy interest in segregating people, such as the interests that are raised where there is only one shared bathroom per floor, such segregation by floor may be defensible. There are no court cases determining the legality of such segregation, and if such a scheme were challenged, a court may find it unlawful. The housing provider would have at least an arguable case that the segregation was not discriminatory and was related to a reasonable business purpose.

Segregation by floors or buildings for certain types of disabilities, such as clean and sober floors or units for alcoholics, would be acceptable under the same analysis that targeting to certain tenants is allowed. Thus, if the housing provider can show that the specific disability requires a certain level of service or a particular physical environment that is unique to that particular disability, and that such services or physical environment are provided on the separate floor, then the segregation by floor would not be arbitrary and should be acceptable. (Providers should remember that if Section 504 applies to the development, limitations for particular disabilities are not allowed unless authorized by a federal statute that applies to the project.) Providers considering designating floors as clean and sober floors should be aware that implementing and enforcing rules designed to uphold such policies may be difficult as discussed in Chapter Six, Section D, Question 1.

Chapter Six

Question 9: What are legal ways to assure an integrated environment with a mix of disabled and non-disabled people in a building?

Because of fair housing laws, it is difficult to assure an integrated environment with such a balanced mix of tenants.

Some housing providers seek to provide an integrated housing environment with prescribed percentages of both disabled residents and non-disabled residents. Some tools are lawfully available to help achieve this outcome. For example, a housing provider can market to a mixed population in hopes of attracting a mixed applicant pool (which will help ensure a mix of tenant types). In addition, a housing provider may legally discriminate in favor of disabled persons (which will help limit the percentage of non-disabled persons), as discussed above in Chapter Four, Section A.

However, it is difficult to achieve and maintain prescribed percentages of disabled and non-disabled residents, because there is no lawful tool to limit the percentage of disabled persons. Federal and California fair housing laws generally prohibit intentional discrimination against disabled persons, and when a non-disabled person vacates a unit, there would be intentional discrimination against disabled persons if the housing provider preserved the target percentages by advantaging non-disabled persons or categorically excluding disabled persons. The possible benefits of an integrated environment in general and a "wellness" model in particular do not create an exception to the law's prohibitions.

Question 10: May a housing provider maintain separate waiting lists for different populations?

Whether separate waiting lists are permissible depends on how the waiting lists are administered.

Some housing providers use separate waiting lists to manage multiple funding sources with different eligibility requirements. As an example, consider a building in which some but not all of the units have HOPWA assistance. The housing provider may seek to maintain two waiting lists, one for HOPWA-eligible households and one for other households. This approach facilitates the housing provider's leasing process: when a HOPWA-assisted unit is vacant, the applicant at the top of the HOPWA waiting list is offered the unit, and when a non-HOPWA unit is vacant, the applicant at the top of the general waiting list is offered the unit.

The problem with this approach is that it could have the effect of penalizing persons on the HOPWA waiting list (who are a protected class under the fair housing laws) because they are not being offered the non-HOPWA units. As discussed under the preceding question, such an approach may result in discrimination against a protected class. A more defensible approach would be to maintain a single waiting list in which an applicant's HOPWA eligibility is noted: when a HOPWA-assisted unit is vacant, the highest HOPWA-eligible applicant on the waiting list is offered the unit, and when a non-HOPWA unit is vacant, the applicant at the top of the waiting list (whether or not HOPWA-eligible) is offered the unit. Another defensible approach would be to maintain a separate HOPWA waiting list, but also to permit HOPWA-eligible applicants to apply for the general waiting list as well as the HOPWA waiting list.

Question 11: May a housing provider advertise for a specific population?

Yes, so long as the project's admission criteria do not violate fair housing laws.

Together, the federal Fair Housing Act and the state Fair Employment and Housing Act prohibit discriminatory advertising and make it illegal to make, print, or publish 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, disability, familial status, or national origin, marital status, ancestry, sexual orientation, and source of income (42 U.S.C. 3604(c); California Government Code Section 12955(c)). These prohibitions are very broad, extending to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling, including oral statements made to persons inquiring about a rental. The prohibitions also extend to printers, advertising agencies, and the media, as well as the person making the advertisement. Newspapers that publish discriminatory advertisements have been found liable for violations of the Fair Housing Act, and providers may therefore find newspapers to be reluctant to publish advertisements that indicate any kind of occupancy preference. Fair housing advertising guidelines used to be included in HUD regulations located at 24 CFR Part 109, but were repealed with the intent that they be republished in a HUD handbook. This has not yet occurred.

While the Fair Housing Act regulations authorize housing for seniors to advertise as such, there is no similar authorization to advertise housing for people with disabilities, and arguably such advertising would be illegal. Logically, if a project's admission requirements do not violate fair housing laws,

those requirements should be permitted to be included in an advertisement. However, given the complexity of the law in this area, as well as the reluctance of the media to make fine distinctions between illegal discrimination and legal occupancy requirements, many providers have found it more practical to advertise by describing their facility rather than describing tenant qualifications (i.e., "housing project serving mentally disabled persons seeks tenants"). Finally, all advertisements should include the HUD equal housing opportunity logo or statement.

Question 12: What is "Affirmative Marketing"? Does an affirmative marketing requirement conflict with targeting of a specific tenant population?

Affirmative marketing is project advertising designed to reach all potential occupants of a project, regardless of race, color, religion, national origin, gender, familial status, disability, or any other protected bases. Affirmative marketing requirements do not preclude designation of a project to serve specific tenant populations.

Most HUD-funded housing programs require compliance with HUD "affirmative fair housing marketing" requirements, as well as approval by HUD or the local jurisdiction administering the HUD-funded program of an "affirmative fair housing marketing plan." Affirmative marketing is project advertising which is designed to reach protected classes of people. HUD's Affirmative Fair Housing Marketing regulations were published in 1972 and are set forth in 24 CFR Part 200. The regulations mandate affirmative marketing to ensure housing availability to individuals in the market area of HUD-assisted projects regardless of their race, color, religion, or national origin. Subsequent amendments to the Fair Housing Act indicate that sex, familial status, and disability should be included in the groups enumerated in the HUD Affirmative Marketing Regulations. These regulations apply to HUD-subsidized and FHA unsubsidized projects. The Section 202 and 811 programs explicitly require compliance with the HUD Affirmative Marketing Regulations. HUD Handbook 8025.1 (Implementing Affirmative Fair Housing Marketing Requirements) provides detailed guidance in this area.

The HUD Affirmative Marketing Regulations require development of an affirmative marketing plan that provides for: (i) a project to be publicized to minority persons using minority media and other minority outlets; (ii) the use of the HUD equal opportunity logo or slogan in all advertising and literature and

posting in conspicuous locations; (iii) maintenance of nondiscriminatory hiring policy so that staff will include people of majority and minority groups and both genders; (iv) oral and written instruction to employees and marketing agents on non-discrimination and fair housing; (v) and solicitation of eligible applicants for housing reported to HUD offices.

The HOME, HOPWA, and various McKinney Act program regulations do not cross-reference the general HUD Affirmative Marketing Regulations. Instead, each includes its own basic affirmative marketing requirement without the requirement to prepare and obtain HUD approval of an affirmative marketing plan. The HOME regulations require each participating jurisdiction to adopt affirmative marketing procedures "to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability," including procedures to be used by owners to inform and solicit applications from persons who are not likely to apply for the housing without special outreach (see 24 CFR 92.351).

The HOPWA regulations require project sponsors to adopt procedures to ensure that all persons who qualify for the assistance, regardless of their race, color, religion, sex, age, national origin, familial status, or handicap, know of the availability of the program (see 24 CFR 574.603). Similarly, the McKinney Act Emergency Shelter Grant, Shelter Plus Care, and Supportive Housing Programs all require project sponsors to adopt procedures to make their programs known and available to persons in the enumerated groups who may not otherwise be reached, and also to make available information on the existence and location of facilities and services that are accessible to persons with disabilities.

In addition, the Shelter Plus Care and Supportive Housing Program regulations state that where a specific population of disabled homeless persons is designated to be served by a project (such as the seriously mentally ill, alcohol or substance abusers, or persons with AIDS), project sponsors must ensure that non-discrimination and affirmative marketing requirements are met within the designated population. (See 24 CFR 576.57(a)(2) for Emergency Shelter Grants; 24 CFR 583.325 for the Supportive Housing Program; and 24 CFR 582.330(c) for Shelter Plus Care.) While no affirmative marketing regulations require marketing materials to be published in languages other than English, housing sponsors or administering agencies may require production of materials in other languages if it appears necessary in order to reach people of a particular ethnicity or national origin (both of which create protected classes) that may otherwise be underrepresented.

It should be possible to comply with affirmative marketing requirements in a project designated for a particular population, so long as the tenant targeting criteria do not violate fair housing law. If a project is lawfully targeted to people with a particular disability, and complies with the Fair Housing Act (see discussion under question C.1 of this Chapter), the affirmative marketing plan may provide for affirmative marketing within the targeted disability group. For example, a project reserved for the mentally ill can be affirmatively marketed to individuals who meet the tenancy requirements for the project and are members of potentially underrepresented racial, ethnic, religious, or other enumerated categories.

Chapter Five

Selection of Individual Tenants

This Chapter discusses issues related to selection of individual tenants in the context of fair housing laws. The concept of "reasonable accommodation" is crucial here, and is discussed at length.

All questions in this Chapter in some way involve the gathering of information by the provider about applicants for housing. Providers are cautioned to be cognizant of the rights of applicants throughout this process. Credit agencies and tenant "blacklists" are rife with incorrect information about individual people. Consequently, applicants for housing should always be informed of the reason for rejection of their application and be given an opportunity to respond to or correct inaccurate information.

Section A: Screening and Intake

Question 1: What questions can be asked to identify an applicant as a member of a targeted group?

If housing may legally be restricted to a particular population, applicants generally can be asked whether they qualify to be admitted to the housing. In addition, the Fair Housing Act provides a list of questions that are permitted to be asked.

The Fair Housing Act Regulations at 24 CFR 100-202 set forth questions that may be asked of applicants for housing. These questions are limited to the following:

- Inquiries into an applicant's ability to meet the requirements of ownership or tenancy. (Presumably this would include inquiries into such things as income if the housing is income-restricted and age if the housing is limited to seniors.)

- Inquiries to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap.

- Inquiries to determine whether an applicant is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap.

- Inquiries to determine whether an applicant is a current illegal abuser or addict of a controlled substance.

- Inquiries to determine whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance. (See Questions 5 and 6 below for additional information regarding inquiries about an applicant's criminal record.)[14]

If these questions are asked of any applicant, then they should be asked of each applicant, regardless of whether the housing provider believes the applicant qualifies for a specific program. The broad areas of permissible inquiry obviously leave many unanswered questions regarding screening of applicants and do not provide any guidance on verifying any information provided by the applicant.

The first step in establishing a tenant screening process is to review procedures to determine whether the information being requested of the applicant is reasonably related to the tenancy. Requests for information that do not bear on the applicant's ability to pay rent, maintain the premises rented, or comply with the terms of the lease may be unlawful.

Numerous questions arise regarding verification of the information provided by the applicant, particularly when this information relates to the applicant's disability. For example, if the housing is limited to people with a particular disability, how do you determine that the applicant has the disability? Also, if an applicant requests a reasonable accommodation, how do you determine whether the applicant qualifies for the reasonable accommodation?

If a person is applying for housing that is designated for people with disabilities or people with a particular disability, the housing provider may ask the applicant to document the disability. If the housing is generally designated for individuals with disabilities and is not targeted to a particular disabled population, the provider may only require documentation that shows the person has a disability, not documentation showing the particular type of disability or the severity of the disability. So, for example, if the applicant provides you with an SSI award letter that does not specify the disability and the housing is designated for all

applicants with disabilities regardless of the type of disability, the applicant would qualify and the housing provider would not be allowed to request any additional information.

It is important to remember that eligibility for SSI is not the only way to establish disability and that the definition of disability under the Fair Housing Act is broader than the SSI definition, including being misclassified or considered by others to have a physical or mental impairment that the individual actually does not have (for example, a gay person who is excluded from housing because he is assumed to have AIDS is protected under the Fair Housing Act, even if he does not have AIDS and is therefore not actually disabled). The expansive definition of handicap under the Fair Housing Act means that housing providers may have to be flexible in the type of documentation they are willing to accept to verify disability status.

The level of documentation that can be requested may depend upon the level of services provided in the housing development. Generally, a housing provider cannot request information regarding the severity of the disability or the applicant's medical status. A housing provider also cannot require the applicant to provide medical records to document the disability, other than a doctor's or medical professional's letter stating that the applicant is disabled.

Question 2: Does having a program component in housing entitle a provider to ask additional eligibility questions as long as they are uniformly asked of all potential tenants?

No.

The fact that the housing includes a service component does not allow the housing provider to ask any questions it desires. The questions asked must relate to lawful conditions of renting (i.e., ability to pay rent, eviction history). See question 4 below for additional information on this issue. In a licensed facility, owners are still subject to the Fair Housing Act, but may be required by licensing laws to ask additional questions of applicants. In such a case, providers should comply with the licensing requirements.

Question 3: Should a housing provider have one housing application which asks all questions to determine eligibility for all programs the agency operates or should it have a separate form for self-identification?

A single application asking all eligibility questions is preferable from a fair housing perspective..

Many housing providers operate developments with multiple sources of funding or may have a number of different developments, each of which has a unique source of funding. These funding sources often contain occupancy restrictions or target occupancy to certain special needs populations. The result of the multiple funding programs is that housing providers may have some units restricted to people with HIV/AIDS and other units restricted to people with mental illness. Determining who qualifies for what housing can be difficult. The easiest and most defensible solution to this problem from a fair housing context would be to have a single housing application for all the housing the provider operates. This application could list the qualifications for each type of housing operated and ask the applicant if he or she qualifies for each type of housing. A single application is preferable to a separate application for each targeted group, since determining which application to provide to an applicant would require the provider to make an assessment of whether the applicant possesses the required disability. This in itself can lead to discrimination claims.

Question 4: May a housing provider use psychosocial history in making tenant selection decisions?

Given the limited nature of inquiries allowed under the Fair Housing Act, psychosocial evaluations should not be used in making tenant-selection decisions in unlicensed facilities.

The issue of psychosocial evaluation often arises when the housing provider operating an unlicensed facility is a social service agency that also provides services independent of the housing or when a housing provider works with a social services agency to provide service-enriched housing. Before performing or participating in any such screening, the housing provider should consult with a knowledgeable fair housing attorney.

Generally, the use of psychosocial evaluations or histories is not appropriate in tenant selection because such an evaluation provides information unrelated to the individual's ability to meet the terms and conditions of tenancy and should

be discouraged. Due to the subjective nature of the information obtained in such a process, a rejected applicant could argue that housing was denied for personal traits rather than on the basis of objective criteria related to tenancy, and it would be difficult for a housing provider to prove otherwise. This does not mean a housing provider cannot inquire into tenant histories, which may include information relating to behaviors relevant to a psychosocial evaluation. However, such an inquiry must be limited to behaviors, rather than mental or physical conditions, and must be related to terms of tenancy such as maintaining the apartment and paying rent.

The operation of supportive housing sometimes requires obtaining some psychosocial history in order to provide appropriate and necessary services to the tenant. Psychosocial information not related to a tenant's ability to pay rent or allow peaceful enjoyment of the property should be asked only after the tenant has been admitted to the housing program, thus ensuring that none of the information obtained by a service provider in order to provide social services is used for housing decisions, since this information is irrelevant to housing decisions. Additionally, it would be prudent for the service agency to maintain completely separate files for the housing and social service sides of the programs, and to allow access to each set of files only to the staff working in each program area. Such strict controls maintain the confidentiality on both sides of the program and also ensure that housing decisions are made on valid grounds.

The reality of many programs, however, is that there is limited staff, so that the same people work in both the social service arm of the program and the housing arm. If staff members responsible for making decisions regarding occupancy have access to information about the applicant that is not directly relevant to the housing decision and which in an ordinary landlord-tenant relationship would not be available to the landlord, caution should be exercised. In these situations where staff members wear many hats or work closely together, the staff members selecting tenants should not base their decisions on information that is extraneous to the landlord-tenant relationship. Before making a tenant selection decision, the staff member may want to ask a series of questions to ensure that the decision is being made on defensible grounds.

- Is the information that is guiding the decision information that would have been obtained if the applicant's only point of contact with the agency was in applying for housing?
- Is the basis of the decision related to the terms and conditions of tenancy rather than the applicant's overall psychosocial evaluation?

- If the applicant is disabled as defined in the Fair Housing Act (see **Appendix 6**) and the housing provider is made aware of this disability, is there a reasonable accommodation that can be provided that will enable the applicant to meet the terms and conditions of tenancy?

In a licensed facility a housing provider may be required to ask for information that is generally gathered as part of a psychosocial evaluation pursuant to licensing requirements. If this is the case, the provider should comply with the licensing requirements because it is required to do so by law.

Question 5: What is HUD's "zero tolerance" or "one-strike" policy, and what housing programs are covered by it?

"One-strike" is a set of federal statutory requirements that requires pre-occupancy screening and rejection of applicants for drug and alcohol abuse and certain criminal activity, and also requires tenant lease provisions that facilitate eviction of tenants in some circumstances related to drugs, alcohol, and criminal activity. "One-strike" applies to many federal programs.

In 1996, President Clinton announced a "one strike and you're out" policy for public and Section 8 housing, requiring housing authorities to enforce stricter screening and eviction policies related to drug and alcohol abuse and criminal activity. Much of the original "one-strike" policy was contained in the Housing Opportunity Program Extension Act of 1996 (42 U.S.C. 1437), which is described in HUD Notice PIH 96-27 (HA) and HUD Notice PIH 96-16 (HA). **The one-strike policy was considerably expanded under the Quality Housing and Work Responsibility Act of 1998[15] and now applies to publicly or privately owned housing assisted under the following federal programs: public housing; tenant-based Section 8 and project-based Section 8 (including new construction, moderate rehabilitation and substantial rehabilitation); Section 202 and Section 811; Section 221(d)(3) and Section 236 mortgage insurance; and Section 514 and Section 515 rural housing. McKinney Act programs are not included in the current one-strike or zero tolerance requirements described above, with the exception of McKinney Act Section 8 Moderate Rehabilitation for Single Room Occupancy Dwellings and the moderate rehabilitation SRO component of Shelter Plus Care. HUD has confirmed that both of these programs are considered Section 8 programs that are covered by the one-strike law; however, the primary focus of one-strike has been in public housing.**

HUD has published draft regulations implementing the one-strike statutes which were published in the *Federal Register* at Vol 64, No. 141 on July 23, 1999, and when final, will be found at 24 CFR Parts 5, 200, 247, 880, 882, 884, 891, 960, 966, and 982. As of the date of publication of this Guide the comment period on the draft regulations has ended, but final regulations have not yet been adopted. The One-Strike Requirements are also discussed at length in a recent HUD General Counsel Memorandum entitled "Medical Use of Marijuana in Public Housing" which is reproduced in **Appendix 8**.

These laws require owners of this housing to prohibit admission to covered projects to: (a) households with a member the owner determines is illegally using a controlled substance; (b) households that the owner determines it has a reasonable cause to believe that a household member's illegal use of a controlled substance or abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents; and (c) persons evicted from federally assisted housing because of drug-related criminal activity for three years following the eviction. "Drug-related criminal activity" is defined to mean the illegal manufacture, distribution, use, or possession with intent "to sell, distribute, or use, of a controlled substance" (42 U.S.C. Section 1437f(5)). (Note that subsection (c) above requires rejection of applicants **previously evicted for drug-related activity** and does not necessarily require a criminal **conviction.**) The Act permits owners to waive the requirements described in (b) and (c) above (and admit tenants) in certain circumstances where the household member demonstrates he or she has successfully completed or is enrolled in a rehabilitation program and is no longer using illegal drugs or abusing alcohol. The requirement may not be waived if the household member is **currently using** a controlled substance. While "current use" is not defined, this term has been interpreted to exclude persons whose illegal use of drugs occurred recently enough to justify a reasonable belief that their drug use is current (see discussion under Question 8 below).

Owners of covered projects are also required to prohibit admission of any individual who is subject to a lifetime registration requirement under a state sex offender registration program. Finally, the law grants authority to owners of covered projects (but does not require them) to deny admission to households with a member that, during a reasonable time preceding the date of application, engaged in any drug-related or violent criminal activity or other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or project employees. Again, note that this law authorizes owners to exclude applicants who the owner believes have engaged in certain criminal **activity**; the law does not require a criminal

conviction in order for an owner to deny application for tenancy, nor does it offer guidance on the type of evidence an owner should rely on to determine if an applicant has engaged in criminal activity. However, providers are cautioned against relying exclusively on arrest records to make a determination concerning previous criminal activity by an applicant, given the racial and ethnic bias that is often reflected in arrest patterns.

Chapter Six

One-Strike also includes a set of requirements to facilitate the eviction of certain tenants who abuse drugs or alcohol or engage in certain criminal activity. These are described in Chapter Six, Section D, Question 5 below.

Question 6: May a housing provider ask applicants if they have a criminal conviction?

A housing provider may ask an applicant if he or she has a criminal conviction, but the request for such information should be related to the terms and conditions of tenancy and determining whether the applicant can comply with the lease.

The Fair Housing Act specifically authorizes housing providers to ask whether an applicant has been convicted of the illegal manufacture or distribution of controlled substances. In addition, it is reasonable for a housing provider to ask whether an applicant has been convicted of a crime that might adversely affect the health, safety or welfare of other tenants.

Although the Fair Housing Act does not specifically state that a housing provider can ask about criminal convictions that are unrelated to drug crimes, such a question can be related to complying with the terms of tenancy as well as the provider's obligation to ensure the safety of occupants. Thus, such a question is reasonable, although there is no case law to provide guidance on that point and providers may find themselves fighting a discrimination claim if such a question is asked.

Arrest records that did not result in a conviction are not a valid reason for rejecting an applicant, except as provided under the HUD "one-strike" requirement in projects where that requirement applies (see Question 5 immediately above).

Question 7: May an applicant be rejected because of a criminal conviction?

Yes, depending on the type of crime that was committed.

A housing provider may deny housing to a person with a criminal conviction history if the conviction involved crimes of physical violence to persons or property, drug-related crimes, or other criminal activity that would adversely affect the health or safety of other tenants if the crime occurred in the housing development. For example, someone who has been convicted of perjury probably does not pose a threat to other residents, but someone with a conviction of assault may pose a threat to others in the development. The housing provider must use judgment to evaluate the age of the convictions and other mitigating factors. In addition, HUD's "one-strike" requirements, discussed in Question 5 of this Section, **requires** exclusion of people with certain criminal convictions from many federally-funded housing projects.

Question 8: May a housing provider require an applicant to be "clean" to be accepted as a tenant? May people who are addicted to drugs be excluded from housing?

Persons who are currently using illegal drugs may be excluded from a project.

Under the Fair Housing Act, housing providers may ask an applicant if he or she is a current illegal user or addict of a controlled substance. If the applicant answers yes, the applicant may be excluded from the housing. If the applicant answers no, the provider may need to assess the truthfulness of the answer.

The Fair Housing Act and the ADA do not deal with how a housing provider determines whether someone is a current drug user versus a former drug user. There is no definition of former drug user that serves as guidance, and probably every drug rehabilitation program has a different standard for what constitutes current versus former drug use. This lack of definition presents a dilemma for housing providers trying to ensure that only former drug users are admitted to the housing program. The only standard available appears to be in the regulations implementing the Americans with Disabilities Act, which define current illegal drug use as "illegal use of drugs that occurred recently enough to justify a reasonable person's belief that a person's drug use is current or that continuing use is a real and ongoing problem" (28 CFR 36.104). A similar definition of current illegal drug use is contained in the proposed regulation for "one-strike" (Federal Register V.64 No. 141, July 23, 1999).

In one federal court case, an individual who was drug free for one year and was involved in a continuing professional rehabilitation and mentoring program was not considered to be a current drug user and thus was entitled to protection as disabled under the Fair Housing Act.[16] A series of ADA cases has tried to define current drug use, with few clear-cut answers. The courts are in agreement that an applicant does not have to have a "needle in the arm or a bong in the mouth" to be a current user, but beyond this test there is no bright-line test emerging.[17]

HUD has attempted in HUD Handbook No. 4350.3, which applies to Section 202, Section 811, Section 221 and Section 236 housing projects, to provide some guidance for housing providers on how to determine current versus former drug use by defining disability to include an individual who (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised drug rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use. The proposed regulations implementing "one-strike" in the programs covered by "one-strike" contain similar language. This expanded definition, obviously, presents some interpretation problems for housing providers and does not give any guidance on how a housing provider determines that an applicant is "not currently engaging in such use" or has "successfully" completed a drug rehabilitation program. However, HUD's guidance may assist in formulating some form of policy for dealing with applicants.

The questions of what constitutes current drug use and what standards a housing provider can adopt for current drug use are the subject of controversy among housing professionals. Some housing advocates argue that a bright-line test, such as no drug use in the last six months, is legal, as long as: (1) the policy is based on some statistical or scientific evidence regarding the likelihood of staying "clean" after such period of time; (2) the provider can demonstrate it is necessary to screen out current illegal drug users to operate a successful program; and (3) any such policy includes a degree of flexibility enabling and requiring the provider to individually assess an applicant who may not fall within the bright-line time period, but can show that they are drug free. Others argue that any bright-line policy is illegal primarily because such policies fail to treat people with disabilities as individuals, and instead, make assumptions about them as a group based on their disability.

Given the lack of court guidance on this issue, any policy adopted by a housing provider may result in claims. A defensible course of action at this time may be to adopt a carefully crafted policy that sets a standard for being clean. This standard should be based on research that shows that some percentage of drug users who are drug free for the designated period of time are likely to remain drug free. The policy should also include provisions that would allow applicants to present additional evidence to rebut the presumption that they are not drug free, such as ongoing participation in drug rehabilitation programs, recommendations from drug treatment centers, or other relevant evidence. The housing provider will then have to evaluate this evidence to determine whether the applicant should be admitted even though the applicant has not been drug free for the required time period. Obviously, this screening process will require some knowledge and skill on the housing provider's part in determining each applicant's likelihood of actually being drug free, but until further guidance is provided in the way of court decisions or regulations, there is no bright-line test that can be applied.

Question 9: Is pre-admission drug testing legal?

Pre-admission drug testing is not prohibited if it is required of all applicants, but is not recommended.

Federal laws limiting drug testing apply to employment situations, not to housing admission. Drug testing is legal if all applicants to all the housing operated by the provider are required to take drug tests as a condition of tenancy. Drug testing might not be lawful if a provider only utilized it in certain types of projects (like projects for people with disabilities or people who are homeless) and not in others. HUD has issued no official guidance on this topic.

Although drug testing is not illegal, before implementing a drug testing policy, housing providers should carefully consider the ramifications. Drug testing can be expensive. Also, the results of drug tests are not infallible and finding reputable, accurate labs may be difficult. The rejection of applicants on the basis of drug tests may result in additional administrative costs if an applicant challenges the results and the housing provider must defend the testing procedures to prove accuracy.

Question 10: Does HUD have a requirement that current drug users must be rejected as tenants?

Yes, it is sometimes called the "one-strike" or "zero tolerance" policy, but it does not apply to all HUD programs.

Federal law requires owners of certain kinds of HUD projects to establish standards that prohibit admission to the housing of any household with a member who **the owner determines** is illegally using a controlled substance or who **the owner determines it has a reasonable cause to believe** that a household member's illegal use (or pattern of illegal use) of a controlled substance may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. Note that a criminal conviction is **not** required. This law applies to public housing, tenant-based Section 8, project-based Section 8 (including new construction, moderate and substantial rehabilitation), Section 202 projects, Section 811 projects, McKinney Act Section 8 Moderate Rehabilitation for SRO Dwellings and the moderate rehabilitation SRO component of Shelter Plus Care, and federally insured Section 221(d)(3) and Section 236 projects, and permits limited exceptions where a person has participated, or is participating, in a drug rehabilitation program and is no longer engaging in illegal use of drugs (42 U.S.C. 1437; 42 U.S.C. 13661, 13662, and 13664) (see extended discussion of the HUD "one-strike" or "zero tolerance" policy under Question 5 above in this Section).

Question 11: Can a housing provider require an applicant to be sober?

Generally, a housing provider cannot require an applicant to be sober. However, HUD programs permit exclusion of applicants whose use of alcohol may interfere with their ability to perform the responsibilities of tenancy or interfere with the health and safety of other tenants.

Unlike their treatment of drug users, the fair housing laws do not distinguish between alcoholics who are currently drinking and alcoholics in recovery. Alcoholism is considered a disability if it interferes with one or more major life activities and therefore is not a basis by itself for refusing occupancy, even if the applicant has neither achieved nor desires sobriety.

Both the Fair Housing Act and the Americans with Disabilities Act include alcoholism within the definition of handicap. Since alcohol is a legal substance, whether the applicant is currently partaking of alcohol is not relevant. Refusing

housing to someone because that person is an alcoholic would be unlawful discrimination since alcoholics are treated like all other individuals with handicaps. If the applicant's problems with alcohol have caused behavior problems that interfere with the applicants ability to meet the terms of tenancy, this may be a basis for rejection. However, since alcoholism is considered a disability under the Fair Housing Act and the ADA, housing providers may be required to consider reasonable accommodations that would allow an alcoholic to reside in the housing. For example, if the applicant has a poor tenancy history due to difficult behaviors resulting from alcohol use, the housing provider may need to waive requirements related to past rental history in order to accommodate the tenant if the tenant can show that steps have been taken to reduce the chances of the negative behavior reoccurring.

It should be noted that HUD's definition of "individual with handicaps" in HUD Handbook No. 4350.3, which applies to Section 202, Section 811, Section 221, and Section 236 housing projects, as well as the definition in Section 504, excludes an individual whose current use of alcohol prevents the individual from participating in the program or activity being applied for, or whose participation, by reason of current use of alcohol, would constitute a direct threat to property or the safety of others. This definition would appear to allow housing providers to reject alcoholics on the basis of current drinking, if the drinking results in behavior problems in projects covered by Section 504 and in the HUD programs listed above. However, caution should be exercised in any such rejection. The HUD definition and Section 504 require that the individual not be able to participate in the program or activity offered because of drinking in order to be excluded from the housing. If the program offered is simply rental of an apartment, with no services provided, which is the case for some of the HUD programs listed above, the housing provider will need to show that the applicant's drinking prevents the applicant from meeting the terms and conditions of tenancy (i.e., payment of rent or maintaining the apartment), which is always a permissible reason for rejecting a tenant (subject to the reasonable accommodation requirement). Thus, the drinking itself is not sufficient reason for rejecting an applicant. Rather, behaviors resulting from the drinking must justify the rejection.

Finally, under the Quality Housing and Work Responsibility Act of 1998 (also known as the "one-strike" policy), owners of certain kinds of HUD-assisted projects must deny occupancy to households where a household member's pattern of abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. The law applies to public housing, tenant-based Section 8, project-based Section 8 (including new

construction, moderate and substantial rehabilitation), Section 202 projects, Section 811 projects, federally insured Section 221(d)(3) and Section 236 projects, and Section 514 and Section 515 rural housing, and includes limited exceptions for people who have completed or are participating in rehabilitation programs and are no longer abusing alcohol (42 U.S.C. 14377; 42 U.S.C. 13661, 13662, and 13664). Please see the detailed discussion of "one-strike" in Question 5 of this Section.

Question 12: May an applicant be rejected for showing up intoxicated at the intake interview?

An applicant may not be rejected solely because he or she is intoxicated at the interview. An applicant may be rejected due to behavior that is inconsistent with tenancy.

An applicant may not be rejected solely by virtue of being intoxicated at the interview, since alcoholism is a protected disability. But if the applicant is unable to participate in the interview fully, is abusive, or exhibits behaviors not consistent with good tenant behaviors, this may be grounds for rejection.

Question 13: What are the legal ramifications of tenants screening each other?

This is a very risky practice, unless proper precautions and oversight are implemented.

A housing provider is responsible for tenant selection decisions regardless of who conducts the screening process. So, if there is a tenant selection committee, the housing provider will be liable for any unlawful discrimination by the committee. This liability cautions against using tenant selection committees for pre-screening since the housing provider loses control in the initial selection process and the process may be affected by the tenants' individual prejudices, while the housing provider will still face all of the risk of decisions that go awry.

Housing providers may want to include tenants as part of the screening process, with the ultimate decision resting with the professional housing manager. In this situation, tenants may be part of the screening process along with professional property managers or others representing the housing provider. When tenants are involved, they should receive training on antidiscrimination laws and the tenant selection procedures should clearly indicate that the screening committee is only advisory.

Section B: Reasonable Accommodation in Tenant Selection

Question 1: What does "reasonable accommodation" mean?

The duty to make a reasonable accommodation extends to two areas: (1) Physical Modifications: Housing providers must allow tenants with disabilities to make reasonable, necessary physical modifications to their units. Under the Fair Housing Act, housing providers are under no obligation to pay for these physical modifications; they must simply allow the modifications to be made. If a housing development receives federal funds and is therefore, subject to Section 504, then housing providers must pay for modifications, unless to do so would cause financial hardship. If a housing development receives non-federal government funding, Title II of the ADA may apply, and would require the provider to pay for reasonable modifications.[18] *(2) Policy Changes: Housing providers must make changes in their "rules, policies, practices, or services" when necessary to allow persons with disabilities equal access to housing.*[19]

The federal Fair Housing Act and the state Fair Employment and Housing Act prohibit discrimination against persons with disabilities in the provision of housing, but they also go further and create an affirmative duty for housing providers to accommodate persons with disabilities. "Failure to accommodate" is a separate and distinct charge under both laws. In other words, housing providers must make changes to their rules, policies, and procedures that will allow persons with disabilities to enjoy the benefits of the housing on an equal basis with persons who are not disabled. Such accommodations, or changes, need only be "reasonable" in the sense that a housing provider is not required to undergo great financial and administrative hardship in order to provide the accommodation. Nor must a housing provider make a fundamental alteration in the nature of its program.[20] However, the provider must bear **some** costs and make **some** special provisions for persons with disabilities. Some accommodations may also place a burden on the tenant to participate in the accommodation. For example, if a housing provider is asked to make a change in tenant acceptance policies to allow a disabled tenant with past behavior problems to reside in the housing, it is reasonable for the provider to require the tenant to demonstrate ongoing treatment or services for the underlying condition that caused the behavior problem. Housing providers are not required to inform tenants of their rights to a reasonable accommodation, but a statement

in the application form informing applicants of these rights is a prudent practice that may eliminate some discrimination claims, and initiate communication between the applicant and the provider before a claim is filed.

If a project receives federal funds, it is also subject to Section 504 of the Rehabilitation Act of 1973. Section 504 includes an implicit reasonable accommodation requirement which generally has a broader scope than the Fair Housing Act and Fair Employment and Housing Act provisions, requiring a housing provider in certain instances to pay for necessary physical modifications to a disabled tenant's unit. If non-federal public funds are received, the assisting public agency's obligations under Title II of the ADA impose a similar reasonable modification requirement on the provider.

In determining what is a reasonable accommodation, courts will balance the financial and administrative burden on housing providers against the benefit to a person with a disability. It is unclear under current law exactly what constitutes a "reasonable" accommodation or an "undue financial and administrative burden," and these questions have produced a great deal of litigation and controversy. Despite this indeterminate state of the law, it is critical that housing providers attempt to understand what accommodations a tenant needs and attempt to provide those accommodations, if feasible, in order to enable the tenant to enjoy the use and benefits of the housing.

The most successful approach for housing providers is to regard reasonable accommodations as a partnership between the provider and the tenant, with each party working toward a result that allows the tenant to access, use, and enjoy the dwelling.

Question 2: How does reasonable accommodation apply to applicant screening?

The screening process itself must be accessible to all applicants. Additionally, the housing provider should determine if there is a reasonable accommodation available that would allow the applicant to occupy the unit.

In the applicant screening process housing providers have two levels of requirements for reasonable accommodation. First, the screening process itself must be accessible to all applicants. For example, if an applicant is hearing impaired, the housing provider will need to provide sign language interpretation or some other method for communicating with the applicant in order to ensure that the applicant has an opportunity to participate in the tenant selection process.

The housing provider's second responsibility in applicant screening is to determine if there is a reasonable accommodation available that would allow the applicant to occupy the dwelling, either by physically modifying the housing unit or changing the rules of the program. It should be noted that housing providers do not have an affirmative obligation to ask applicants if they need a reasonable accommodation, but housing providers also should not ignore obvious disabilities. Nor do housing providers have to try to determine what the reasonable accommodation might be. But if an applicant requests a reasonable accommodation as part of the screening process, the housing provider is required to consider the request and implement the accommodation if it does not fundamentally alter the nature of the housing program and does not cause an undue financial burden on the housing provider. Additionally, the reasonable accommodation must be an accommodation that is related to the applicant's residency in the housing and is designed to enable the applicant to reside in and have full enjoyment of the housing. For example, if an applicant requests as a reasonable accommodation that the housing provider allow the applicant to occupy the most desirable unit in the development because it has a nice view that will lend inspiration to the applicant, this may not be a reasonable accommodation even if the applicant has a disability which would entitle the applicant to an accommodation. Conversely, if the applicant requests the best unit in the development because it is the only unit that can accommodate the applicant and the applicant's live-in care attendant, the housing provider should honor the request, even if units are usually assigned randomly.

If an applicant requests a reasonable accommodation, a housing provider may request documentation or some proof of the disability and the link between the disability and the requested accommodation. The housing provider may not, however, require an applicant to submit medical records as proof of his or her disability; such records are private. Instead, the housing provider should request a doctor's letter, an SSI award letter, or some similar verification. Even when the housing provider is seeking proof of the applicant's disability, the provider may not ask about the particular type or severity of disability or other specifics, unless the housing is designated for only a particular disabled population, or unless the specific information relates to the provision of an accommodation.[21]

A safe way for a housing provider to elicit information about applicants' disabilities in a nondiscriminatory manner is to disclose to all applicants—whether or not they appear disabled—information about the housing provider's duty to make reasonable accommodations. Additionally, in informing an applicant that the housing provider has rejected the application, a general information statement regarding the availability of reasonable accommodations should be included.

Question 3: On what grounds may a housing provider reject an applicant who is disabled?

Subject to reasonable accommodation requirements, a disabled applicant may be rejected for failure to meet legal occupancy requirements that are applied to all applicants.

Property managers can refuse to accept applicants for occupancy if the applicant does not meet the requirements for occupancy adopted by the housing provider, provided the requirements are legal and are applied to all applicants for housing. Insufficient income, a history of nonpayment of rent, or a history of evictions for failure to maintain the premises are all legal reasons for refusing occupancy. Other reasons for refusing occupancy may not be so clear cut. Making the determination of who is a "good" tenant without violating fair housing laws presents a challenge to property owners and managers. Before denying an applicant occupancy, the housing provider or manager should ask him or herself whether the conditions or behaviors demonstrated by the applicant that are causing the denial could be related to a disability. If so, the next question is whether a reasonable accommodation could allow the applicant to live in the facility. Although the fair housing laws do not require the property owner or manager to affirmatively offer reasonable accommodations if the tenant or applicant does not request them, thinking through whether there are any reasonable accommodations that can be helpful may avoid some discrimination claims.

Property owners and managers may also deny housing to anyone whose tenancy would constitute a direct threat to the health and safety of others. Determining that someone poses a direct threat to others must be based on past behavior rather than a sense that the person might be violent or destroy the property. Thus, an applicant's history of eviction from other housing for violent behavior might be sufficient grounds for denying occupancy. However, if the applicant merely displays behavior at the intake interview that the interviewer finds inappropriate or scary, but which does not constitute threatening behavior, and there is no documented previous history of threatening behavior, then it would not be appropriate to deny occupancy to the applicant on the basis of posing a threat to others. If a reasonable accommodation would eliminate the threat to others, then such an accommodation should be offered to the applicant.

In at least two reported federal court decisions, courts have refused to evict tenants with disabilities who physically assaulted other tenants because the owner of the housing failed to show that there was no reasonable accommodation that could be provided that would remove the threat to others.[22] These court

decisions do not indicate whether the tenants requested an accommodation before the eviction, which should be a requirement since without such a request, the owner has no way of knowing whether the violent behavior is the result of a disability. Also, these courts did not give any indication of what the reasonable accommodation would be in this situation. Determining a reasonable accommodation in such a situation will require owners to weigh the needs of the individual tenant versus the needs of all the tenants to live in a safe environment. An example of a reasonable accommodation for a violent tenant might be to allow the tenant to remain in the housing as long as the tenant is receiving counseling on the violent behavior. Such an accommodation would be reasonable only if the accommodation adequately ensured the safety of the other residents.

Question 4: May an applicant be rejected if s/he has a bad tenancy record caused by his or her disability?

If an applicant's bad tenancy record is the result of a disability, the housing provider may be required to offer the tenant a reasonable accommodation that would allow the tenant to live in the housing.

For example, a tenant may have a bad tenancy record as a result of a failure to take proper medication. If the tenant provides evidence to the housing provider that he or she has made arrangements that ensure that the tenant will take the needed medication, such as daily nurse visits, the housing provider may need to waive rules requiring rejection of applicants with bad tenancy records. Housing providers are not required to seek out information to determine whether the applicant's bad tenancy record is the result of a disability. However, it is a good business practice to include in notices rejecting applicants for bad tenancy records a statement that if the ground for rejection is the result of a disability, the applicant may be entitled to a reasonable accommodation.

Question 5: How does reasonable accommodation apply to screening tenants with drug and alcohol addiction?

Reasonable accommodation considerations apply to applicants with alcohol or drug addictions the same way they apply to other disabled applicants, unless current illegal drug use is involved.

Some applicants who have had problems with drug addiction or alcohol abuse may have a history of poor tenancy or criminal convictions that stem from the

drug or alcohol problem. The housing provider, in reviewing the prospective tenant's application, may find the applicant undesirable because of this past behavior. However, because alcoholism and drug addiction are "handicaps" under the Fair Housing Act, the housing provider has a duty to accommodate these disabilities by considering them as mitigating factors to a poor tenancy record if the applicant discloses the drug or alcohol problem.

As a reasonable accommodation, the housing provider should focus on the applicant's current behavior and ability to meet the terms of the tenancy. The landlord will need to know what mitigating circumstances exist, and whether past alcohol or drug use was responsible for the applicant's criminal conviction and bad tenancy history. The landlord can ask an applicant to explain the bad tenancy history and criminal conviction, essentially inviting an applicant's disclosure of the disability.

If the applicant does not have a reason for the past behavior that is related to a disability, then the housing provider may deny the application. If the housing provider rejects an applicant because of past negative behavior, the provider should disclose that an applicant's disability could entitle the applicant to a consideration of mitigating circumstances and to a reasonable accommodation.

If the applicant gives a reason for past poor behavior that is related to a disability, the provider must consider whether a reasonable accommodation is appropriate. For example, if the applicant shows that negative behavior was caused by alcoholism, and the applicant is participating in a program that addresses this condition, it may be reasonable for the provider to waive its policy that all applicants with poor tenancy histories be rejected for tenancy.

Question 6: Can a housing provider exclude tenants with disabilities because they need care and supervision?

Generally, a housing provider cannot exclude a disabled tenant because they need care and supervision or because they cannot live independently, unless they cannot meet the requirements for tenancy.

One federal court found that a housing authority's use of an independent living requirement was discriminatory. Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (1990). This case presented the most egregious example of an independent living requirement in that the need for in-home caregivers or assistance was deemed to disqualify the applicant, even if the applicant

demonstrated that the necessary assistance was available and being provided. Thus, the court found that the independent living requirements resulted in discrimination against those with disabilities.

The Cason case has generally been read to mean that you cannot have an independent living requirement in **any** housing development, whether or not funded by Section 202. (It should be noted that HUD's 202 manuals and recommended forms and leases continue to contain independent living requirements, although they appear to be invalid based on Cason.) However, this does not mean that a housing provider must allow occupancy to a tenant who clearly cannot care for him or herself and is not receiving the assistance necessary to enable the occupant to reside in a non-licensed housing unit. If the applicant cannot meet the terms and conditions of tenancy and the only reasonable accommodation that would allow the tenant to reside in the housing unit is for the housing provider to provide care and supervision, this would not be a reasonable accommodation. An accommodation is only reasonable if it does not require a fundamental alteration in the housing provider's program. The provision of care and supervision, which would require licensing, would be a fundamental alteration. However, if the applicant requires care and supervision and has made arrangements to receive this care and supervision, the housing provider would be required to accept the applicant, even if the care and supervision arrangements may violate the rules of the development.

For example, in a recent court case, a housing development had specific rules about who could have keys to the main entrance of the building and was threatening eviction of a resident for giving a key to a care attendant. The court found that allowing the care attendant to have a key was a reasonable accommodation.[23] This same decision provides clear guidance on how housing providers can deal with care and supervision issues. According to this trial court decision, providers can ask questions to determine if an applicant meets the criterion for the development, including whether the applicant is disabled, if this is a criteria. The provider may also inform applicants that the provider does not provide personal care services. However, housing providers may not (a) inquire into the severity of disabilities to determine if the applicant needs services that the provider is not required to provide; or (b) prohibit a tenant from arranging for services. It should be noted that this guidance from the trial court is not binding on other courts and other courts may interpret care and supervision issues differently.

If the tenant's disability requires a live-in care attendant, the housing provider may have to waive occupancy rules to allow the live-in attendant. However, a

waiver of health and safety code requirements, such as allowing a live-in care attendant in a room limited by law to one person, would not be reasonable if it violates applicable building code requirements.

Chapter Six

Operation and Management of Housing

This Chapter discusses a range of operating and management issues, including termination of tenancy. Again, fair housing law, especially as it relates to reasonable accommodation, is a major factor in this discussion, along with California landlord tenant law and state community care facility licensing requirements.[24]

Section A: Community Care Licensing Issues

Question 1: When is community care licensing required?

Community care licensing is required whenever "care and supervision" are provided; in addition, there is some risk that community care licensing is required whenever tenants needing care and supervision are accepted and retained.

A community care facilities license is issued with respect to a single community care facility by the State Department of Social Services ("DSS"). To qualify for the license, the facility must meet local building code and staffing standards that are more rigorous than the corresponding standards for unlicensed rental housing. Because it is costly to meet these rigorous standards, and because meeting these rigorous standards may substantially alter the housing environment, many providers of supportive housing wish to avoid triggering a community care license requirement. However, as the following paragraphs will explain, the laws on community care facilities licensing do not easily accommodate some supportive housing activities, making this an area in need of additional clarification and potentially legislative reform.

The term "community care facility" is defined by law as a facility where "care and supervision" are provided. In addition, the term "unlicensed community

care facility" is defined by law to include both of the following types of facilities: (i) an unlicensed facility where care and supervision are provided;[25] and (ii) an unlicensed facility that accepts and retains residents who demonstrate the need for care and supervision, even if care and supervision are not provided. "Care and supervision" means any of the following activities provided by a facility to meet the needs of its clients/residents: (1) assistance in dressing, grooming, bathing, and other personal hygiene; (2) assistance with taking medication; (3) central storage and/or distribution of medications; (4) arrangement of and assistance with medical and dental care; (5) maintenance of house rules for the protection of clients (as opposed to for the benefit of the housing provider); (6) supervision of schedules and activities; (7) maintenance and/or supervision of cash resources or property; (8) monitoring food intake or special diets; or (9) providing the basic services required to be provided in a community care facility.

Two recently adopted statutes address the extent to which a housing provider can provide services without triggering a licensing requirement. The first law provides an exemption for housing for elderly and/or disabled persons if (a) the housing is financed under the Section 202, 221(d)(3), 236, or 811 program, and (b) the project owner or operator does not contract for or provide supportive services (although the project owner or operator may coordinate, or help residents gain access to, supportive services) (Health and Safety Code Section 1505(o)). Furthermore, the DSS Director has the discretion to administratively exempt "any similar facility" (Health and Safety Code Section 1505(p)).

The second recently adopted statute provides that a license is not required, even where a housing provider provides meals, transportation, housekeeping, recreational and social activities, the enforcement of house rules, counseling on activities of daily living, and/or service referrals, as long as both of the following conditions are met. First, after any referral, residents must "independently obtain care and supervision and medical services" without assistance from the housing provider or any person or entity with an organizational or financial connection with the housing provider. The statute states that a memorandum of understanding between the housing provider and a service agency to which it refers residents does not necessarily itself constitute an "agreement for care and supervision of the resident" (but the statute's wording suggests that such an agreement between the housing provider and the service agency could in some instances constitute an "agreement for care and supervision of the resident," and such an agreement would prevent this first condition—no assistance from the housing provider in obtaining care and supervision—from being satisfied). Second, no resident can have an unmet need for care and supervision. Thus, a resident's inability or failure to obtain all needed care and supervision will

prevent this licensing exemption from applying. (Health and Safety Code Section 1568.03.)

Except as set forth in the recently adopted statutes described above, the licensing statutes require a community care facility license for supportive housing providers who either (i) provide care and supervision, or (ii) accept and retain residents who demonstrate the need for care and supervision. To avoid triggering the need for a community care facilities license, supportive housing providers carefully avoid performing or arranging care and supervision activities. Instead, they maintain a strict landlord-tenant relationship, and/or offer services that are outside the definition of "care and supervision," while encouraging other organizations (such as service providers) to visit the property and offer services (which may include services defined as "care and supervision") to residents with special needs. Indeed, the Community Care Licensing regulations provide (at 22 CCR 80007(a)(7)) that no license is required by a provider of room and/or board "which provides no element of care and supervision."

Nevertheless, there is still a risk for supportive housing providers who, without a license, accept or retain residents who demonstrate the need for care and supervision, even if care and supervision are not provided by the housing provider. California statutes clearly require a license where a provider accepts or retains residents who demonstrate the need for care and supervision, and the cited Community Care Licensing regulation does not clearly establish a "safe harbor" of licensing exemption.

This risk (for housing providers who, without a license, accept or retain residents who demonstrate the need for care and supervision) has three tangible manifestations. First, Community Care Licensing might change its policy inclination codified in its regulations (at 22 CCR 80007(a)(7)), and begin pursuing enforcement actions where a housing provider accepts or retains residents who demonstrate the need for care and supervision, even if the provider is in compliance with the regulation. Second, another government agency (such as the local district attorney) might pursue an enforcement action, even where Community Care Licensing is not interested in pursuing an enforcement action. Finally, even in the absence of an enforcement action, a nonlicensed housing provider that should be licensed under the statutes faces the possible application of the "negligence per se" rule described in **Appendix 1**.

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As an overlay to the licensing issues, there are fair housing law issues triggered by a refusal to rent to a person who demonstrates a need for care and supervision (see discussion in Chapter Five, Section B, Question 6. Thus, a housing provider

without a license faces conflicting legal requirements when facing an applicant or tenant who demonstrates a need for care and supervision. On the one hand, the housing provider might violate fair housing laws (and face civil liability) by not admitting or retaining the person. On the other hand, the housing provider might violate licensing laws (and face civil and criminal liability) by admitting or retaining the person (and this risk is most acute where the person does not independently arrange for the needed care and supervision, or has an unmet need for care and supervision).

This is an area in need of legislative reforms that balance the need for regulation to protect the health and safety of tenants who need care and supervision with the need for housing that provides independence for tenants. Until there is legislative reform, each supportive housing provider in California faces a difficult policy decision about how to balance the conflicting legal requirements.

Question 2: How does landlord-tenant law apply to a licensed community care facility?

It is prudent to follow landlord-tenant law in a licensed community care facility. Where licensing regulations conflict with landlord tenant law, the provider must comply with the licensing regulations.

There are different positions on the applicability of California landlord-tenant law to licensed community care facilities. There is no case law providing guidance on this issue.

The key principle in the law that determines whether a person is considered a tenant under state law, and is therefore afforded certain tenant protections, is their right to occupy real property with the right to exclude others.

The California Department of Community Care Licensing maintains that residents of licensed community care facilities are non-tenant residents of a non-medical facility who do not occupy real property, and that licensees are operators of facilities that provide non-medical care and supervision. Community Care Licensing therefore maintains that residents of licensed community care facilities have no rights under landlord-tenant law. However, because the Department has no enforcement power over individual residents relative to the transfer/eviction process, it "invites" its licensees to use the Code of Civil Procedure unlawful detainer eviction process (which is used to evict tenants under landlord-tenant law).

On the other hand, the statutes setting forth landlord-tenant law do not make an explicit exception for licensed facilities. Moreover, residents of licensed community care facilities might properly be classified as "lodgers" (who by definition occupy real property under the control of another and without the right to exclude others), and landlord-tenant law provides rights for lodgers that are for most (but not all) purposes identical to the rights of tenants. However, even if landlord-tenant law applies, there are instances where licensing regulations will require the providers to take actions that are inconsistent with landlord-tenant law.

Given the foregoing, and in the absence of clarification from the legislature or judiciary, the prudent course of action for a licensed provider is as follows. First, a licensed provider should always comply with licensing regulations. In addition, a licensed provider should generally follow landlord-tenant law's rules and respect the tenant rights set forth in landlord-tenant law (such as changing terms of occupancy only with 30 days notice, or honoring tenant repair-and-deduct practices). However, where licensing regulations conflict with landlord-tenant law (meaning that compliance with licensing regulations prevents compliance with landlord-tenant law), the provider should follow the licensing regulations, but not landlord-tenant law. For example, if licensing regulations require the provision of care and supervision by entering a resident's room without notice, but landlord-tenant law generally prohibits unnoticed entry, then the provider need not provide notice to enter the room. However, in the spirit of recognizing tenant rights under landlord-tenant law, it is advisable to inform residents in writing and, when possible, prior to their occupancy, that the provider's policy and practice is to comply with applicable licensing requirements, for example by entering residents' rooms without notice to monitor the health and safety of the residents. This approach will avoid a risk to the provider's license, strengthens the provider's position before a judge that any action undertaken that does not comply with landlord-tenant law was required to comply with licensing requirements, and assists in defining the housing environment for residents.

An operator of a licensed community care facility should be familiar with both sets of rules, and should ask its attorney for guidance on how the two sets of rules apply in a particular situation. In addition, an operator should ask Community Care Licensing for any necessary guidance on licensing regulations.

Section B: Reasonable Accommodation During Occupancy

Question 1: How does reasonable accommodation apply after the tenant has moved in?

A tenant's need for a reasonable accommodation can arise any time during the tenancy. The housing provider has the same obligation to consider the request for a reasonable accommodation once the tenant is already occupying the unit as the provider had during the screening process.

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The obligation to provide a reasonable accommodation to a tenant arises even if the tenant did not disclose the disability during the screening process or the tenant becomes disabled after occupying the housing and requests the accommodation after taking up residency. If a tenant requests a reasonable accommodation, the housing provider may request documentation verifying the disability, but as discussed in Chapter Five, Section B, Question 2 above, medical records cannot be required. A medical practitioner's or social worker's letter confirming the disability without disclosing the nature or severity of the disability is sufficient.

Question 2: What is a reasonable accommodation for a person with a physical disability?

A reasonable accommodation for a person with a physical disability will depend upon the disability and what is necessary to allow the person to occupy the dwelling.

The first requirement of a requested accommodation is that it be necessary to the tenant's equal enjoyment of the housing. Indeed, a landlord's duty to accommodate extends only to providing an equal opportunity for persons with disabilities to enjoy housing, not to providing special advantages unrelated to a person's disability.[26] Such necessary accommodations may include, for example, allowing a visually or hearing impaired tenant to keep a specially trained dog in violation of a "no pets" rule,[27] providing a specially designated parking space in violation of a condominium association's deed restrictions,[28] or allowing a tenant to install a ramp.[29] The Fair Housing Act does not require the landlord to fund any physical changes, but only to allow physical changes to be made by the tenant.[30] However, Section 504, which applies to all federally funded developments, requires the landlord to pay for modifications unless to do so would cause financial hardship. In state and local government programs, Title II

of the ADA may also require reasonable modifications at the owner's expense as necessary to accommodate a tenant with disabilities.

In addition to being necessary, an accommodation must be reasonable. This inquiry is guided by a requested accommodation's effect on third parties and financial burden on the landlord. In one case, a court held that to accommodate a tenant with multiple chemical sensitivities, it was not reasonable to evict a downstairs neighbor who had moved in before the tenant with a disability.[31] Such an eviction would unreasonably compromise the vested rights of third parties. In deciding what is financially reasonable, there are few fixed guidelines. However, it is clear that a housing provider must handle each reasonable accommodation request on its own merits at the time it is requested. The housing provider cannot argue that an accommodation is not reasonable because the provider needs to save money for future accommodations, or wants to avoid setting a precedent for other tenants.

Question 3: What is a reasonable accommodation for a person with a mental disability?

A reasonable accommodation for a person with mental disabilities usually involves the waiver or flexible application of a rule or policy.

Reasonable accommodation for tenants with mental disabilities is guided by the same principles as accommodations for tenants with physical disabilities: the housing provider must make changes in rules and policies to enable the tenants with disabilities equal access to housing. Sometimes a physical change may be necessary, for example, extra soundproofing may be necessary to accommodate a mentally disabled tenant who speaks very loudly in his or her unit. As with physical disabilities, the limitations on this duty arise from the cost of the accommodations and the countervailing rights of other tenants. If the project receives federal funding and is subject to Section 504, the housing provider may be obligated to pay for physical modifications if to do so would not cause a financial hardship.

Question 4: How does reasonable accommodation apply to tenants with substance use problems, including alcohol?

Reasonable accommodation applies to tenants with substance use problems in much the same way as to those with other disabilities, but it never operates to permit a tenant to use illegal drugs.

Generally, if a tenant has a substance use problems and requests a reasonable accommodation, the housing provider must consider the request and grant it unless the accommodation fundamentally alters the housing program or places an undue burden on the owner. However, it would not be a reasonable accommodation to allow a tenant to continue the illegal use of drugs on the premises. Current use of illegal drugs is specifically exempted from the definitions of disability, so a current user would not be entitled to a reasonable accommodation solely by virtue of drug addiction. Current use of alcohol, though, does not exempt a tenant from being considered disabled by reason of alcoholism under the definitions of disability in the Fair Housing Act. (See Chapter Four, Section A, Question 4 and Chapter Five, Section A, Question 11 regarding the treatment of alcoholism in the Fair Housing Act.) A housing provider may have to accommodate some behaviors that often accompany drinking under the reasonable accommodation requirements. It would not be a reasonable accommodation, however, if a recovering alcoholic requested that the housing provider prohibit all other tenants from using alcohol on the premises. This would infringe on other tenants' rights, and thus is not considered reasonable.

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Question 5: Can someone be evicted because s/he needs care and supervision that the facility doesn't provide?

No, unless the tenant cannot meet the terms and conditions of occupancy.

A tenant cannot be evicted simply because they need care and supervision. However, if the tenant needs care and supervision that the facility does not provide and the lack of care and supervision affects the tenant's ability to meet the terms and conditions of occupancy, the housing provider may have a basis for evicting the tenant as it would for any tenant. For example, a tenant who needs care and supervision may not meet the requirements for occupancy if the tenant is unable to maintain the apartment due to physical disabilities requiring

a care attendant. Housing providers should explore whether there is a reasonable accommodation that can be offered to the tenant (such as helping the tenant obtain a care attendant) to enable the tenant to meet the occupancy requirements before instituting eviction proceedings. If a reasonable accommodation cannot be found and the apartment is not being maintained, there may be grounds for eviction on that basis, not because the tenant requires care and supervision.

HUD's Section 202 and Section 811 programs include requirements in the tenant application documents that residents be able to live independently, which has been interpreted by some to mean that a resident cannot require the services of in-home care attendants. As discussed in Chapter Five, Section B, Question 6, these requirements in HUD forms are probably invalid based on the *Cason* case, so it is not advisable that operators of these developments rely on the requirements in the application documents in order to evict residents. Several Bay Area Section 202 housing operators have spent considerable time and money attempting to evict residents because of the residents' need for care and supervision that was not being provided. Disability rights advocates have been able to stop or stall these evictions to the point that the housing providers have withdrawn the evictions, and in one instance, obtained a federal district court order declaring an independent living requirement in a Section 202 project illegal under Section 504 of the Rehabilitation Act of 1973.[32]

Section C: Providing Services to Tenants

Question 1: May a housing provider require residents to participate in services by including the requirement in the lease?

This practice is prohibited in certain HUD programs and permitted in others. If a project does not have HUD funding, it may require tenants to utilize services, but enforcement may be difficult

Some supportive housing providers seek to require residents to utilize services offered by the housing provider or third parties, including therapy, drug rehabilitation, and money management services. The issue of providing services with housing (or "service linkage") is a controversial and complicated one, which presents problems that cannot always be easily solved. As discussed below, some HUD programs permit service linkage and others prohibit it. Except under certain funding programs such as Shelter Plus Care which specifically allow the lease to require participation in supportive services (see discussion in

the next question), requirements that a tenant participate in a service program may present discrimination problems for housing providers and may not be enforceable. Although the requirement that tenants participate in a service program may meet the business necessity tests for disparate impact discrimination claims, courts may struggle with the housing provider's dual missions of providing housing and providing social services. Which business necessity will take greater precedence in a court's mind is an unknown. Although the requirement that a tenant participate in a service program is not on its face discriminatory, a court may be reluctant to enforce such a provision if the housing provider attempts to evict a resident for noncompliance. This is because the provision of services does not fall within the ambit of the ordinary landlord-tenant relationship that judges are used to interpreting, and the judge may not view the services provision as "material" to the landlord-tenant relationship (i.e., related to the payment of rent, maintenance of the unit, and other standard rental obligations). Additionally, by its very nature the provision of a service component often means that the tenant qualifies as disabled under the Fair Housing Act, in which case the tenant may argue that failure to comply is the result of lack of a reasonable accommodation that is necessary for the tenant to continue to occupy the housing. This reasonable accommodation may include the nonparticipation of the tenant in the service component.

Nothing in landlord-tenant law prevents a landlord from inserting into a lease agreement the requirement that a tenant utilize services. To maximize the possibility of enforceability, a housing provider seeking to require residents to utilize services should ensure that the requirement is part of the original lease agreement (whether in the body of the agreement or an attachment), but the housing provider should still be prepared for a judge to refuse to enforce the requirement.

The Shelter Plus Care program regulations specifically allow the tenant's lease to require participation in supportive services as a condition of continued occupancy (24 CFR 822.315(c)), although this practice is not required. The Section 202 and 811 programs explicitly prohibit requiring tenants to participate in services as a condition of occupancy (see Notice of Funding Availability). If participation in services is required (and is permitted), a provider may legally terminate a lease for failure to participate, although the enforcement issues discussed above may emerge.

An additional consideration in requiring residents to utilize services is the possibility that such a requirement could trigger community care facility licensing requirements, as discussed above in Question B.1 of this Chapter.

Question 2: May a tenant's rental assistance or Section 8 assistance be terminated for failure to participate in supportive services?

Only in the Shelter Plus Care program and possibly the HOPWA program.

The Shelter Plus Care program regulations specifically allow the tenant's lease to require participation in supportive services as a condition of continued occupancy (24 CFR 582.315(c)). The regulations also provide that rental assistance to a tenant may be terminated if the tenant violates program requirements or conditions of occupancy (24 CFR 582.320). Some providers have requested the local housing authority that is administering the rental component of the Shelter Plus Care program to terminate the rental assistance to a tenant that fails to comply with his or her lease, including failure to participate in supportive services. Although a housing authority (as the agency responsible for administering the rental subsidy program) must provide tenants with a notice and hearing prior to termination of rental assistance, this process is considerably easier than a court eviction for a lease violation. Once rental assistance is terminated, the tenant may then need to be evicted for nonpayment of rent.

The HOPWA regulations do not include specific authority to require participation in supportive services; however, the regulations do provide for termination of rental assistance if a tenant violates program requirements or conditions of occupancy (24 CFR 574.310(e)(2). However, the regulation also states that providers must ensure that supportive services are provided, so that a tenant's assistance is terminated only in the most severe cases. Providers should therefore exercise great care in this area. In the final analysis, the ability to require participation in services under HOPWA is unclear.

If a tenant receives rental assistance under a HUD program other than Shelter Plus Care, and, arguably, HOPWA, the rental assistance may not be terminated for failure to participate in services.

Section D: Clean and Sober Requirements

Question 1: Is clean and sober housing legal?

Clean and sober requirements are most likely to be legal if backed by studies supporting their efficacy in maintaining recovery, and if clearly disclosed to tenants prior to occupancy. Enforceability is sometimes difficult.

Many supportive housing providers operate clean and sober housing programs designed to assist alcoholics and drug users in recovery to maintain sobriety.

The operation of housing targeted to recovering alcoholics or drug users would be acceptable under the same analysis that allows targeting to certain types of disabilities. If the housing provider can show that the specific disability requires a certain level of service or a particular physical environment that is unique to that particular disability, then the segregation would not be arbitrary and should be allowed. Clean and sober requirements are most likely to be legal if backed by solid evidence that the policies are an effective way to maintain drug and alcohol recovery. Housing which receives federal funding, and thus is subject to Section 504, however, cannot limit occupancy to people with a particular disability without statutory authorization, and therefore targeting to recovering alcoholics and drug-addicted persons in such housing is not allowed unless specifically authorized by federal statute.

Although they may be legal, clean and sober policies can present problems for housing providers. Housing providers can prohibit the use of illegal drugs on the premises, but the use of alcohol falls into another category. Alcohol is a legal substance, and alcoholics who are still drinking are persons with a disability. Although a policy of no alcohol may be reasonable, particularly when it is part of a service program designed to meet the needs of a disabled population (i.e., alcoholics and people with substance use problems), enforcement of the policy may be problematic. This is because waiver or flexible application of a rule is a typical reasonable accommodation for a person with a disability. If a provider were to try to evict a tenant for use of alcohol in the housing or for being drunk, the tenant would have a reasonable argument that the tenant is disabled by virtue of being an alcoholic and that waiver of the no alcohol policy to allow the tenant to remain even though the tenant was drunk is a reasonable accommodation. Although a court may find waiver of a sobriety rule a reasonable accommodation, repeated requests for waiver of the rule by a tenant may, over the course of time, cease to be seen as reasonable. In addition, the reasonable

accommodation may require the tenant to comply with additional requirements, such as attending recovery support meetings or other treatment. How a court would decide an eviction case in a clean and sober facility will depend upon the court's level of sympathy with the tenant and the court's interest in furthering the housing provider's social goals. Finally, it should be noted that although eviction for use of alcohol may be unsuccessful, the housing provider can evict for behaviors that interfere with tenancy that may be caused by the use of alcohol, such as excessive noise.

The use of illegal drugs in violation of a clean and sober policy should generally be easier to enforce than violation of a no alcohol rule. The use of illegal drugs on the premises is a crime and most courts will uphold an eviction for this reason. Providers should be aware, though, that proving the use of illegal drugs may be difficult and attempting to evict for behavior that the provider thinks indicates the use of illegal drugs (without having actual proof of the use of drugs on the premises) may be not be successful. For additional discussion of this issue, see Chapter Four, Section A, Question 4, and Chapter 4, Section C, Questions 8, Chapter Six, Section B, Question 4, and the balance of this section.

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To maximize the enforceability of a clean and sober requirement, the requirement should be adequately disclosed and explained to potential tenants prior to occupancy, and the policy should be consistently enforced. However, consistent enforcement may present a fair housing dilemma for the provider. On the one hand, a clean and sober policy may be most defensible if it is strictly enforced, thereby defeating claims that the provider is motivated by bias against a particular tenant with a disability. On the other hand, a provider must provide reasonable accommodation to tenants with disabilities, which may be best accomplished by a flexible application of clean and sober rules. Providers should also be conscious of the fact that judges also apply their own bias in eviction cases. A judge may refuse to evict an alcoholic for drinking on the theory that the provider's mission is, or should be, to work with alcoholics, whether in recovery or not.

Finally, a clean and sober requirement that extends to tenants' off-premises behavior is less likely to be enforceable than a clean and sober requirement that applies only to tenant behavior within the housing development.

Question 2: May a provider impose a "clean and sober" requirement after tenancy has been established?

A provider's ability to change the terms of tenancy depends on the term of the lease and the application of local landlord-tenant and just cause eviction laws.

Generally, the terms of tenancy for a tenant who rents on a month-to-month basis may be changed on thirty (30) days notice. If a tenant has a longer term lease (for example, a one-year lease), terms of tenancy may only be changed when the lease expires and is renewed. In some jurisdictions with just cause eviction laws a tenant cannot be evicted for the tenant's refusal to sign a new lease that materially alters the conditions of tenancy. If after a tenant moves in, the landlord imposes a "no alcohol" rule and the tenant refuses to sign the new agreement, the tenant may have a defense to eviction on the grounds that this is a material change in the terms of the tenancy. In jurisdictions which do not have just cause for eviction, tenants probably do not have a defense to a change in the lease at the time of renewal as long as the new requirements are not unreasonable or discriminatory. Nonetheless, a tenant may argue that requirements prohibiting a tenant from consuming alcohol are discriminatory, since alcoholism is a disability.

Some providers include a provision in their leases that "house rules" are incorporated into the lease and may be changed periodically by the provider. Such a provision gives the provider a basis to enforce a new house rule during the lease term, but a court may refuse to recognize the new rule if it is deemed material to the tenancy.

Although a prohibition against the use of illegal drugs should be in the lease from the initiation of the tenancy, the imposition of such a rule after a tenant moves in probably would not be considered unreasonable or unenforceable, since use of illegal drugs is a crime.

Question 3: May a housing provider evict for non-sobriety?

Evictions for non-sobriety may be difficult because alcoholism is a disability.

Generally, in standard rental housing a housing provider cannot impose sobriety conditions on tenants since alcoholism is a disability under the Fair Housing

Act. However, if a housing provider is providing housing to recovering alcoholics, sobriety may be a reasonable condition to occupancy as part of the services the housing provider makes available to the residents. In such an instance the housing provider would have a compelling interest in maintaining an alcohol-free environment.

Caution should be exercised in evicting any residents solely for failure to abide by the sobriety rules, however. An alcoholic may be considered a disabled person entitled to a reasonable accommodation, and this accommodation may require waiver of the sobriety rules. Housing providers could argue that waiver of a sobriety rule is a fundamental alteration in the nature of a clean and sober housing program, and therefore is not a **reasonable** accommodation, but at this time there are no reported cases on this issue. When making such an argument, a housing provider may need to offer an alternative accommodation such as permitting continued occupancy by a tenant who breaks a sobriety rule if he or she attends a rehabilitation program.

Some housing providers attempting to maintain sobriety policies include the sobriety rules in their lease or house rules, but do not evict for failure to comply with the rules, since such evictions are difficult and often fail. The success of such an eviction will most likely depend upon the vigor of the tenant's advocate and the judge's own inclinations regarding individual rights. Behavior problems that result from problems with alcohol may be grounds for eviction if these behavior problems interfere with other tenants' rights or affect the tenant's ability to meet the terms of tenancy.

Question 4: May a housing provider evict for illegal drug use?

Yes, however, evidence to support the claim may be difficult to get, thereby making it difficult to successfully evict a tenant for illegal drug use.

The use of illegal drugs should generally be sufficient grounds for eviction; however, it is advisable that leases contain a provision prohibiting the use of illegal drugs so the eviction is based on a lease violation. Most jurisdictions allow eviction for criminal activity, including illegal drug use. Additionally, housing providers should be prepared for the resident to assert the need for a reasonable accommodation in any eviction. Although it is difficult to think of what the reasonable accommodation would be in the instance where the housing provider has clear evidence of illegal drug use, providers should be prepared for creative defenses asserted by tenants who are being evicted for drug use.

Housing providers may have difficulty obtaining convincing evidence of the tenant's drug use. Rarely will a tenant use drugs in front of staff, and other tenants are often reluctant to testify against fellow residents. Evidence based on behavior may not be convincing, or explained away by the tenant.

Question 5: Is eviction of people who abuse drugs or alcohol required under the HUD "one-strike" requirements?

"One-strike" requires lease provisions that allow owners to terminate tenancies for drug or alcohol abuse, but does not require evictions in all such cases.

The one-strike statutes require **lease provisions** in covered projects that allow the owner to terminate tenancy for any household with a member **the owner determines** is using illegal drugs or whose use of illegal drugs or abuse of alcohol is determined by the owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. The law does not require a criminal conviction, nor does it establish any standards for an owner to use in making a determination that a person is using illegal drugs or that a person's use of illegal drugs interferes with the health and safety or peaceful enjoyment of other residents. As with admission requirements, the owner is permitted to consider the participation of the individual in a drug or alcohol rehabilitation programs before deciding to terminate tenancy. It is important to note that this law **requires specific lease provisions permitting evictions for these causes**; for privately owned housing, actual eviction is not required. A recent HUD General Counsel Memorandum, written to address questions about medical marijuana, emphasized the fact that HUD has not historically extensively regulated the area of eviction or termination of assistance, leaving the ultimate determination in these cases to the "reasoned discretion" of owners and housing authorities. In the context of medical marijuana use, the opinion urges the consideration of all relevant factors in determining whether to terminate the tenancy or assistance, including: (1) the physical condition of the medical marijuana user; (2) the extent to which the user has other housing alternatives; and (3) the extent to which the owner or housing authority would benefit from enforcing lease provisions prohibiting the illegal use of controlled substances (see HUD General Counsel Memorandum in **Appendix 8**).

Some provisions of "one-strike" that apply only to housing authorities **require eviction** and termination of Section 8 assistance under certain circumstances (42 U.S.C. 1437(d)(1)(5)). State courts have enforced these provisions and upheld evictions where these anti-crime or anti-drug lease provisions have been

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violated. Please see Chapter Five, Section A, Question 5 above for a detailed description of "one-strike," including a description of the kinds of projects which are subject to this law.

Question 6: What does the Drug Free Workplace law require? How does the Drug Free Workplace Act apply to housing providers?

The Drug Free Workplace Act requires federal grant recipients to provide a workplace where employees are prohibited from using or selling illegal drugs. It does not apply to drug use by tenants.

The Drug Free Workplace Act of 1988 (41 USCS Section 701) requires any recipient of a federal grant to certify to the federal agency administering the grant that it provides a workplace in which employees are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance. If any employee is convicted of violation of a criminal drug statute occurring in the workplace, the grantee is also required to inform the administering federal agency of the conviction and to take appropriate personnel action against the employee, which may include discipline, termination, or a requirement that the employee participate in a drug rehabilitation program. The Drug Free Workplace Act applies only to employees of a grantee and not to tenants. Consequently, drug use by tenants (so long as they are not also employees of the grantee) would not cause a provider to be in violation of this Act.

Section E: Other Management Issues

Question 1: Is a housing provider required to disclose to potential tenants that some or all of the tenants in a building have a particular disability?

No. Housing providers must maintain tenant's confidentiality and may not disclose information regarding disabilities.

A housing provider should never reveal to other tenants that a particular tenant has a particular disability, unless such disclosure is specifically authorized by the tenant with the disability. However, this prohibition does not mean that the provider may not reveal in marketing materials that the project or some number of units in the project are targeted to specific populations or limited by funding sources to tenancy by a particular group of disabled persons. While disclosures

of this type are not required by law (except with regard to deaths in the unit as described in the next paragraph), many providers make such general disclosures to allow potential tenants who might be disturbed by such preferences to self-select themselves out of the applicant pool.

California has adopted a statute (Civil Code Section 1710.2) governing disclosure of on-premises deaths to buyers and renters. The statute provides that an owner or agent will not be liable for failing to disclose that a death occurred on the property if that death occurred more than three years prior to the sale or lease. The law also provides that an owner or agent will not be liable for failing to disclose that a previous occupant had HIV or AIDS or died from an AIDS-related condition. This statute gives rise to the inference that owners and agents should disclose to a potential tenant the fact that a death occurred in the building within the past three years, but that owners are never obligated to disclose that a former occupant had HIV or AIDS or died from such a condition. Notwithstanding these limitations, if a tenant makes a direct inquiry about a death occurring on the property more than three years ago, the owner must answer such inquiry truthfully.

Question 2: Can a housing provider disclose one tenant's disability to other tenants?

Generally, you cannot disclose one tenant's disability to other tenants.

Under federal and state privacy laws, you are required to keep confidential any personal information about a person that you obtained in a confidential manner or from a confidential source. If the tenant with the disability gives the housing provider permission to reveal the information (which permission should preferably be in writing), then the housing provider can inform other tenants, but caution should be exercised that any information is disclosed only to people authorized by the tenant and that the particular information disclosed is the information for which disclosure is authorized.

Question 3: How much information about a tenant's disability should be released to a property manager by a case manager?

Case managers should not disclose any information to property managers that would violate their professional duties of confidentiality, unless they have properly obtained waivers of confidentiality.

What information a case manager releases to a housing manager is not a fair housing question, but rather goes to the professional standards and duties of the case manager. Case managers, be they social workers, nurses, or some other professional designation, all have duties of confidentiality which should not be breached by disclosing information to a housing manager, unless the client authorizes the disclosure or disclosure is necessary to protect the health and safety of others. Unless waived by the tenant, these confidentiality obligations apply regardless of whether the case manager and housing manager work for the same organization. See **Appendix 12** for a reference guide on confidentiality issues.

Chapter Five

As discussed in Chapter Five, Section A, Question 4, it would be best if the case manager did not disclose information to the housing manager during the tenant screening process. Without an appropriately obtained waiver of confidentiality, it is also best if the case manager does not disclose information to the housing manager during tenancy. The type of information disclosed would most likely relate to the severity and nature of a client's disability, which is information a housing manager is generally not entitled to request of a tenant either as part of an application process or once a tenancy is established. The fact that a housing manager possesses such information may open the door for the tenant to allege that the housing manager made decisions regarding the tenant's housing situation based on this information, which would be discriminatory. Although the housing manager may not have considered the information in making a decision—such as the decision to evict—the mere possession of such information makes such an argument harder to support.

Realistically, when serving a special needs population, such as persons with mental illness, information from a case manager may be useful to the housing manager in his or her day-to-day dealings with the tenant. If the housing manager believes such information would be useful and in the best interest of the tenant, the best course of action would be to request that the tenant waive confidentiality requirements that the case manager may have so that the case manager may provide the housing manager with the necessary information.

Question 4: Are restrictive guest and overnight policies legal?

Restrictive guest and overnight policies are generally legal, unless they violate fair housing laws. However, a judge may refuse to evict a tenant solely because of a violation of guest and overnight policies.

Some supportive housing providers, either at their own behest or at the request of tenant groups, seek to restrict visitors, such as by limiting the number of

visitors at one time, denying the right to receive visitors with a reputation for illegal or disruptive activity, charging for guest visits, requiring visitors to register with a desk clerk, limiting the hours during which visits may occur, or limiting the frequency of overnight guests. These policies are generally legal. As described below, such policies and practices should be carefully structured and administered to avoid violating fair housing laws. However, even visitor policies and practices that comply with fair housing laws might prove to be unenforceable in practice, because a judge or jury might refuse to evict a tenant solely because of a violation of guest and overnight policies. Indeed, a San Francisco jury was recently reported to have prevented just such an eviction.

Nothing in California landlord-tenant law prevents a landlord from inserting into a lease agreement a provision to restrict visitors in any of the ways described above. However, it is possible that a judge or jury would not permit an eviction where the tenant's sole lease violation was related to restrictive guest policies, because the judge or jury would not view the policies as "material." In addition, it is even less likely that a judge or jury would permit an eviction where the restrictive guest policies were not part of the original lease agreement, unless the tenant is on a month-to-month tenancy with no local rent control or eviction protections, and the landlord can therefore change the terms of tenancy with a thirty (30) day notice. To maximize the possibility of enforceability, a housing provider seeking to impose restrictive guest policies should ensure that the policies are part of the original lease agreement (whether in the body of the agreement or an attachment) and that the guest policies are stated clearly.

Even when guest policies are permitted under landlord-tenant law, they may violate fair housing or civil rights laws. For example, a housing provider wishing to deny the right to receive visitors with a reputation for illegal or disruptive activity must necessarily exercise discretion to determine who is an acceptable visitor and who is an unacceptable visitor, and such discretion can sometimes lead to unlawful discrimination. Similarly, a guest policy that explicitly disfavors members of a protected class of people would probably be illegal (such as a prohibition against visits by children, which is the functional equivalent of discrimination based on family status, or a prohibition against visits by people of one gender).

Some guest policies may also violate funder or program requirements. For example, a fee charged for receiving visitors may be defined as "rent" in funder contracts or program regulations, and such fees could cause the rent to exceed the permissible rent ceiling under the funder contracts or program requirements.

One reason why housing providers have guest policies is to prevent a guest from becoming a tenant with rights under landlord-tenant law. Whether a guest has become a tenant depends in California on specific factors, including (most importantly) whether the guest has remained in residence for more than thirty (30) consecutive days. A housing provider can decrease the likelihood of a guest becoming a tenant by requiring the presence of guests to be disclosed in writing or by strictly prohibiting guest stays of more than a few weeks.

Question 5: Is a durational residency limit enforceable in a transitional housing program?

Whether a durational limit is enforceable depends on the facts, but such limits are usually enforceable if consistent with applicable good cause eviction protections.

Some supportive housing providers seek to provide transitional housing in which residency is limited to a maximum duration, such as two years. Whether a durational limit is enforceable depends on the facts.

Under landlord-tenant law, there is no general requirement that a landlord renew a lease agreement when the lease term expires. Therefore, a landlord can generally refuse to renew a lease agreement when it expires. However, it is possible that a judge would not permit an eviction from a supportive housing development where the tenant's sole lease violation was holding over after the expiration of a durational limit. Two factors that would strengthen the housing provider's position would be (a) explicit lease agreement statements of the durational residency limit, and (b) funder requirements that impose the durational residency limit. For example, the McKinney Act's Supportive Housing Program limits occupancy to two (2) years.

In addition, supportive housing providers are sometimes bound by "good cause eviction" protections that prohibit eviction of tenants without good cause. The common sources of these protections are (a) contracts with government subsidy providers, whether as a matter of policy or in fulfillment of funding program requirements (such as the HOME program), and (b) local rent control laws. If good cause eviction protections apply, then whether the expiration of the housing provider's durational limit constitutes the "good cause" necessary to justify an eviction will depend on the applicable definition of "good cause." The HOME program, for example, includes specific authorization to terminate tenancies in transitional housing projects following expiration of the specified transitional term of occupancy. (24 CFR 92.253(c))

Chapter Seven

Zoning and Land Use

Local zoning laws and housing codes exist to regulate how land may be used and to allow compatible uses to occur as well as to restrict non-compatible uses. Unfortunately, these laws may also work to restrict access to housing for persons with disabilities and members of other protected classes of people. For example, many zoning decisions—such as granting variances, conditional use permits, and the like—involve a large measure of discretion on the part of local governments. This land use discretion could become a vehicle for discrimination against persons with disabilities by the local government, and could provide an entry point for neighborhood hostility against housing for disabled populations.

Local governments' land use and zoning actions concerning housing are subject to the federal Fair Housing Act and the California Fair Employment and Housing Act. These laws prohibit the use of zoning for discriminatory purposes, and in some cases prohibit zoning laws that have a discriminatory effect on persons with disabilities. The Fair Housing Act and Fair Employment and Housing Act also create an affirmative duty for a local government to accommodate persons with disabilities, for example, by granting a variance that would allow a group home to locate in an area where the facility does not meet a zoning requirement. This duty is qualified; the locality is entitled to balance the burden required to grant the accommodation and the adverse effect on the locality's general policies against the benefit of the accommodation.

This Chapter discusses the Fair Housing Act's prohibitions on zoning laws that have a discriminatory intent or a discriminatory effect on persons with disabilities, and also the scope of the Fair Housing Act's duty to accommodate. Since most of the relevant court cases interpret the federal law, the discussion focuses on the federal Fair Housing Act.

Section A: Land Use Actions with Discriminatory Intent

Courts are hostile to any zoning laws that, on their face, treat housing for people with disabilities differently from other housing. Restrictions on the location of residential care facilities, for example, will trigger court scrutiny. Spacing requirements (that is, requirements that facilities be a certain distance apart),[33] requirements for special use permits,[34] neighbor notification requirements,[35] and special assurances[36] are all suspect if they apply only to housing for persons with disabilities. Rather, any such zoning provisions must apply on a neutral basis to all structures over a certain size or to all similar living arrangements. San Francisco, for instance, after considering a neighbor notification requirement which would have applied specifically to assisted housing, adopted instead a more defensible neighbor notification program for city financial assistance for a broad range of projects.

Similarly, the Fair Housing Act explicitly says that it does not bar a local government from enacting reasonable occupancy limits (that is, limits on the number of persons who can live in a building of a certain size or room count), so long as the occupancy limit is applied in a neutral manner.[37] While the state Fair Employment and Housing Act does not contain the same explicit provision, it would probably be interpreted to reach a similar result.

Any different treatment of persons with disabilities must be justified by a legitimate reason, not merely by stereotypes or hostility. For example, different safety provisions or fire code requirements are permissible only if they are grounded in real differences between persons with disabilities and others.[38] Similarly, special permit requirements may be allowed, but only where they provide some objective standard for approval or disapproval that, again, is grounded in the real differences between persons with disabilities and others. Where special permits are standardless, and provide a vehicle for arbitrary decision-making, they are impermissible.[39]

Some local governments have attempted to enact minimum spacing requirements for residential care facilities with the allegedly benign justification that such spacing will foster the deinstitutionalization of persons with disabilities and their integration into the community. There is some disagreement about the permissibility of such spacing requirements. Although one federal circuit court has accepted the deinstitutionalization rationale,[40] the more common view is that spacing requirements reflect an unreasonable fear of saturation by persons with disabilities, and are an impermissible restriction.[41]

Section B: Land Use Actions with Discriminatory Effect

Courts will also scrutinize zoning laws and decisions that are neutral on their face, but are applied in a manner that discriminates against or adversely affects persons with disabilities. When a local government takes action that delays or discourages housing for persons with disabilities, courts will compare the treatment of this housing to the treatment of other similarly situated housing.[42] Local governments will often argue that their requirements relate not to the disabilities of prospective occupants of supportive housing, but to such "objective" factors as parking and traffic which may be generated in a residential neighborhood when services are provided. The validity of such arguments depends on the substance of the "objective" factors.

Likewise, a local government may not deny a variance to a provider of housing to persons with disabilities when it routinely grants variances to similarly situated permit applicants constructing housing for the non-disabled. Where zoning decisions that negatively impact persons with disabilities are not supported by some rational reason, the negative impact could serve as evidence of discriminatory intent on the part of the local government.[43]

Constitutional principles also prohibit local governments from treating group occupancies differently depending on whether the group is a "family" related by blood or marriage. Although this has been the law in California since the 1980 California Supreme Court decision in City of Santa Barbara v. Adamson, 27 Cal. 3d 123, some local ordinances still rely on legally defective traditional definitions of family and treat those not related by blood or marriage more restrictively.

Even when a local government does not intend to discriminate against persons with disabilities, and when its zoning laws apply equally to all permit applicants, the law may be found to violate the Fair Housing Act due to its disproportionate burden alone. However, such cases are considerably more rare than cases in which discriminatory intent can be inferred, and are less likely to be successful. For example, occupancy limits exist in many local zoning codes, and are specifically authorized by the Fair Housing Act,[44] yet often operate to restrict the siting of group homes and residential care facilities. To defeat these occupancy limits, a housing provider would have to show the absolute necessity of a certain minimum occupancy level to its financial viability or its program of service.[45] Such a claim ordinarily takes the form of a request for reasonable accommodation, described below.

Section C: Reasonable Accommodation in Land Use Approvals

The affirmative duty under the Fair Housing Act to accommodate persons with disabilities will also cause local zoning laws to yield in many cases. Many challenges to neutral laws with a discriminatory effect will appear as reasonable accommodation cases. If a person with a disability requests that a local government waive a particular provision, in whole or in part, as a way to meet that person's special needs, then the local government may be required to allow the nonconformity as a reasonable accommodation. For instance, as noted below, localities have been required to allow exceptions from setback requirements so that a paved path of travel can be provided.

Courts determine whether a local government must grant a variance or other exception to its existing zoning scheme as a reasonable accommodation on a case-by-case basis, based on the specific facts of each case. The basic test is whether the zoning change or variance will undermine the fundamental purpose of the zoning law, and also whether the change will impose significant financial or administrative burdens on the local government.[46] Nearby property owners' fear of effects on their property values is not part of this test, but neighbors can argue that the policy from which an exception is sought is important and that the policy protects their property values.

Establishing an entirely different use from those allowed by an area's zoning, such as a residential use in a commercially zoned area, is usually not considered a reasonable accommodation.[47] However, evidence that the same local government has allowed similar nonconforming uses in other cases can provide evidence of discriminatory treatment and lead a court to order the variance.

A variance that represents only a minor change to existing zoning, such as a greater building size (for instance, to permit space for treatment or accessibility), is more likely to be considered a reasonable accommodation than, for instance, allowing an otherwise prohibited use. But even variances of less significant rules are not automatic, and typically courts will view a variance as a reasonable accommodation only where it involves a marginal change from existing zoning.[48] A request that is too large will not be deemed reasonable.[49] Moreover, a permit applicant must be flexible, and must be willing to negotiate with the local government over the extent of the reasonable accommodation.[50] Whether a variance for greater size will be allowed depends on whether the greater size is necessary to the effective operation or financial viability of the facility.[51]

Building code provisions, even if they serve a legitimate safety purpose, must sometimes be waived as a reasonable accommodation. In one case, the local government reclassified a home for persons with mental disabilities as an institutional use, and ordered the home to install an expensive sprinkler system.[52] The court ordered a waiver of the sprinkler requirement as a reasonable accommodation, because the court determined that residents with mental disabilities did not pose a unique, greater fire danger. Again, the test was whether the reasonable accommodation would frustrate the purposes of the overall legal scheme, and the court held it did not.

Reasonable accommodations can also involve allowing tenants or building owners to make physical modifications in their structures to provide access to persons with disabilities. Such modifications usually involve minor physical alterations, such as building a paved driveway in the front yard of a resident who has a disability in violation of local setback requirements,[53] or allowing a side yard rather than the backyard otherwise required by local zoning.[54]

A local government can avoid giving additional reasonable accommodations if its zoning laws already provide special benefits or exceptions to persons with disabilities. Courts have upheld occupancy restrictions on residential care facilities and other housing for persons with disabilities, for example, where the local zoning already allowed greater size or occupancy for these facilities than for other structures.[55] A variance could be denied in these cases because the higher occupancy limit on the face of the law was itself viewed as a reasonable accommodation.

Section D: Land Use Approvals for Supportive Housing

Question 1: Is it legal for a local government to require a conditional use permit for supportive housing?

Courts generally decide this on a case-by-case basis, based on whether the permit requirement also affects those without disabilities, the justification for the requirement, and the extent of the requirement's effects on persons with disabilities.

Zoning ordinances sometimes include requirements that certain types of projects cannot be located in a particular zone without receiving a special "conditional

use" permit from the local government, which is only granted at the discretion of the local government after weighing the advantages and disadvantages of the project. Requiring a conditional use permit for supportive housing facilities may be illegal, depending on whether the requirement for the permit has a discriminatory intent or effect.

Under California state law, licensed facilities serving six persons or fewer receive special land use protection. California requires that many types of licensed facilities serving six persons or fewer be treated for zoning purposes like single-family homes. Except in extraordinary cases in which even a single-family home requires a conditional use permit, these laws bar conditional use permits for facilities which serve six or fewer persons. This protection applies to intermediate care facilities for individuals who have developmental disabilities (Health and Safety Code Section 1267.8), residential facilities for persons with disabilities and for abused children (Health and Safety Code Section 1566.3, and Welfare and Institutions Code Section 5116), residential facilities for persons with chronic life threatening illness (Health and Safety Code Section 1568.0831), residential facilities for the elderly (Health and Safety Code Section 1569.87) and alcoholism and drug treatment facilities (Health and Safety Code Section 11834.23).

In each of these cases, state law protects facilities which by definition require some form of state license. Therefore, these statutes do not protect a non-licensed facility. Non-licensed facilities and licensed facilities for more than six are still entitled to protection against discrimination under the state and federal fair housing acts and other statutes, but they do not receive the stronger protection which the listed statutes give. Nothing in the broader federal or state fair housing laws or other state anti-discrimination law creates a blanket prohibition on all conditional use permit-type requirements, and therefore the jurisdiction may require a conditional use permit. The legality of requiring such a permit depends on whether it has a discriminatory intent or effect.

In assessing whether a court would find a discriminatory intent or effect, the first question is whether the permit requirement also applies to uses other than housing for persons with disabilities. Courts generally do not uphold permit requirements which, on their face, apply only to housing for protected classes.

Different treatment of persons with disabilities must be justified by legitimate reasons grounded in real differences between persons with disabilities and others. For instance, one court struck down local fire code provisions requiring extra safety measures for housing for the elderly and persons with disabilities because the requirements were based on stereotypes.

Where conditional use permit or similar requirements apply to a range of uses, not limited to those serving persons with disabilities or other protected classes, they are more likely to be upheld but may still be subject to challenge if applied in a way that discriminates against or adversely affects persons with disabilities. For instance, one court found a Fair Housing Act violation for denial of a variance for a nursing home in a residential area, where the nursing home was physically substantially similar to a retirement community, and retirement communities were allowed. Conditional use requirements would be similarly subject to challenge in other cases based on good evidence that a conditional use permit or similar requirement is applied differently to housing for those with disabilities, or is applied mainly to block such housing. Courts will also invalidate use permits and like requirements if they fail to provide standards for approval or disapproval and are applied arbitrarily to housing for persons with disabilities or other protected groups.

Finally, in assessing whether the permit requirements are valid, courts will look at the non-discriminatory justifications asserted for permit requirements or other applications.

Question 2: Is it legal for a local government to require a conditional use permit for transitional housing for people who are homeless?

In California, a conditional use permit requirement specifically for transitional housing for homeless people is probably not legal; in other states where only the federal Fair Housing Act applies, such a requirement could still be illegal, if it primarily affects persons with disabilities.

Under California law, a local government could probably be successfully challenged if it applied requirements to transitional housing for people who are homeless which do not apply to other comparable uses. California Government Code Section 65008(d) prohibits any local government from imposing different requirements on a residential development or emergency shelter either because the development or shelter receives government financial assistance or based on the income levels of the expected occupants.

To determine whether requirements are different, the rules for transitional housing would have to be reviewed alongside those for other comparable development. The statute does not say how to make this comparison. For transitional housing in which tenants are expected to have longer stays, the

comparison should probably be to apartments; for transitional housing in which tenants are expected to have shorter stays, the logical comparison would be other short-term occupancies, such as hotels, boarding or rooming houses, time-share projects, or single-room occupancy housing with short-term occupancies. The borderline between a "longer" and a "shorter" stay is not established, but probably falls somewhere between 60 days and one year, depending on the length of time a typical resident would remain in the development. Under Section 65008(d), a conditional use permit probably cannot be required for transitional housing, unless conditional use permits are also required for these comparable uses.

The courts have not yet interpreted Section 65008(d), and a local government may assert that the section should not be interpreted to protect transitional housing for people who are homeless. Because the statute applies to "residential development," a local government might question whether transitional housing is "residential." However, because the statute expressly covers emergency shelters, these technical distinctions would probably be rejected by a court.

Outside California, assuming there is no applicable state law comparable to Section 65008, the answer is less clear. Neither homelessness nor poverty in itself is considered a disability, and neither condition is directly protected by federal law governing local land use decisions. The Fair Housing Act would apply if it could be shown that the population affected by such a conditional use requirement was expected to have disabilities. As with other conditional use and similar requirements (discussed in the immediately preceding question above), the Fair Housing Act would be applied on a case-by-case basis, with the outcome depending on the extent to which the requirement focused on persons with disabilities, how drastically the requirement affected such persons, and the legitimacy of the underlying policies on which the local government relied to justify the requirement.

Question 3: Is it legal to require public hearings before a supportive housing facility is sited?

As with the conditional use permits discussed above, the legality of a public hearing requirement would be decided case-by-case.

The legal principles which apply to public hearing requirements are essentially the same as those which apply to conditional use permit requirements. Such hearing requirements are more likely to be invalidated if they apply only to facilities for protected groups, either on their face or in practice, if they are

applied arbitrarily, if they lack legitimate justification grounded in objective facts, or if they are not linked to some criteria for decision on the project which is subject to the hearing. They are more likely to be upheld if they apply to broad classes of facilities, or are justified by verifiable effects which may result from such facilities and are linked to stated principles for decision-making which limit the possibility of arbitrariness.

In California, licensed facilities serving six residents or less receive additional protections from the statutes cited above, and should be subject only to those public hearing requirements which also apply to single-family homes.

In a number of cities, public hearing requirements have been imposed not on project land use approvals, but as a precondition to local financial assistance. Such hearing requirements are still subject to challenge if limited to housing for people with disabilities or other protected groups. However (as with the San Francisco neighborhood notification example discussed in Section A above of this Chapter Seven), a broadly applicable requirement for a hearing before funding approval is likely to be difficult to challenge, given that local government generally has wide discretion in allocating limited financial assistance.

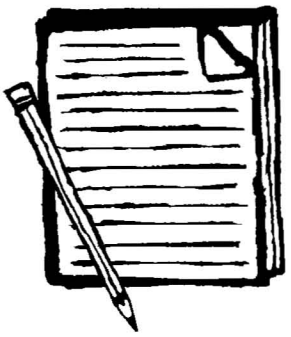
Question 4: Is local government required to grant a variance or discretionary approval for supportive housing as a reasonable accommodation under the state or federal Fair Housing Acts?

Local government may be required to grant a variance or approval as a reasonable accommodation if justified by the facts.

A local government may be required to grant a variance or other exception to its zoning requirements as a reasonable accommodation. However, it will not always be required to do so. Courts decide this issue case-by-case, based on the specific facts of each case.

The basic test is whether the variance or other change will undermine the fundamental purpose of the zoning law or impose significant financial or administrative burdens on local government. Also, the applicability of the reasonable accommodation requirement depends in practice on how drastic a variance or other change is required. Establishing an entirely different use or dramatically different density, such as a residential facility in a commercial area or an apartment building in a single-family zone, is usually not required as a reasonable accommodation. However, if there is evidence that similar variances

or exceptions have been granted in the past, then a variance or exception could be required as a reasonable accommodation. In contrast, a relatively minor change to existing zoning, such as a somewhat larger building, or modification of parking or setback requirements, is more likely to be required as a reasonable accommodation.



Endnotes:

1 Keith v. Volpe, 855 F.2d 467 (9th Cir. 1988).

2 Independent Housing Services v. Filmore Center Associates, 840 F.Supp.1328 (N.D.Cal.1993).

3 In Re Cox, Cal. 3d. 205 (1970) f.n. 11.

4 The Unruh Act and the Fair Housing Act both allow occupancy in certain housing developments to be limited to senior citizens, although each law sets forth different requirements for a project to qualify as a senior citizen development, and the federal law does not pre-empt the state law (California Civil Code Sections 51.2 - 51.4; 42 U.S.C. 3607(b)(2)).

5 Preamble II 24 CFR ch.1, subch A, app. I, 54 Fed. Reg. 3246 (Jan. 23, 1989).

6 Easley v. Snider, 36 F.3d 297 (3rd Cir. 1994).

7 The Secretary of HUD has delegated the authority to approve targeting of a specific disability in Section 811 projects to the Housing Director or the Director of the Multifamily Housing Division in HUD regional offices. Revocation and Redelegation of Authority Notice, 59 Fed. Reg. 62739, 62743, and FR-4274-D-01.

8 Bragdon v. Abbot, 524 U.S. 624, 118 S.Ct. 1206 (1998).

9 Moreau v. HUD, No. C 89 3469 (N.D. Cal.) (1989).

10 Harris v. Capital Growth Investor XIV, 52 Cal.3d 1142 (1991).

11 P.L. 105-276; HUD FY 1996 Appropriations Act, Section 554 striking Section 8(t) of the Housing Act of 1937.

12 Lindsey v. Normet, 405 U.S. 56 (1972).

13 PLR 8944042; PLR 8945036; PLR 8950057; see also Internal Revenue Bulletin 1989-2.

14 24 CFR 100.202.

15 The Quality Housing and Work Responsibility Act (Title V of H.R. 4194) is also known as the "Public Housing Reform Act," and amended the United States Housing Act of 1937 (the "Act"), at 42 U.S.C. 1437. It also contains four freestanding sections (576 through 579) which are codified in Chapter 135 ("Residency and Service Requirements in Federally Assisted Housing") at 42 U.S.C. 13661, 13662, and 13664.

16 United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992).

17 Shafer v. Preston Memorial Hospital Corporation, 107 F.3d 274, 1997.

18 *See* 42 U.S.C. 3604(f)(3)(A); 24 CFR 8.24(a); and 28 CFR 35.150.

19 *See* 42 U.S.C. 3604(f)(3)(B).

20 *See* Smith & Lee Associates v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996); Southeastern Community College v. Davis, 442 U.S. 397, 410-12 (1979).

21 *See* Robards v. Cotton Mill Associates, 1998 WL 321714 (Me.), June 18, 1998 (holding that a landlord can require physician's authorization that an applicant is disabled, but cannot require the applicant to provide a description of the disability).

22 Roe v. Boulder Housing Authority, 909 F.Supp.814 (D.Col. 1996); Roe v. Sugar Mill Associates, 820 F.Supp. 636, 639-40 (D.N.H. 1993).

23 Niederhauser v. Independence Square Housing Corporation, No. C96-20504 RMW (N.D. Cal. August 25, 1998) (order granting in part and denying in part plaintiff's motion for summary judgment).

24 As noted in Footnote 2 of **Appendix 1**, this Guide's discussion of facility licenses emphasizes community care facilities because the definition of "community care facility" creates the possibility that a supportive housing provider will inadvertently trigger a community care licensing requirement.

25 A court recently discussed this trigger for licensing in Grimes v. State Department of Social Services, 70 Cal. App. 4th 1065, 1071-72 (1999). The court ruled in Grimes that DSS abused its discretion by refusing to exempt from licensing a housing situation in which a person with special needs (who was mentally competent) lived as a tenant in the home of two close friends who provided care and supervision in addition to housing.

26 *See* Bryant Woods Inn v. Howard County, 124 F.3d 597, 605 (4th Cir. 1997).

27 *See* Bronx v. Ineichen, 54 F.3d 425 (7th Cir. 1995) (holding that a requested hearing dog was not necessary because the tenants had lived before without the dog).

28 *See* Gittleman v. Woodhaven Condominium Assoc., Inc., 972 F. Supp. 894 (D.N.J. 1997) (requiring a condominium association to provide a specially designated parking space as a reasonable accommodation, even though the space would violate the condominium deed restriction that common areas were designated for non-exclusive use only).

29 *See* HUD v. Ocean Sands, Inc., P-H: Fair Housing – Fair Lending Rptr. par. 25,055, at pp. 25539-44 (HUD ALJ 1993).

30 *See* Rodriguez v. 551 West 157th St. Owners Corp., 992 F. Supp.385 (S.D.N.Y. 1998) (landlord not required, as a reasonable accommodation, to install wheelchair ramps and lifts).

31 Temple v. Gunsalus, 1996 U.S. App. LEXIS 24994.

32 Niederhauser v. Independence Square Housing Corporation, No. C96-20504 RMW (N.D. Cal. August 25, 1998) (order granting in part and denying in part plaintiffs' motion for summary judgement).

33 *See, e.g.,* Larkin v. State of Michigan, 89 F.3d 285 (6th Cir. 1996).

34 *See* ARC of N.J., Inc. v. State of New Jersey, 1996 U.S. Dist. LEXIS 19481, Dec. 31, 1996 (striking down zoning law that required conditional use permits for residential care facilities with seven or more residents).

35 *See* Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D. Md. 1993) (striking down special licensing law that required neighbor notification for the development of group homes for people with disabilities).

36 *See* Bangerter v. Orem City, 46 F.3d 1491 (10th Cir. 1995) (striking down special requirements that a home for the mentally retarded must provide 24-hour supervision to its residents and must establish a community advisory panel to handle resident complaints).

37 42 U.S.C. Section 3607(b)(1). *See* U.S. v. Village of Palatine, 37 F.3d 1230, 1233 (7th Cir. 1994) (denying plaintiff's charge that public hearing requirements, when applied to a proposed group home, would allow a "firestorm" of local opposition). *But see* City of Edmunds v. Oxford House, Inc., 115 S.Ct. 1776 (1995) (holding that a single-family zoning limitation does not meet the Section 3607(b)(1) exception).

38 *See* Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057 (N.D. Ill. 1996) (striking down fire code provisions that require extra measures for housing for the elderly and disabled because the requirements were based on stereotypes of the abilities of the elderly and disabled).

39 *See* Sunderland Family Treatment Services v. City of Pasco, 903 P.2d. 986 (Wash. 1995) (striking down a special use permit requirement for "group care facilities" because the law provides no standards for permit denial).

40 Familystyle of St. Paul v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991).

41 *See, e.g.,* Larkin v. State of Michigan, 89 F.3d 285 (6th Cir. 1996).

42 *See* Samaritan Inns v. District of Columbia, 1995 U.S. Dist. LEXIS 9294 (finding a FHA violation for city action to pull a permit and delay construction of a home for former drug abusers, where the home was allowed by local zoning as a matter of right); Hovsons, Inc. v. Brick, N.J., 89 F.3d. 1096 (3rd Cir. 1996) (finding a FHA violation for the denial of a variance to build a nursing home in a residential area, where the zoning code allowed retirement communities as of right, and the nursing home was substantially similar to a retirement community in its physical elements).

43 *See, e.g.,* Baggett v. Baird, 1997 U.S. Dist. LEXIS 5825, Feb. 18, 1997 (striking down as irrational a zoning requirement that nursing home residents must be "ambulatory"); Children's Alliance v. Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997) (finding intentional discrimination against abused and delinquent children where a zoning ordinance permits group homes with fewer than seven residents, but prohibits group homes with short-term residents).

44 42 U.S.C. Section 3607(b)(1).

45 *See* Gamble v. City of Escondido, 104 F.3d. 300, 306-307, n.2 (9th Cir. 1997) (denying plaintiff's claim that a city's denial of a conditional use permit to a group home, based on the size of the home, disproportionately and significantly affects the physically challenged; to establish disparate impact, plaintiff would have to demonstrate that persons with disabilities must live in group homes).

46 *See* Proviso Association of Retarded Citizens v. Village of Westchester, 914 F. Supp. 1555 (N.D. Ill. 1995).

47 *See* Homeless Action Committee v. City of Albany, 1997 WL 792944 (N.D.N.Y.), Oct. 2, 1997 (holding that the city was not required to grant a variance to allow a home for recovering alcoholics to operate in a commercially zoned neighborhood, but allowing that discriminatory treatment might be shown if the city had granted other variances since it had established the commercial zone). *But see* Judy B. v. Borough of Tioga, 889 F Supp. 792 (M.D. Pa. 1995) (ordering a variance to be granted for a 15-person home for people with disabilities, where the home would occupy a former motel in a commercial zone).

48 *See* Hemisphere Bldg. Co. v. Village of Richton Park, 1998 WL 100291 (N.D. Ill.) Feb. 12, 1998 (denial of variance is permissible when developer requested nine units and city was willing to allow six).

49 *See, e.g.*, Act I, Inc. v. Zoning Hearing Board of Bushkill Township, 704 A. 2d. 732 (Pa. Commw. 1997) (denial of variance for group home for abused girls is permissible because allowing 14 unrelated individuals in a home where local zoning allows only four unrelated individuals is not "reasonable").

50 *See* Erdman v. City of Atkinson, 84 F.3d. 960 (7th Cir. 1996) (holding that it was permissible to deny a conditional use permit to a home for 24 disabled elderly persons where the developer failed to comply with the suggestions of the local government for modification of the project).

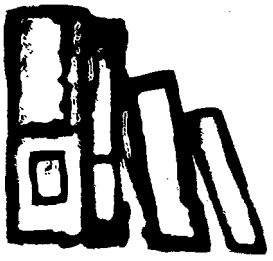
51 *See* Bryant Woods Inn v. Howard County, Maryland, 1997 U.S. App. LEXIS 22544, Aug. 25, 1997 (holding that variance was not required to allow a facility for people with disabilities to expand to 15 units, where local zoning permits eight units as of right, because the larger size was not necessary to the effective operation or financial viability of the facility).

52 Proviso Association of Retarded Citizens v. Village of Westchester, 914 F. Supp. 1555 (N.D. Ill. 1996).

53 Trovato v. City of Manchester, 992 F. Supp. 493 (D.N.H. 1997).

54 U.S. v. City of Philadelphia, 838 F. Supp. 223 (E.D. Pa. 1993) (holding that the substitution of a side yard for a rear yard is required as a reasonable accommodation, because it would not require a fundamental alteration of the city's zoning code).

55 *See, e.g.*, Oxford House v. City of St. Louis, 1996 U.S. App. LEXIS 2838, Feb. 23, 1996 (upholding a zoning code restriction on the number of unrelated handicapped residents who could live in a group home in a single-family neighborhood, where the zoning code allowed only three unrelated nonhandicapped individuals to reside together); Elderhaven, Inc. v. City of Lubbock, 98 F. 3d. 175 (5th Cir. 1996) (finding no FHA violation where the city granted a variance for a group home to house 10 disabled persons, rather than the 12 persons requested, where the zoning code required any group of five or more people to apply for a variance).



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Appendix 1

Overview of Other Relevant Laws

Section A: California Planning and Zoning Law

The United States and California Constitutions give local governments broad "police power" to regulate land use in their local jurisdictions in order to protect the health, safety, and welfare of residents. Cities and counties regulate land use by adopting general plans and by adopting zoning ordinances. The general plan is the "land use constitution" of the jurisdiction: all development decisions must be consistent with the general plan. General plans are required to have seven different subject matter chapters or "elements," the most relevant of which for supportive housing providers are the land use element and the housing element. The land use element sets forth the general land uses permitted in different parts of the city or county, such as high density residential, low density residential, commercial, industrial, open space, and others. The housing element governs the development of housing in the jurisdiction. Each local jurisdiction's housing element must identify sites for all types of housing, including emergency shelters and transitional housing. In addition, housing elements must also include, as part of a policy of providing housing to all segments of the population, programs that promote equal opportunities in housing.[1]

Zoning ordinances, which must be consistent with the general plan, establish districts where particular land uses (for example, single-family residential, multifamily residential, or commercial) are permitted by right and other land uses (for example, a nightclub) are permitted only if the planning commission or city council approves a "conditional use" for the property. Zoning ordinances set forth detailed requirements that apply in each zoning district and also usually grant local planning commissions and city councils the power to modify these zoning requirements by granting a "variance" to individual properties. The California Planning and Zoning Law is the state statute that sets minimum standards for land use planning and zoning and land use approvals by cities and counties.

California's Planning and Zoning Law contains two provisions which address housing discrimination and disapproval of housing developments and are

relevant to the siting of supportive housing facilities. California Government Code Section 65008 prohibits denying any residence opportunity or land use approval based on race, sex, color, religion, ethnicity, national origin, ancestry, lawful occupation, age, method of financing the housing, or income level (disability is not included in this statute). California Government Code Section 65589.5 (known as the "Anti-NIMBY Law") requires approval of housing development projects for very low, low, or moderate income households, and prohibits the imposition of approval conditions that make such projects infeasible, unless the disapproving local government can make one of the following six specific findings:

1. the local government has a legally adequate and up-to-date housing element and the project is not needed to meet the jurisdiction's fair share of the regional need for lower or moderate income housing;

2. the project would have a specific, measurable adverse impact upon public health or safety, under objective written standards, that cannot be mitigated without rendering the project unaffordable;

3. the denial of the project or the imposition of conditions is required in order to comply with state or federal law;

4. the project would increase the concentration of very low income households in a neighborhood that already has a disproportionate number of housing developments reserved for such households, as compared to other predominantly very low income neighborhoods, and the project would be approved and feasible elsewhere in the jurisdiction;

5. the project land is zoned for agriculture or does not have adequate water or wastewater facilities to serve the project; or

6. the project is inconsistent with both the jurisdiction's zoning ordinance and the land use designation in the jurisdiction's general plan as it existed when the application for the development was filed.

Section 65589.5 was amended in 1999 to require a court which finds that the section has been violated to order that the project in question be approved by the local government within 90 days.

The federal Fair Housing Act also prohibits discriminatory zoning and land use actions by local governments and imposes an affirmative duty on local governments to adjust land use requirements as necessary to reasonably accommodate housing for people with disabilities.

Section B: California Affordable Housing Law and Other Laws that Affect Local Government Decisions Related to Siting of Supportive Housing Projects

The California Affordable Housing Law (Government Code Section 65008(d)) prohibits any local government from imposing different requirements on a residential development or emergency shelter either because the development or shelter receives government assistance or based on the income levels of the expected occupants.

Chapter Seven

A number of other California statutes provide special protections for licensed residential care facilities (including community care facilities, residential health facilities, and alcoholism and drug treatment facilities), which serve six or fewer people. These laws prohibit requirements for conditional use permits, zoning variances or other special zoning clearances for these facilities that are not also required for a single-family residence in the same zone. The discussion in Chapter Seven, Section D, Question 1 lists the types of facilities covered by this law (see Health and Safety Code Sections 1267.8, 1566.3, 1568.0831, 1569.87, and 11834.23 and Welfare and Institutions Code Section 5116). While this law provides extra protections for licensed facilities, this does not mean local governments are therefore authorized to impose special requirements on unlicensed facilities.

Section C: California Licensing Laws

A license is explicit governmental permission to do something that would be illegal without such permission. The most relevant licenses for operating supportive housing in California are a real estate broker's license and a community care facility license.

It is unlawful, without a California real estate broker's license, to accept compensation for managing another person's real property (California Business and Professions Code Section 10131(b)). "Another person" is defined literally as any other person, regardless of the affiliation between the property owner and the property manager. Managing real property includes a broad range of tasks, including placing ads, showing units for rent, and collecting rent. Given these

rules, a supportive housing organization should be licensed as a real estate broker before accepting compensation for property management activities at the project of another person (including a corporate affiliate).

It is also unlawful, without a California community care facility license, to operate a facility defined by California law as a "community care facility" (Health and Safety Code Section 1500 *et seq.*; 22 CCR 80005). Community care facilities include transitional shelter care facilities, transitional housing placement facilities, residential facilities, adult day care facilities, adult day support facilities, therapeutic day services facilities, foster family homes, small family homes, social rehabilitation facilities, and community treatment facilities. The term "community care facility" and the license requirement are further discussed in Chapter Six, Section A.[2]

Chapter Six

Acting without a required real estate broker's or community care facility license is punishable by both civil penalties and criminal penalties. Because criminal penalties apply, a person acting without a required real estate broker's or community care facility license has the added risk of the "negligence per se" rule. This rule of personal injury law deems a person who is violating a criminal law to act negligently even if the person was not actually negligent. Thus a supportive housing provider acting without a required real estate broker's or community care facility license faces potential liability for personal injuries suffered by residents even where the provider has acted reasonably. For example, if a fire causes injury to residents in a building operated by an unlicensed provider who should be licensed, then in a personal injury lawsuit by the fire's victims, the unlicensed provider could be deemed negligent, even if it actually acted reasonably.

Section D: California Landlord-Tenant Law, Transitional Housing Misconduct Law, and the Local Rent Control and Eviction Ordinances

State landlord-tenant law applies whenever a tenant occupies property as a renter for more than thirty continuous days (Civil Code Section 1940; Revenue and Taxation Code Section 7280). An unlicensed supportive housing facility that charges its residents rent (which includes program fees) is covered by state landlord-tenant law. California Civil Code Sections 1940 *et seq.* govern the basics of the landlord-tenant relationship, including leases and rental agreements,

security deposits, the landlord's right to enter the tenant's unit, and notices to change the terms of tenancy or to terminate tenancy. California Code of Civil Procedure Sections 1161 *et seq.* govern termination of tenancy and evictions. *The Landlord's Law Book – Rights and Responsibilities*, published by Nolo Press, is an excellent self-help resource book on landlord-tenant law.

The Transitional Housing Misconduct Law (California Health and Safety Code Sections 50580 *et seq.*) authorizes operators of transitional housing programs (defined in the law as housing for homeless persons which includes a comprehensive social service program and a tenancy term of at least 30 days but no more than 24 months) to remove program participants from housing by applying to a court for a temporary restraining order and injunction, where certain kinds of misconduct have occurred and the participant has not resided on the premises for more than six (6) months. However, if the participant violates the court order, eviction proceedings under Code of Civil Procedure Section 1161 may still be required.

Some cities and counties have adopted local rent control and just cause eviction ordinances which also affect the landlord-tenant relationship. Many local rent control and eviction control ordinances do not cover tenancies where the rent is controlled by another branch of government. Consequently, a supportive housing provider that has signed a regulatory agreement with a department of the federal, state, or local government that regulates rents in the facility will often, although not always, be exempt from local rent and eviction controls. The local rent control board that administers the rent or eviction control ordinance should be contacted for guidance on the kind of projects that are covered by, or exempt from, the local ordinance. Rent and eviction control laws vary greatly from community to community, making it important to review carefully the ordinance and regulations that apply in your own city or county, and to contact rent board staff for assistance in interpretation.

Section E: Privacy Laws

Many different laws protect the privacy of the individual. Courts have held that the United States Constitution provides a right of privacy, although the right is not specifically stated in the Constitution. The government may not infringe on a person's zone of privacy unless it has a compelling reason to do so. The California Constitution also includes a right of privacy, which courts have interpreted to protect against the secret gathering of personal information by the government, the collection and retention of unnecessary personal information by

the government and business interests, the improper use of information gathered for one purpose but used for another or disclosed to third parties, and the failure to check on the accuracy of existing records.

Personal injury (or tort) law also protects the privacy of the individual. If a person or organization acts unreasonably and reveals personal information about a person, thereby harming the person, the harmed person may sue for invasion of privacy and be awarded damages.

Many federal and state statutes include confidentiality requirements. Federally funded public benefit programs (like Social Security), drug and alcohol programs, and housing programs include regulations protecting the confidentiality of program participants. California state laws that protect confidentiality rights include the Information Practices Act, the Confidentiality of Medical Information Act, portions of the Welfare and Institutions Code that cover state and county departments, and the Right to Financial Privacy Act.

Finally, many professionals (like counselors, therapists, social workers, doctors, and lawyers) are bound by confidentiality guidelines specific to their professions, which are included in codes of ethics and licensing regulations.

Section F: Physical Accessibility Laws

Chapter Six

The Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and state and local building codes include physical accessibility requirements. Which laws apply depends on the type of project, whether it involves new construction or rehabilitation, and the funding received by the project. Accessible design requirements for new construction and rehabilitation are described below. Accessibility issues in project operations are discussed as part of the "reasonable accommodations" addressed in Chapter Six, Section B, Question 2.

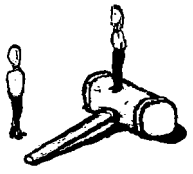
1. Accessibility-related laws that apply to new construction or rehabilitation when there is **no** government involvement.

The Fair Housing Act imposes physical accessibility requirements if (a) the building was first occupied after March 13, 1991, and (b) the construction activity is for a "covered multifamily dwelling." A covered multifamily dwelling is every unit in an elevator building with at least four units, and every ground

floor unit in a non-elevator building with at least four units. The first occupancy date threshold makes the Fair Housing Act physical accessibility requirements applicable, for practical purposes, only to new construction: the Fair Housing Act applies to rehabilitation of only those buildings that were already subject to the Fair Housing Act at the time of the new construction.

Title III of the ADA imposes physical accessibility requirements if the building or space is a place of public accommodation or a commercial facility. Housing is neither a place of public accommodation nor a commercial facility, but certain components of a residential building (such as a rental office), and non-residential components of a mixed-use building, may be a place of public accommodation or a commercial facility, depending on whether members of the general public are expected to visit the component (such as a rental office) or do business there. In addition, social service centers within residential buildings may be subject to Title III if a significant level of service is provided. Homeless shelters are considered to be social service facilities that are places of public accommodation, and therefore subject to Title III.

Finally, state and local building codes often impose certain accessibility-related design requirements. Although a discussion of such codes is beyond the scope of this Guide, such codes may well require greater accessibility than the federal laws discussed above. For a discussion of the relationship between federal law, state law, and local law, see Chapter Three, Section A, Question 2. For a discussion of what must be done when different laws have mutually inconsistent requirements, see Chapter Three, Section A, Question 3.



Chapter Three

2. Accessibility-related laws that apply to new construction or rehabilitation when there is government involvement.

All of the requirements described under Question 1 above continue to apply where there is government involvement. In addition, Title II of the ADA applies to the extent that the government involvement transforms the development into part of a public program. Furthermore, Section 504 imposes accessible design requirements if (a) there are five or more units in the project, and (b) the government involvement at issue is federal funding (including state or local funding under federal programs such as HOME or CDBG, but excluding federal tax-related funding such as low-income housing tax credits or tax-exempt bonds, and excluding tenant-based Section 8) (24 CFR 8.4(b)(6)).

3. Requirements of each accessibility-related law that are applicable to new construction or rehabilitation.

For all accessibility requirements, a housing provider should consult an architect. However, it is possible to summarize some of the accessibility requirements.

The Fair Housing Act has the following requirements (stated in a simplified form):

a. A building must have an entrance on an accessible route, except where compliance is impractical due to terrain or unusual characteristics of the site.

b. If a building has a building entrance on an accessible route, then the building's public and common use areas must be readily accessible to and usable by handicapped persons. HUD has explained this to mean that persons with disabilities must have access to at least one of each type of public/common facility offered.

c. Doors in accessible units must be usable by mobility-impaired persons.

d. There must be an accessible route into and through an accessible unit.

e. Light switches, electrical outlets, thermostats, and other environmental controls must be placed in accessible locations.

f. Bathroom walls in accessible units must be reinforced to allow installation of grab bars.

g. Kitchens and bathrooms in accessible units must have sufficient space to allow people in wheelchairs to maneuver about.

A housing provider can comply with these requirements by following specific standards spelled out in American National Standards Institute (ANSI) document A117.1 and/or the Fair Housing Act Guidelines published by HUD. However, these do not preclude the use of other designs that would achieve compliance with the requirements. For details, ask your architect, local planning and building officials, the applicable local government's ADA office, the Pacific Disability and Technical Assistance Center (a nonprofit provider of technical assistance that can be reached at (800) 949-4232), and/or the Disability Rights Education Defense Fund (a nonprofit law firm that can be reached at (800) 466-4232). The Uniform Federal Accessibility Standards are available at **www.access-board.gov/ufas/ufas.htm**, codified at 28 CFR 36 and 49 CFR 37.

The ADA's accessibility requirements depend on the title of the ADA at issue. Under Title II, a public entity may currently choose (with limited exceptions) from two design standards, either the Uniform Federal Accessibility Standards ("UFAS") or the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). In addition, ANSI document A117.1 is available from ANSI's electronic store at **http://webstore.ansi.org/shopper-lookup.asp**, and the Fair Housing Act Guidelines are codified at 24 CFR Chapter I. Under UFAS, five percent of the units (or at least one unit) in a newly constructed multifamily housing project of fifteen or more units must be accessible for people with physical disabilities. There are no specific UFAS percentage requirements for rehabilitation of housing, but compliance with the five percent new construction requirement would be sufficient. Under Title III, ADAAG must be followed, but currently does not contain specific requirements for housing. To the extent that a particular type or element of a facility is not specifically addressed in such guidance, the type or element should be designed in accordance with the general directive that the facility be "accessible to and usable by" individuals with disabilities. In addition, there are special requirements for alterations. There are exceptions to the ADA requirements where compliance would be infeasible or structurally impractical. For details, ask your architect and/or local planning and building officials.

Section 504 has the following requirements in new construction and substantial rehabilitation: five percent of the units (or at least one unit) must be accessible for people with mobility impairment, and an additional two percent (or at least one unit) must be accessible for people with visual or hearing impairment. The requirements are less expansive for insubstantial rehabilitation. The UFAS design standards apply, but departures from UFAS are permitted where substantially equivalent or greater access and usability are provided. For details, ask your architect and/or your local planning and building officials.

1 California Government Code Section 65583.

2 Similar licensing requirements apply to other kinds of specialized facilities that serve special-needs populations. For example, "clinics" organized for outpatient health care must be licensed. This Guide's discussion of facility licenses emphasizes community care facilities because the definition of "community care facility" creates the possibility that a supportive housing provider will inadvertently trigger a community care licensing requirement. In contrast, it is unlikely that a supportive housing provider will inadvertently trigger a health facility licensing requirement.

Appendix 2

Fair Housing Laws Summary

Law	Law Applies to Whom	Who Is Protected by the Law	Provisions
Equal Protection Clause of the 14th Amendment to the U.S. Constitution (1868)	All state action, including actions by private parties who get governmental assistance, including owners of housing receiving government assistance.	Distinctions between people based on: • "suspect" classes & violations of "fundamental rights." Violations determined by "strict scrutiny" test; withstands test if "compelling state interest" and if there is no less restrictive alternative means for the state to achieve its objectives. • "semi-suspect" classes can be justified by "important governmental interest." • all other distinctions can be justified by a "rational basis."	Prohibits government from denying any person "equal protection of the laws." Prohibits irrational, arbitrary or unreasonable discrimination. Discriminatory motivation is required to show a violation of the Equal Protection Clause. Section 5 grants power to Congress to legislate against discriminatory conduct; pursuant to this, Congress has adopted civil rights laws, including Fair Housing Laws.
Fair Housing Act (1968) and Fair Housing Act Amendments (1988)	Applies to all housing— those receiving public funds and the private housing market (with several very narrow exceptions). Applies in sale, rental, financing and advertising of housing as well as to zoning and land use decisions by local government.	Enumerated bases: race, color, religion, national origin, gender, familial status and handicap. Definition of handicap: • physical or mental impairment which substantially limits one or more major life activities (or a record of such an impairment or being regarded as having one) ◦ physical or mental impairment: - physiological disorders ... - mental or psychological disorders... Includes HIV infection, emotional or mental illness, specific learning disabilities, alcoholism, drug addiction (but not current, illegal use of or addiction to a controlled substance). ◦ major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning and working.	Prohibits discrimination in housing. (Housing for seniors that meets certain criteria is exempt from the Act's prohibition of discrimination against families with children.) Discriminatory effect without discriminatory intent is generally sufficient to prevail in court. Standard of proof to justify discriminatory effect when there's no discriminatory intent is "business necessity." Requires a specific percentage of accessible units and specific accessibility requirements for newly constructed or substantially rehabilitated housing. Imposes affirmative duty on housing providers to provide reasonable accommodation to person with disabilities to allow them equal access to the housing. Reasonable accommodation: physical modification of the housing site/unit (at the tenant's expense) and/or a change to the provider's rules, policies and procedures, with the limitation that a provider is not required to undergo undue financial and administrative hardship or make a fundamental alteration to the nature of its program.

Law	Law Applies to Whom	Who Is Protected by the Law	Provisions
Section 504 of the Rehabilitation Act of 1973	Applies to all housing and non-housing programs receiving federal funding, including CDBG, HOME, HOPWA, Sections 202 and 811, McKinney Act. Does not include low income housing tax credits or tax-exempt bond financing. Applies to public and private owners receiving federal funding.	Individual with handicaps: any person who has a physical or mental impairment that substantially limits one or more major life activities (or a record of having such an impairment or being regarded as having one). Uses similar definitions as Fair Housing Act above. For purposes of employment, handicap does not include: • an individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents him/her from performing the duties of the job in question, or whose employment would constitute a direct threat to property or safety of others. • any individual who has a currently contagious disease or infection and who would constitute a direct threat to the health or safety of other individuals or who is unable to perform the duties of the job. For purposes of other programs and activities (including housing), handicap does not include: • any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the individual from participating in the program or activity in question, or whose participation would constitute a direct threat to property or the safety of others.	Prohibits discrimination on basis of disability. Requires access for people with disabilities to housing and non-housing programs operated with federal funds. Requires a specific percentage of accessible units and specific accessibility requirements for newly constructed or substantially rehabilitated housing. Requires integration of people with disabilities. Prohibits projects receiving federal funds from limiting occupancy to people with disabilities or with one particular type of disability unless such a restriction is authorized by a federal statute or executive order that applies to the project, e.g., Section 811, HOPWA, Shelter Plus Care, etc. Non-housing and housing programs or activities must be operated so when viewed in entirety they are readily accessible by people with disabilities. Non-substantial alterations are required to the maximum extent feasible. Existing facilities/programs are to be made accessible to extent it doesn't pose undue financial/administrative burden or fundamentally alter the nature of its program. Requires the owner to pay for physical modifications as part of duty of reasonable accommodation.

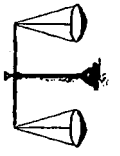
Law	Law Applies to Whom	Who Is Protected by the Law	Provisions
Americans with Disabilities Act (ADA) (1990)	Title II: state and local public entities Title III: commercial establishments and privately owned places of "public accommodation"	Individual with disabilities: any person who has a physical or mental impairment that substantially limits one or more major life activities (or a record of having such an impairment or being regarded as having one). Uses similar definitions as Fair Housing Act above. However, Title III defines symptomatic and asymptomatic HIV as protected.	Broad civil rights protection to people with disabilities, extending beyond activities of the federal government or programs receiving federal funds. Five parts or titles, two are relevant to supportive housing providers: **Title II:** prohibits discrimination by state and local government in all government programs and services (whether or not federal funding is utilized), i.e., requires them to operate services, programs and activities so when viewed in entirety, they are readily accessible. Has its own accessibility standards. Imposes reasonable accommodation duty. Allows state and local government to establish programs to target people with disabilities or a sub-group to provide them with equal access to housing, so long as overall programs are accessible. Unclear if Title II applies directly to nonprofit housing providers receiving state/local funds under contract. Clear that Title II requires public entities to ensure facilities receiving their funds are operated in a manner that enables the public entity to meet its Title II obligations. **Title III:** prohibits disability-based discrimination in commercial establishments and places of "public accommodation." Requires them to be constructed and altered in compliance with certain accessibility standards. Requires duty of reasonable accommodation. Public accommodation includes privately-run activities as long as their operation affects commerce: hotels and other places of lodging except owner-occupied buildings of less than five rooms...auditoriums and other places of public gatherings...day care centers, homeless shelters, and other social service centers. Public accommodation does not include portions of privately owned rental housing used exclusively as residences, but does include areas within facilities available to the general public, such as rental offices and community rooms available for rental or use by non-residents. (Social services programs operated by housing providers available to non-residents would be public accommodations.) If social services are provided only to residents and level of services is significant, services portion of premises may also be considered a public accommodation, subject to Title III.

Law	Law Applies to Whom	Who Is Protected by the Law	Provisions
California Fair Employment and Housing Act (FEHA) (1980)	All housing, except owner-occupied single-family homes with only one roomer or boarder. Applies to land use practices within California.	Enumerated bases of housing provisions of FEHA: race, color, religion, sex, national origin, familial status, disability, marital status, ancestry, and as of January 1, 2000, sexual orientation and source of income. Pre-empts local jurisdictions from protecting additional groups not named in FEHA or the Unruh Act.	Substantially same requirements as Fair Housing Act, including non-discrimination provisions and duty to provide reasonable accommodations. However, FEHA prohibits both intentional discrimination and facially neutral policies that have disparate adverse impact on protected groups. (FEHA is stricter standard than the Fair Housing Act, where statute is silent on discriminatory impact.)
Unruh Civil Rights Act (1905)	All business establishments, including housing.	Enumerated bases: sex, race, color, religion, ancestry, national origin and disability. Courts have extended law's protection under "arbitrary discrimination" clause to include: sexual orientation, familial status and age. Source of income was specifically rejected by CA Supreme Court as arbitrary discrimination.	Based on 14th Amendment, California statute prohibiting discrimination. California courts have interpreted the law broadly to prohibit all arbitrary discrimination, regardless of whether it's based on one of the specifically enumerated bases.
Local Housing Discrimination Ordinances	Some cities and counties have adopted local ordinances prohibiting discrimination in housing for groups not specifically protected by state or federal housing law. These are probably not enforceable against private owners of housing because of the pre-emption discussed under FEHA. However, if a local government is providing financial assistance to a project, it will have additional authority to regulate the operation of the project and may be able to impose non-discrimination requirements that protect additional classes not specifically protected under state law.		

Appendix 3

Supportive Housing Sources of Funding Summary

Funding Program/ Applicable Fair Housing Laws*	Type(s) of Assistance	Tenant Eligibility Authorized by Statute	1-Strike	Potential Conflicts for Blended Funding
Community Development Block Grant (CDBG) † • 14th Amendment / U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Housing acquisition, rehab, new construction; public services; public facilities and community buildings construction; accessibility work; code enforcement. Formula grant program administered by eligible jurisdictions; project sponsors apply/contract with jurisdictions. May apply to portion of a project.	**Populations:** May not sub-target a disability category unless have federal authorization, e.g., federal program like HOPWA. **Income Levels:** Households with incomes at or below 80% of area median income (AMI) adjusted for family size. Localities can further restrict maximum income if supported by local Consolidated Plan and HUD (and doesn't have a discriminatory intent).	No	
HOME Investment Partnership Programs † • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Rental housing production and rehabilitation; first-time homebuyer assistance; tenant-based rental assistance; rehab loans for homeowners. Formula grant program administered by eligible jurisdictions; project sponsors apply/contract with jurisdictions. May apply to portion of a project.	**Populations:** May not sub-target a disability category unless have federal authorization, e.g., federal program like HOPWA. **Income Levels (except where noted, applied to jurisdictions, not projects):** **Rental:** not less than 90% of households assisted must be at or below 60% AMI adjusted for family size and remainder must be at or below 80% AMI adjusted for family size. (On a project basis, if 5 or more HOME assisted units, 20% of households must be at or below 50% AMI; the balance of assisted units must be at or below 60% or 80% of AMI.) **Homeownership:** households with incomes at or below 80% of AMI adjusted for family size. Localities can further restrict maximum income if supported by local Consolidated Plan & HUD (and no discriminatory intent).	No	• When combining with LIHTC, HOME funding needs special structuring (i.e., how it goes in – loan or grant, what it's used for).



Funding Program/ Applicable Fair Housing Laws*	Type(s) of Assistance	Tenant Eligibility Authorized by Statute	1-Strike	Potential Conflicts for Blended Funding
HOPWA† • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Housing information and coordination services; acquisition, rehab and leasing of property; project- or tenant-based rental subsidies; housing operating costs; supportive services; technical assistance; administrative expenses. Formula grant program administered by eligible jurisdictions; project sponsors apply/contract with jurisdictions. May apply to portion of a project.	**Populations:** People with HIV/AIDS. **Income Levels:** People with incomes at or below 80% of area median income (AMI) by family size. Localities can further restrict maximum income if supported by local Consolidated Plan & HUD (and no discriminatory intent).	No No	• Section 811 (doesn't allow exclusion of any people with disabilities) unless targeting approved by HUD Secretary. • Shelter Plus Care (although can target sub-populations of the disabled, can't exclude any homeless disabled people), if using for same units as covered by HOPWA. • Section 811, Shelter Plus Care and SHP define HIV/AIDS disability as disabling or symptomatic AIDS. Conflict unless HOPWA can cede. • When combining with LIHTC, HOPWA funding needs special structuring.
McKinney SHP †† • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Acquisition, rehab, new construction, leasing, operating costs, support services in transitional/permanent supportive housing for people with disabilities; stand-alone supportive services. Competitive grant program under Continuum of Care process applied for by jurisdictions with sponsor projects; project sponsors (nonprofits or governmental entities) contract with HUD. May apply to portion of a project.	**Populations:** Homeless people (with special consideration for homeless people with disabilities and homeless families with children). Homeless disabled people for permanent supportive housing component. (It appears that sponsors may sub-target a disability category, but not exclude an otherwise eligible homeless disabled person.) **Income Levels:** Households with incomes at or below 50% of area median income (AMI) adjusted by family size.	No	• For permanent housing component of SHP, HOPWA (requires set-asides for people with HIV/AIDS). • HOPWA definition of HIV/AIDS includes symptomatic and asymptomatic HIV/AIDS. Conflict unless one cedes to the other.

Funding Program/ Applicable Fair Housing Laws*	Type(s) of Assistance	Tenant Eligibility Authorized by Statute	1-Strike	Potential Conflicts for Blended Funding
McKinney Shelter Plus Care (S+C) †‡ • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Tenant-based rental assistance; project-based rental assistance; sponsor-based rental assistance; Section 8 single room occupancy (SRO)— in rental housing with support services. Competitive grant program under Continuum of Care process applied for by jurisdictions with sponsor projects; project sponsors contract directly with jurisdictions. May apply to portion of a project.	**Populations:** Statute: homeless people with disabilities, (primarily those who are seriously mentally ill, have chronic problems with alcohol and/or drugs, have AIDS & related diseases). Regulations: same definition as statute but allows admission preferences to one or more statutorily targeted populations. However, can't exclude other eligible persons not in preference group. Local HUD office position: targeted marketing to statutorily targeted groups but may not exclude otherwise eligible homeless disabled people. **Income Levels:** Households with incomes at or below 50% AMI for all components except Section 8 SRO which defines eligible income level as up to 80% AMI.	Section 8 SRO Component Only	• If used for same units as covered by Shelter Plus Care, HOPWA (requires set-asides for people with HIV/AIDS). • HOPWA definition of HIV/AIDS includes symptomatic and asymptomatic HIV/AIDS. Conflict unless one cedes to the other.
McKinney Section 8 Moderate Rehab Program for Single Room Occupancy (SRO) Dwellings for Homeless Individuals †‡ • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Project-based rental assistance for SROs (to cover debt service for rehab and/or operating costs). Competitive grant program under Continuum of Care process applied for by jurisdictions with sponsor projects; project sponsors contract directly with jurisdiction. May apply to portion of a project.	**Populations:** Homeless individuals (and Section 8-eligible current occupants.) May not sub-target a disability category unless have federal authorization, e.g., federal program like HOPWA. **Income Levels:** Households with incomes at or below 50% AMI adjusted by family size.	Yes	

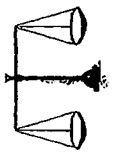
Funding Program/ Applicable Fair Housing Laws*	Type(s) of Assistance	Tenant Eligibility Authorized by Statute	1-Strike	Potential Conflicts for Blended Funding
Section 8 • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Tenant-Based Vouchers (rental subsidies); Project-Based Rental Assistance Formula grant program administered by eligible PHAs; project sponsors apply/contract directly with PHA. May apply to portion of a project.	**Populations:** For general program may not sub-target beyond eligible income levels unless have federal authorization, e.g., federal program like HOPWA. Are special NOFAs targeting people with disabilities, families transitioning from welfare to work, etc. **Income Levels:** Households with incomes at or below 50% AMI adjusted by family size.	Yes	
Section 202 Supportive Housing for the Elderly • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Prior to 1991, was combined with 811 program. Capital advance program for acquisition, rehab, new construction and operating costs of rental housing with supportive services. Competitive grant program; project sponsors apply/contract directly with HUD. Requirements apply to entire building even if is not 100% of the funding.	**Populations:** Households with a member who is 62 years of age or older. **Income Levels:** Households with incomes at or below 50% of area median income (AMI) adjusted by family size. Can't blend with programs that require or allow deeper income targeting.	Yes	• Can't blend with programs that require deeper income targeting, e.g., LIHTC. • LIHTC requires syndication; 202 requires single-purpose entity nonprofit sponsor.

Funding Program/ Applicable Fair Housing Laws*	Type(s) of Assistance	Tenant Eligibility Authorized by Statute	1-Strike	Potential Conflicts for Blended Funding
Section 811 Program for People with Disabilities • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Section 504 of Rehab Act	Prior to 1991, was combined with 202 program. Capital advance program for acquisition, rehab, new construction and operating costs of rental housing with supportive services. Competitive grant program; project sponsors apply/contract directly with HUD. Requirements apply to entire building even if is not 100% of the funding.	**Populations:** Households with a member who is disabled (physically, mentally or developmentally). **Statute:** Households with a member who is disabled (physically, mentally or developmentally). With HUD Secretary's approval can limit occupancy to people with similar disabilities that require similar services. **Regulations:** uses same eligibility standards but says that providers must permit occupancy by any qualified person with a disability that could benefit from the housing or services. **Income Levels:** Households with incomes at or below 50% of area median income (AMI).	Yes	• Can't blend with programs that require deeper income targeting, e.g., LIHTC. • HOPWA (requires setasides for people with HIV/AIDS) unless HUD secretary approves 811 sub-targeting. HOPWA definition of HIV/AIDS disability conflicts unless it can cede to 811's (of disabling/symptomatic AIDS). • LIHTC requires syndication; 811 requires single-purpose entity nonprofit sponsor
Low Income Housing Tax Credits (LIHTC) • 14th Amendment/ U.S. Constitution • Fair Housing Act/ Amendments • Not considered federal assistance, 504 doesn't apply	Creates tax incentives for private investment in low-income housing: investors buy 99% limited partnership interests, thereby being eligible to claim tax credits. Provides project equity used for construction or rehab. May apply to portion of project.	**Income Levels:** Minimally 20% of households with incomes at or below 50% of area median income (AMI) adjusted by family size; or Minimally 40% of units for households earning at or below 60% of area median income (AMI) adjusted by family size. (Practically to be competitive for receiving an award, must have 100% of households at 50% and 60% of AMI.) State Allocation Committee can further restrict maximum income.	No	• LIHTC requires syndication; 811 and 202 require single-purpose entity nonprofit sponsor • Funding programs that require a significant level of medical support services may be ineligible for LIHTC. • HOME/HOPWA funding needs special structuring (i.e., how it goes in – loan or grant, what it's used for).

* Please note: The fair housing laws listed here are those that are absolutely applicable due to specific sources of funding. The ADA may also apply to a particular development depending on the relationship to a local government's housing program (Title II) and/or whether portions of the project are considered public accommodations (areas open to the general public, e.g., community rooms) or a significant level of social services are provided to the residents, thereby deeming the services portion of the premises a public accommodation (Title III). Supportive housing providers in California are also subject to the California Fair Employment and Housing Act, the Unruh Civil Rights Act and local housing discrimination ordinances.

† Along with the Emergency Shelter Grant Program (ESG), these are covered under the Consolidated Plan or require municipal or state certification of consistency with the Plan.

‡ Part of the annual national SuperNOFA competition that requires submission of Continuum of Care Plan.



Funding Program	Authorizing Statute	Regulations	Administering Agency
CDBG -1975	Housing and Community Development Act of 1974, Title I. (42 U.S.C. 5301 *et seq.*)	24 CFR Part 570	HUD Office of Community Planning and Development
HOME - 1990	Cranston-Gonzales National Affordable Housing Act, Title II, Home Investment Partnership Act adopted in 1990 and as Amended. (42 U.S.C. 12701 *et seq.*)	24 CFR Part 92	HUD Office of Community Planning and Development
HOPWA – 1990	AIDS Housing Opportunity Act of 1990, Amended 1992. (42 U.S.C. 12901)	24 CFR Part 574	HUD Office of Community Planning and Development
McKinney Section 8 Mod Rehab SRO for Homeless Individuals	Stuart B. McKinney Homeless Assistance Act, Section 441 (42 U.S.C. 11401 *et seq.*)	24 CFR Part 882, Subpart H	HUD Office of Community Planning and Development
McKinney Shelter Plus Care	Stuart B. McKinney Homeless Assistance Act, Title IV, Subtitle F (42 U.S.C. 11403 *et seq.*)	24 CFR Part 582	HUD Office of Community Planning and Development
McKinney SHP – 1987	Stuart B. McKinney Homeless Assistance Act, Title IV, Subtitle C. (42 U.S.C. 11381 *et seq.*)	24 CFR Part 583	HUD Office of Community Planning and Development
Section 8 – 1937	United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. (42 U.S.C. 1427 *et seq.*)	24 CFR Part 982: Tenant-Based Vouchers 24 CFR CFR 983: Project-Based Certificate Program 24 CFR 880: New Construction 24 CFR 881: Substantial Rehab 24 CFR 882: Moderate Rehab 24 CFR 886:Special Allocations	HUD Office of Public Housing
Section 202 - 1959	Housing Act of 1959; Section 210 of the Housing and Community Development Act of 1974 P.L. 86 – 372. (12 U.S.C. 1701q, 73 Stat. 654, 667); and the National Affordable Housing Act, P.L. 101 – 625 (42 U.S.C. 12701)	24 CFR Part 891	HUD Office of Multifamily Housing
Section 811 – 1990	National Affordable Housing Act, Section 811 (42 U.S.C. 8013)	24 CFR Part 890	HUD Office of Multifamily Housing Development, New Products Division
LIHTC - 1986	Internal Revenue Code, Section 42.	Federal Treasury Regulations 1.42-1 through 1.42-16	

Appendix 4

"How the Law Thinks"
Outline of Relevant Laws

LEGAL ISSUES IN SUPPORTIVE HOUSING WORKSHOP

November 6, 1997

"HOW THE LAW THINKS"

OUTLINE OF RELEVANT LAWS

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"HOW THE LAW THINKS"

OUTLINE OF RELEVANT LAWS

LANDLORD/TENANT LAW.

A. CONCEPTUAL FRAMEWORK. Landlord/tenant law is just a specialized version of basic contract law. Landlord and tenant enter into a contract which is enforceable in court. Regulation of this contractual relationship by state and local government has emerged over time in response to perceived abuse, taking of unfair advantage, and discrimination.

(1) Duties. Landlord must comply with lease and applicable law regarding habitable premises, notice before entry, security deposits, nondiscrimination, local rent control. Tenant must comply with lease.

(2) Rights. Landlord has the right to force compliance with the rental agreement and to terminate the tenancy if the tenant does not comply. Tenant has the right to enforcement of rental agreement, habitable premises, freedom from landlord entry without notice, and notice and established practices for termination of tenancy. Where there is local rent control, tenant has protection from arbitrary rent increases and from eviction without just cause.

(3) Remedies. Both parties can enforce the lease by going to court and can enforce local rent control by going to the local rent board and/or to court. Landlord's ultimate remedy is termination of lease for tenant violation and eviction of tenant by court judgement and sheriff enforcement.

B. APPLICABLE LAW.

(1) Federal. No federal law governs this relationship directly. Federal fair housing laws affect the relationship because they prohibit discrimination and require reasonable accommodation in certain circumstances. Funding programs (like HOME) may also impose lease and eviction requirements.

(2) California State Law.

(a) Civil Code Section 1940 et seq. Governs the basics of the relationship: entering into leases and rental agreements, notices to change terms of tenancy, security deposits (how much landlord can collect, circumstances when landlord can keep the deposit, when and how the deposit must be returned). Also establishes parameters for local rent and eviction control ordinances.

(b) Code of Civil Procedure Section 1161 et seq. Governs the details of termination of tenancies (unlawful detainer), including types and forms of eviction notices and procedure for eviction actions.

(c) Fair Employment and Housing Act and Unruh Act. Prohibit certain types of discrimination - see Part 2 of Outline below.

(3) City and County Ordinances.

(a) Rent Control, Rent Stabilization, and Eviction Control Ordinances. Localities have broad power to adopt ordinances and charter provisions regulating rents and evictions.

(i) Limitations. Local laws are limited by state and federal constitutional protections against taking of private property without just compensation (must permit reasonable rate of return) and state statutory requirements (no more vacancy control; no rent control on newly constructed housing).

(ii) Exemptions. Housing receiving public money that includes rent regulation is often exempt from local rent control.

(b) Interest on Security Deposits. Local ordinances can require landlords to pay interest.

FAIR HOUSING LAWS.

A. CONCEPTUAL FRAMEWORK. Emphasis is on the right of the individual to be free from unlawful discrimination. Unlawful discrimination is the act of treating people differently on account of specifically forbidden considerations, such as race, sex, religion, or disability. Over time, more categories have been added to the laws creating more specifically forbidden considerations (and more protected classes of people). At first, laws prohibited discrimination where there was federal funding. Over time, this was extended to cover all public programs and, finally, actions of private parties as well. Discrimination includes intentional discrimination and seemingly neutral acts that have a discriminatory impact.

(1) Duties. Owners, managers, sellers, landlords, and brokers have a duty not to discriminate against protected classes of people, which includes making reasonable accommodation for people with disabilities.

(2) Rights. Individuals have the right to obtain housing without discrimination based on certain characteristics. People with disabilities have the right to reasonable accommodation. Owners have the right to protect other tenants from harm and to protect their property.

(3) Remedies. Aggrieved individuals can file administrative complaints with HUD or the California Department of Fair Employment and Housing and receive damages, injunctive relief, and civil penalties. They can also file a lawsuit in federal or state court and receive damages, injunctive relief and attorneys fees.

B. APPLICABLE LAW.

(1) Federal.

(a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000a). Made it illegal to discriminate based on race and other categories in programs receiving federal funding.

(b) Fair Housing Act of 1968 (42 U.S.C. 3601). Civil rights law applying to private parties and public agencies making discrimination illegal on the basis of race, sex, religion, and nationality, and covering many housing practices, including advertising, renting, terms and conditions, and eviction. HUD has issued implementing regulations at 24 CFR part 100. Owner-occupied dwellings of no more than four units are exempt.

(c) Fair Housing Amendments Act of 1988. Amended Fair Housing Act to add disability and family status as protected classes and to add enforcement measures. Imposes accessibility requirements on new multifamily housing. Also prohibits discriminatory land use and zoning practices.

(i) Disability defined as a physical or mental impairment which substantially limits one or more major life activity. Includes alcoholism and treatment for or recovery from former illegal drug use. Excludes current use of illegal drugs. Definition does not include people if their tenancy poses a direct threat to others, would result in substantial physical damage to the property of others, or if the person is not otherwise qualified for the housing.

(ii) Requires "reasonable accommodation" of persons with disabilities, meaning an obligation to make reasonable adjustments to rules, policies, practices and procedures and to make structural modifications that do not result in an undue financial and administrative hardship. Requires owners to permit tenants to make reasonable modifications to premises at their own expense.

(d) Section 504 of the Rehabilitation Act of 1974 (29 U.S.C. 794). Made it illegal to discriminate on the basis of disability in programs receiving federal funding. HUD has issued implementing regulations found at 24 CFR part 8. Regulations require integration of people with

disabilities, auxiliary aids and services necessary for communication with disabled, and establish accessibility requirements for newly constructed or substantially rehabilitated housing, and program access.

(e) The Americans With Disabilities Act (ADA) (42 U.S.C. 12101 et seq., adopted in 1990). Title II of the ADA extended the coverage of Section 504 to all public entities regardless of federal funding. The requirements are similar to the requirements of the Fair Housing Amendments Act. Title III of the ADA prohibits disability-based discrimination and requires accessibility in places of public accommodation.

(2) California State Law.

(a) Fair Employment and Housing Act (Government Code Sections 12955 et seq.). Prohibits discrimination in housing based on race, color, religion, sex, national origin, familial status, disability (same as federal) and marital status, ancestry, sexual orientation, and source of income. Excepts owner-occupied single family house with only one renter.

(b) Unruh Civil Right Act (Civil Code Section 51 et seq.). Protects similar classes of people as Fair Employment and Housing Act, but also prohibits age discrimination and arbitrary discrimination. This has been interpreted to include discrimination based on sexual orientation and other personal characteristics, but does not include discrimination based on economic status.

(3) Local Ordinances. Local laws may include additional protected classes (like sexual orientation) and may establish local commission to process complaints.

RELOCATION LAW.

A. CONCEPTUAL FRAMEWORK. Federal and state statutes and regulations give people who are displaced by public action the right to receive certain benefits to mitigate their displacement. These laws were adopted at the federal and local level in response to the massive displacement that occurred due to freeway building and urban renewal movements of the 1950s and 1960s.

(1) Duties. The government has a duty to adopt relocation plans and to provide certain assistance to people who are displaced by public action, including action by private parties who have public agency funding.

(2) Rights. Displaced people and businesses have the right to receive special advance notice of pending displacement, counseling, moving allowances, and payments to offset increased costs resulting from displacement.

(3) Remedies. Displacees can appeal to a local relocation appeals board and can sue in court to enforce their right to benefits. They can also prevent/delay their eviction if there was not compliance with requirements.

B. APPLICABLE LAW.

(1) Federal.

(a) Uniform Relocation Act (URA) (42 U.S.C. 4201 et seq. and Regulations (49 CFR part 24). This statute applies to all displacement as a result of action by the federal government or action by private parties that is funded by the federal government. The Regulations fill in the details of the URA and were adopted by the U.S. Department of Transportation and HUD. The URA and regulations apply to housing developers who receive financing from CDBG, HOME, HOPWA, McKinney Act, and other federal programs.

(b) HUD Handbook 1378. The HUD handbook is not itself a regulation, but it sets forth HUD's interpretation of the requirements of the statute and regulations, and provides sample forms of required notices. Since HUD implements most of the federal housing programs, HUD's view of the implementation of the law and regulations is persuasive.

(c) Statutes and Regulations for Various HUD Programs. The individual laws and regulations for many programs like HOME and HOPWA have additional relocation obligations.

(2) California State Law.

(a) Relocation Assistance Act (Government Code Sections 7260 et seq.). Adopted by the state legislature to cover displacement by public agencies or private parties acting under contract with public agencies.

(b) Real Property Acquisition and Relocation Assistance Guidelines. Adopted by the State Department of Housing and Community Development (HCD) to implement and interpret the Relocation Assistance Act.

(c) HCD Programs. Individual HCD programs (RHCP, CHRP, etc.) require compliance with the Guidelines. HCD interpretation of the Guidelines often varies from local interpretation.

(3) Local Governments (Cities, Counties, Redevelopment Agencies).

(a) Relocation Appeals Board. Local governments usually have a relocation appeals board, where appeals of local agency relocation decisions are heard.

(b) Housing and Redevelopment Staff. These are the people who implement the state and federal requirements at the local level, often in consultation with HUD about the required scope. Although the public agency providing the funding is the entity that is obligated to provide relocation benefits, this is usually passed on to the housing developer who receives the local, state or federal funding.

ZONING AND PLANNING LAW.

A. CONCEPTUAL FRAMEWORK. The U. S. and California constitutions give local governments broad "police power" to regulate land use to protect the health, safety, and welfare of residents. A land use restriction is valid if it is fairly debatable that it bears a reasonable relation to the general welfare. However, state statutes set minimum standards for exercise of the police power by local governments, and state and federal fair housing laws prohibit local land use that has a discriminatory impact on protected groups. Federal and State constitutions also impose restrictions on the government taking private property without just compensation.

(1) Duties. Local governments are required by state law to adopt general plans, which include housing elements, and which must comply with state law requirements. In adopting plans and zoning ordinances and in approving individual projects the local government must at least arguably be furthering legitimate goals of public welfare and cannot discriminate against protected classes of people, deny affordable housing projects without making special findings, or treat licensed facilities occupied by unrelated groups of six or fewer people differently than it treats families.

(2) Rights. The local community has the collective right to establish land use plans and standards. Individual property owners (including housing developers) have the right to develop their property in a manner consistent with local zoning laws. Protected classes of people have the right to nondiscriminatory adoption and application of local zoning laws.

(3) Remedies. Affected parties can appeal land use decisions to City Council, Board of Supervisors, or Permit Appeals Board, as applicable. Thereafter, they can sue in court to enforce their rights and force or invalidate project approval.

B. APPLICABLE LAW.

(1) Federal. No federal law governs planning and zoning directly. U.S. Constitution and federal fair housing laws prohibit zoning laws that have discriminatory impact, and require zoning laws to reasonably accommodate persons with disabilities. U.S. Constitution also prohibits government taking of private property without just compensation.

(2) California State Law.

(a) General Plan and Housing Element Law. Government Code Section 65300 et seq. requires the adoption by local governments of a general plan, including 7 elements, one of which is the housing element. The General Plan is the land use constitution for the jurisdiction, and all other land use decisions must be consistent with the General Plan. The Housing Element must access the needs of all economic segments of the community, and plan to address those needs.

(b) State Zoning Law (Government Code Section 65800 et seq.) establishes minimum standards and procedures for adopting and implementing local zoning ordinances, including granting of variances and conditional use permits.

(c) California Environmental Quality Act (CEQA) (Public Resources Code Section 21000 et seq.) requires a review of the environmental impact of most projects, resulting in either a negative declaration (no significant impact) or an environmental impact report (EIR) that identifies impacts and proposes mitigations. Certain affordable housing projects are now exempt from CEQA.

(d) Density Bonus Law (Government Code Section 65915-16). Requires local government to grant developers increased density plus additional incentives if developer agrees to restrict certain percentage of units for lower income households.

(e) Anti-NIMBY Law (Government Code Section 65589.5). Prohibits a local agency from disapproving an affordable housing development or imposing conditions on the development that make it infeasible unless special findings are made based on substantial evidence.

(f) Affordable Housing Discrimination Law (Government Code Section 65008). Prohibits discrimination by local government agencies against affordable housing and shelters and against the residents and developers of affordable housing and shelters, if the discrimination is based on race, sex, color, religion, ethnicity, national origin, ancestry, occupation, age, method of financing, or occupancy by low or moderate

income persons. Applies to disparate impact, as well as intentional discrimination.

(g) Group Home Law (Health and Safety Code Sections 1267.8, 1566.3 and 1568.083). Requires local governments to treat licensed group homes of six or fewer residents no differently than single family homes. Local agencies must allow these homes in any area zoned for residential use.

(h) Fair Employment and Housing Act (Government Code Section 12900 et seq.). Prohibits land use actions by local governments that make housing opportunities for protected groups unavailable. The Act also requires local government to make reasonable accommodations in rules, policies, practices, or services in order to afford disabled persons equal opportunity to use and enjoy a dwelling.

(i) Community Redevelopment Law. Establishes procedure for adoption of redevelopment plans by local jurisdictions and sets forth powers of local redevelopment agencies. Imposes significant affordable housing requirements on redevelopment agencies.

(3) City and County Ordinances.

(a) Housing Element of General Plan. Must comply with state law requirements and receive approval of State Department of Housing and Community Development.

(b) Planning Code/Zoning Law. Establishes districts that regulate height, bulk, and uses of buildings.

(c) Building Code. Establishes minimum building requirements, including occupancy standards that limit the number of people in a dwelling.

(d) Redevelopment Plans. Create special redevelopment areas where redevelopment agency has power to condemn and redevelop. Creates tax increment flow to redevelopment agency. Includes low and moderate income housing requirements.

Appendix 5

Fair Housing Act Regulations

Code of Federal Regulations, Title 24, Part 100

SUBCHAPTER A—FAIR HOUSING

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

Subpart A—General

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100.5 Scope.
100.10 Exemptions.
100.20 Definitions.

Subpart B—Discriminatory Housing Practices

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100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.
100.65 Discrimination in terms, conditions and privileges and in services and facilities.
100.70 Other prohibited sale and rental conduct.
100.75 Discriminatory advertisements, statements and notices.
100.80 Discriminatory representations on the availability of dwellings.
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Subpart C—Discrimination in Residential Real Estate-Related Transactions

100.110 Discriminatory practices in residential real estate-related transactions.
100.115 Residential real estate-related transactions.
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100.140 General rules.
100.141 Definitions.
100.142 Types of information.
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100.145 Loss of privilege.
100.146 Limited use of privileged information.
100.147 Adjudication.
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Subpart D—Prohibition Against Discrimination Because of Handicap

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100.201 Definitions.
100.202 General prohibitions against discrimination because of handicap.
100.203 Reasonable modifications of existing premises.
100.204 Reasonable accommodations.
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Subpart E—Housing for Older Persons

100.300 Purpose.
100.301 Exemption.
100.302 State and Federal elderly housing programs.
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Subpart F—Interference, Coercion or Intimidation

100.400 Prohibited interference, coercion or intimidation.

AUTHORITY: 42 U.S.C. 3535(d), 3600–3620.

SOURCE: 54 FR 3283, Jan. 23, 1989, unless otherwise noted.

Subpart A—General

§ 100.1 Authority.

This regulation is issued under the authority of the Secretary of Housing and Urban Development to administer and enforce title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (the Fair Housing Act).

§ 100.5 Scope.

(a) It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

(b) This part provides the Department's interpretation of the coverage

of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions.

(c) Nothing in this part relieves persons participating in a Federal or Federally-assisted program or activity from other requirements applicable to buildings and dwellings.

§ 100.10 Exemptions.

(a) This part does not:

(1) Prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted because of race, color, or national origin;

(2) Prohibit a private club, not in fact open to the public, which, incident to its primary purpose or purposes, provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members;

(3) Limit the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling; or

(4) Prohibit conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(b) Nothing in this part regarding discrimination based on familial status applies with respect to housing for older persons as defined in subpart E of this part.

(c) Nothing in this part, other than the prohibitions against discriminatory advertising, applies to:

(1) The sale or rental of any single family house by an owner, provided the following conditions are met:

(i) The owner does not own or have any interest in more than three single family houses at any one time.

(ii) The house is sold or rented without the use of a real estate broker, agent or salesperson or the facilities of any person in the business of selling or renting dwellings. If the owner selling the house does not reside in it at the time of the sale or was not the most recent resident of the house prior to such sale, the exemption in this paragraph (c)(1) of this section applies to only one such sale in any 24-month period.

(2) Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his or her residence.

§ 100.20 Definitions.

The terms Department, Fair Housing Act, and Secretary are defined in 24 CFR part 5.

Aggrieved person includes any person who—

(a) Claims to have been injured by a discriminatory housing practice; or

(b) Believes that such person will be injured by a discriminatory housing practice that is about to occur.

Broker or *Agent* includes any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions.

Discriminatory housing practice means an act that is unlawful under section 804, 805, 806, or 818 of the Fair Housing Act.

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.

Familial status means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(a) A parent or another person having legal custody of such individual or individuals; or

(b) The designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

Handicap is defined in § 100.201.

Person includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 U.S.C., receivers, and fiduciaries.

Person in the business of selling or renting dwellings means any person who:

(a) Within the preceding twelve months, has participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein;

(b) Within the preceding twelve months, has participated as agent, other than in the sale of his or her own personal residence, in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein; or

(c) Is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

State means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

[54 FR 3283, Jan. 23, 1989, as amended at 61 FR 5205, Feb. 9, 1996]

Subpart B—Discriminatory Housing Practices

§ 100.50 Real estate practices prohibited.

(a) This subpart provides the Department's interpretation of conduct that is unlawful housing discrimination under section 804 and section 806 of the Fair Housing Act. In general the prohibited actions are set forth under sections of this subpart which are most applicable to the discriminatory conduct described. However, an action illustrated in one section can constitute a violation under sections in the subpart. For example, the conduct described in § 100.60(b)(3) and (4) would constitute a violation of § 100.65(a) as well as § 100.60(a).

(b) It shall be unlawful to:

(1) Refuse to sell or rent a dwelling after a *bona fide* offer has been made, or to refuse to negotiate for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate in the sale or rental of a dwelling because of handicap.

(2) Discriminate in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with sales or rentals, because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Engage in any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.

(4) 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 because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(5) Represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that a dwelling is not available for sale or rental when such dwelling is in fact available.

(6) Engage in blockbusting practices in connection with the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(7) Deny access to or membership or participation in, or to discriminate against any person in his or her access

to or membership or participation in, any multiple-listing service, real estate brokers' assocation, or other service organization or facility relating to the business of selling or renting a dwelling or in the terms or conditions or membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin.

(c) The application of the Fair Housing Act with respect to persons with handicaps is discussed in subpart D of this part.

§ 100.60 Unlawful refusal to sell or rent or to negotiate for the sale or rental.

(a) It shall be unlawful for a person to refuse to sell or rent a dwelling to a person who has made a *bona fide* offer, because of race, color, religion, sex, familial status, or national origin or to refuse to negotiate with a person for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate against any person in the sale or rental of a dwelling because of handicap.

(b) Prohibited actions under this section include, but are not limited to:

(1) Failing to accept or consider a *bona fide* offer because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Refusing to sell or rent a dwelling to, or to negotiate for the sale or rental of a dwelling with, any person because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Using different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale or rental approval procedures or other requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Evicting tenants because of their race, color, religion, sex, handicap, familial status, or national origin or because of the race, color, religion, sex, handicap, familial status, or national origin of a tenant's guest.

§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.

(b) Prohibited actions under this section include, but are not limited to:

(1) Using different provisions in leases or contracts of sale, such as those relating to rental charges, security deposits and the terms of a lease and those relating to down payment and closing requirements, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Failing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an an owner, tenant or a person associated with him or her.

(5) Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.

§ 100.70 Other prohibited sale and rental conduct.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a

community, neighborhood or development.

(b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons.

(c) Prohibited actions under paragraph (a) of this section, which are generally referred to as unlawful steering practices, include, but are not limited to:

(1) Discouraging any person from inspecting, purchasing or renting a dwelling because of race, color, religion, sex, handicap, familial status, or national origin, or because of the race, color, religion, sex, handicap, familial status, or national origin of persons in a community, neighborhood or development.

(2) Discouraging the purchase or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin, by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development.

(3) Communicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Assigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of race, color, religion, sex, handicap, familial status, or national origin.

(d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:

(1) Discharging or taking other adverse action against an employee, broker or agent because he or she refused to participate in a discriminatory housing practice.

(2) Employing codes or other devices to segregate or reject applicants, purchasers or renters, refusing to take or to show listings of dwellings in certain areas because of race, color, religion, sex, handicap, familial status, or national origin, or refusing to deal with certain brokers or agents because they or one or more of their clients are of a particular race, color, religion, sex, handicap, familial status, or national origin.

(3) Denying or delaying the processing of an application made by a purchaser or renter or refusing to approve such a person for occupancy in a cooperative or condominium dwelling because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.75 Discriminatory advertisements, statements and notices.

(a) It shall be unlawful 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 which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(b) The prohibitions in this section shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling. Written notices and statements include any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling.

(c) Discriminatory notices, statements and advertisements include, but are not limited to:

(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter

because of race, color, religion, sex, handicap, familial status, or national origin of such persons.

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.

(d) 24 CFR part 109 provides information to assist persons to advertise dwellings in a nondiscriminatory manner and describes the matters the Department will review in evaluating compliance with the Fair Housing Act and in investigating complaints alleging discriminatory housing practices involving advertising.

§ 100.80 Discriminatory representations on the availability of dwellings.

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to provide inaccurate or untrue information about the availability of dwellings for sale or rental.

(b) Prohibited actions under this section include, but are not limited to:

(1) Indicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Representing that covenants or other deed, trust or lease provisions which purport to restrict the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin preclude the sale of rental of a dwelling to a person.

(3) Enforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting information, by word or conduct, regarding suitably priced dwellings available for inspection, sale or rental, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Providing false or inaccurate information regarding the availability of a dwelling for sale or rental to any person, including testers, regardless of whether such person is actually seeking housing, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.85 Blockbusting.

(a) It shall be unlawful, for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap.

(b) In establishing a discriminatory housing practice under this section it is not necessary that there was in fact profit as long as profit was a factor for engaging in the blockbusting activity.

(c) Prohibited actions under this section include, but are not limited to:

(1) Engaging, for profit, in conduct (including uninvited solicitations for listings) which conveys to a person that a neighborhood is undergoing or is about to undergo a change in the race, color, religion, sex, handicap, familial status, or national origin of persons residing in it, in order to encourage the person to offer a dwelling for sale or rental.

(2) Encouraging, for profit, any person to sell or rent a dwelling through assertions that the entry or prospective entry of persons of a particular race, color, religion, sex, familial status, or national origin, or with handicaps, can or will result in undesirable consequences for the project, neighborhood or community, such as a lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other services or facilities.

§ 100.90 Discrimination in the provision of brokerage services.

(a) It shall be unlawful to deny any person access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization, or facility

relating to the business of selling or renting dwellings, or to discriminate against any person in the terms or conditions of such access, membership or participation, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Prohibited actions under this section include, but are not limited to:

(1) Setting different fees for access to or membership in a multiple listing service because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Denying or limiting benefits accruing to members in a real estate brokers' organization because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing different standards or criteria for membership in a real estate sales or rental organization because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Establishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service, real estate brokers' organization or other service, organization or facility relating to the business of selling or renting dwellings, because of race, color, religion, sex, handicap, familial status, or national origin.

Subpart C—Discrimination in Residential Real Estate-Related Transactions

§ 100.110 Discriminatory practices in residential real estate-related transactions.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful housing discrimination under section 805 of the Fair Housing Act.

(b) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.115 Residential real estate-related transactions.

The term residential *real estate-related transactions* means:

(a) The making or purchasing of loans or providing other financial assistance—

(1) For purchasing, constructing, improving, repairing or maintaining a dwelling; or

(2) Secured by residential real estate; or

(b) The selling, brokering or appraising of residential real property.

§ 100.120 Discrimination in the making of loans and in the provision of other financial assistance.

(a) It shall be unlawful for any person or entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available loans or other financial assistance for a dwelling, or which is or is to be secured by a dwelling, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Prohibited practices under this section include, but are not limited to, failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.125 Discrimination in the purchasing of loans.

(a) It shall be unlawful for any person or entity engaged in the purchasing of loans or other debts or securities which support the purchase, construction, improvement, repair or maintenance of a dwelling, or which are secured by residential real estate, to refuse to purchase such loans, debts, or securities, or to impose different terms or conditions for such purchases, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Unlawful conduct under this section includes, but is not limited to:

(1) Purchasing loans or other debts or securities which relate to, or which are secured by dwellings in certain communities or neighborhoods but not in others because of the race, color, religion, sex, handicap, familial status, or national origin of persons in such neighborhoods or communities.

(2) Pooling or packaging loans or other debts or securities which relate to, or which are secured by, dwellings differently because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Imposing or using different terms or conditions on the marketing or sale of securities issued on the basis of loans or other debts or securities which relate to, or which are secured by, dwellings because of race, color, religion, sex, handicap, familial status, or national origin.

(c) This section does not prevent consideration, in the purchasing of loans, of factors justified by business necessity, including requirements of Federal law, relating to a transaction's financial security or to protection against default or reduction of the value of the security. Thus, this provision would not preclude considerations employed in normal and prudent transactions, provided that no such factor may in any way relate to race, color, religion, sex, handicap, familial status or national origin.

§ 100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.

(a) It shall be unlawful for any person or entity engaged in the making of loans or in the provision of other financial assistance relating to the purchase, construction, improvement, repair or maintenance of dwellings or which are secured by residential real estate to impose different terms or conditions for the availability of such loans or other financial assistance because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Unlawful conduct under this section includes, but is not limited to:

(1) Using different policies, practices or procedures in evaluating or in determining creditworthiness of any person in connection with the provision of any loan or other financial assistance for a dwelling or for any loan or other financial assistance which is secured by residential real estate because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, duration or other terms for a loan or other financial assistance for a dwelling or which is secured by residential real estate, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.135 Unlawful practices in the selling, brokering, or appraising of residential real property.

(a) It shall be unlawful for any person or other entity 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, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) For the purposes of this section, the term appraisal means an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.

(c) Nothing in this section prohibits a person engaged in the business of making or furnishing appraisals of residential real property from taking into consideration factors other than race, color, religion, sex, handicap, familial status, or national origin.

(d) Practices which are unlawful under this section include, but are not limited to, using an appraisal of residential real property in connection

with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status or national origin.

§ 100.140 General rules.

(a) *Voluntary self-testing and correction.* The report or results of a self-test a lender voluntarily conducts or authorizes are privileged as provided in this subpart if the lender has taken or is taking appropriate corrective action to address likely violations identified by the self-test. Data collection required by law or any governmental authority (federal, state, or local) is not voluntary.

(b) *Other privileges.* This subpart does not abrogate any evidentiary privilege otherwise provided by law.

[62 FR 66432, Dec. 18, 1997]

§ 100.141 Definitions.

As used in this subpart:

Lender means a person who engages in a residential real estate-related lending transaction.

Residential real estate-related lending transaction means the making of a loan:

(1) For purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(2) Secured by residential real estate.

Self-test means any program, practice or study a lender voluntarily conducts or authorizes which is designed and used specifically to determine the extent or effectiveness of compliance with the Fair Housing Act. The self-test must create data or factual information that is not available and cannot be derived from loan files, application files, or other residential real estate-related lending transaction records. Self-testing includes, but is not limited to, using fictitious credit applicants (testers) or conducting surveys of applicants or customers, nor is it limited to the pre-application stage of loan processing.

[62 FR 66432, Dec. 18, 1997]

§ 100.142 Types of information.

(a) The privilege under this subpart covers:

(1) The report or results of the self-test;

(2) Data or factual information created by the self-test;

(3) Workpapers, draft documents and final documents;

(4) Analyses, opinions, and conclusions if they directly result from the self-test report or results.

(b) The privilege does not cover:

(1) Information about whether a lender conducted a self-test, the methodology used or scope of the self-test, the time period covered by the self-test or the dates it was conducted;

(2) Loan files and application files, or other residential real estate-related lending transaction records (e.g., property appraisal reports, loan committee meeting minutes or other documents reflecting the basis for a decision to approve or deny a loan application, loan policies or procedures, underwriting standards, compensation records) and information or data derived from such files and records, even if such data has been aggregated, summarized or reorganized to facilitate analysis.

[62 FR 66432, Dec. 18, 1997]

§ 100.143 Appropriate corrective action.

(a) The report or results of a self-test are privileged as provided in this subpart if the lender has taken or is taking appropriate corrective action to address likely violations identified by the self-test. Appropriate corrective action is required when a self-test shows it is more likely than not that a violation occurred even though no violation was adjudicated formally.

(b) A lender must take action reasonably likely to remedy the cause and effect of the likely violation and must:

(1) Identify the policies or practices that are the likely cause of the violation, such as inadequate or improper lending policies, failure to implement established policies, employee conduct, or other causes; and

(2) Assess the extent and scope of any likely violation, by determining which areas of operation are likely to be affected by those policies and practices, such as stages of the loan application

process, types of loans, or the particular branch where the likely violation has occurred. Generally, the scope of the self-test governs the scope of the appropriate corrective action.

(c) Appropriate corrective action may include both prospective and remedial relief, except that to establish a privilege under this subpart:

(1) A lender is not required to provide remedial relief to a tester in a self-test;

(2) A lender is only required to provide remedial relief to an applicant identified by the self-test as one whose rights were more likely than not violated;

(3) A lender is not required to provide remedial relief to a particular applicant if the statute of limitations applicable to the violation expired before the lender obtained the results of the self-test or the applicant is otherwise ineligible for such relief.

(d) Depending on the facts involved, appropriate corrective action may include, but is not limited to, one or more of the following:

(1) If the self-test identifies individuals whose applications were inappropriately processed, offering to extend credit if the applications were improperly denied; compensating such persons for any damages, both out-of-pocket and compensatory;

(2) Correcting any institutional policies or procedures that may have contributed to the likely violation, and adopting new policies as appropriate;

(3) Identifying, and then training and/or disciplining the employees involved;

(4) Developing outreach programs, marketing strategies, or loan products to serve more effectively the segments of the lender's market that may have been affected by the likely violation; and

(5) Improving audit and oversight systems to avoid a recurrence of the likely violations.

(e) Determination of appropriate corrective action is fact-based. Not every corrective measure listed in paragraph (d) of this section need be taken for each likely violation.

(f) Taking appropriate corrective action is not an admission by a lender that a violation occurred.

[62 FR 66432, Dec. 18, 1997]

§ 100.144 Scope of privilege.

The report or results of a self-test may not be obtained or used by an aggrieved person, complainant, department or agency in any:

(a) Proceeding or civil action in which a violation of the Fair Housing Act is alleged; or

(b) Examination or investigation relating to compliance with the Fair Housing Act.

[62 FR 66432, Dec. 18, 1997]

§ 100.145 Loss of privilege.

(a) The self-test report or results are not privileged under this subpart if the lender or person with lawful access to the report or results:

(1) Voluntarily discloses any part of the report or results or any other information privileged under this subpart to any aggrieved person, complainant, department, agency, or to the public; or

(2) Discloses the report or results or any other information privileged under this subpart as a defense to charges a lender violated the Fair Housing Act; or

(3) Fails or is unable to produce self-test records or information needed to determine whether the privilege applies.

(b) Disclosures or other actions undertaken to carry out appropriate corrective action do not cause the lender to lose the privilege.

[62 FR 66432, Dec. 18, 1997]

§ 100.146 Limited use of privileged information.

Notwithstanding § 100.145, the self-test report or results may be obtained and used by an aggrieved person, applicant, department or agency solely to determine a penalty or remedy after the violation of the Fair Housing Act has been adjudicated or admitted. Disclosures for this limited purpose may be used only for the particular proceeding in which the adjudication or admission is made. Information disclosed under this section remains otherwise privileged under this subpart.

[62 FR 66433, Dec. 18, 1997]

§ 100.147 Adjudication.

An aggrieved person, complainant, department or agency that challenges a privilege asserted under § 100.144 may seek a determination of the existence and application of that privilege in:

(a) A court of competent jurisdiction; or

(b) An administrative law proceeding with appropriate jurisdiction.

[62 FR 66433, Dec. 18, 1997]

§ 100.148 Effective date.

The privilege under this subpart applies to self-tests conducted both before and after January 30, 1998, except that a self-test conducted before January 30, 1998 is not privileged:

(a) If there was a court action or administrative proceeding before January 30, 1998, including the filing of a complaint alleging a violation of the Fair Housing Act with the Department or a substantially equivalent state or local agency; or

(b) If any part of the report or results were disclosed before January 30, 1998 to any aggrieved person, complainant, department or agency, or to the general public.

[62 FR 66433, Dec. 18, 1997]

Subpart D—Prohibition Against Discrimination Because of Handicap

§ 100.200 Purpose.

The purpose of this subpart is to effectuate sections 6 (a) and (b) and 15 of the Fair Housing Amendments Act of 1988.

§ 100.201 Definitions.

As used in this subpart:

Accessible, when used with respect to the public and common use areas of a building containing covered multifamily dwellings, means that the public or common use areas of the building can be approached, entered, and used by individuals with physical handicaps. The phrase *readily accessible to and usable by* is synonymous with accessible. A public or common use area that complies with the appropriate requirements of ANSI A117.1–1986 or a comparable standard is *accessible* within the meaning of this paragraph.

Accessible route means a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities. Interior accessible routes may include corridors, floors, ramps, elevators and lifts. Exterior accessible routes may include parking access aisles, curb ramps, walks, ramps and lifts. A route that complies with the appropriate requirements of ANSI A117.1–1986 or a comparable standard is an *accessible route.*

ANSI A117.1–1986 means the 1986 edition of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from American National Standards Institute, Inc., 1430 Broadway, New York, NY 10018. Copies may be inspected at the Department of Housing and Urban Development, 451 Seventh Street, SW., room 10276, Washington, DC, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Building means a structure, facility or portion thereof that contains or serves one or more dwelling units.

Building entrance on an accessible route means an accessible entrance to a building that is connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, or to public streets or sidewalks, if available. A building entrance that complies with ANSI A117.1–1986 or a comparable standard complies with the requirements of this paragraph.

Common use areas means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings.

Controlled substance means any drug or other substance, or immediate precursor included in the definition in section 102 of the Controlled Substances Act (21 U.S.C. 802).

Covered multifamily dwellings means buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units.

Dwelling unit means a single unit of residence for a family or one or more persons. Examples of dwelling units include: a single family home; an apartment unit within an apartment building; and in other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep. Examples of the latter include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.

Entrance means any access point to a building or portion of a building used by residents for the purpose of entering.

Exterior means all areas of the premises outside of an individual dwelling unit.

First occupancy means a building that has never before been used for any purpose.

Ground floor means a floor of a building with a building entrance on an accessible route. A building may have more than one ground floor.

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. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite. As used in this definition:

(a) *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; disgestive; genito-urinary; 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 infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

(b) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(c) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) *Is regarded as having an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

Interior means the spaces, parts, components or elements of an individual dwelling unit.

Modification means any change to the public or common use areas of a building or any change to a dwelling unit.

Premises means the interior or exterior spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of a building.

Public use areas means interior or exterior rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

Site means a parcel of land bounded by a property line or a designated portion of a public right or way.

§ 100.202 General prohibitions against discrimination because of handicap.

(a) It shall be unlawful 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—

(1) That buyer or renter;

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

(3) Any person associated with that person.

(b) It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(1) That buyer or renter;

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

(3) Any person associated with that person.

(c) It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person. However, this paragraph does not prohibit the following inquiries, provided these inquiries are made of all applicants, whether or not they have handicaps:

(1) Inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(2) Inquiry to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap;

(3) Inquiry to determine whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;

(4) Inquiring whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance;

(5) Inquiring whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance.

(d) Nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

§ 100.203 Reasonable modifications of existing premises.

(a) It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises, occupied or to be occupied by a handicapped person, if the proposed modifications may be necessary to afford the handicapped person full enjoyment of the premises of a dwelling. 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. The landlord may not increase for handicapped persons any customarily required security deposit. However, where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, the landlord may negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations. The interest in any such account shall accrue to the benefit of the tenant.

(b) A landlord may condition permission for a modification on the renter

providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.

(c) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A tenant with a handicap asks his or her landlord for permission to install grab bars in the bathroom at his or her own expense. It is necessary to reinforce the walls with blocking between studs in order to affix the grab bars. It is unlawful for the landlord to refuse to permit the tenant, at the tenant's own expense, from making the modifications necessary to add the grab bars. However, the landlord may condition permission for the modification on the tenant agreeing to restore the bathroom to the condition that existed before the modification, reasonable wear and tear excepted. It would be reasonable for the landlord to require the tenant to remove the grab bars at the end of the tenancy. The landlord may also reasonably require that the wall to which the grab bars are to be attached be repaired and restored to its original condition, reasonable wear and tear excepted. However, it would be unreasonable for the landlord to require the tenant to remove the blocking, since the reinforced walls will not interfere in any way with the landlord's or the next tenant's use and enjoyment of the premises and may be needed by some future tenant.

Example (2): An applicant for rental housing has a child who uses a wheelchair. The bathroom door in the dwelling unit is too narrow to permit the wheelchair to pass. The applicant asks the landlord for permission to widen the doorway at the applicant's own expense. It is unlawful for the landlord to refuse to permit the applicant to make the modification. Further, the landlord may *not,* in usual circumstances, condition permission for the modification on the applicant paying for the doorway to be narrowed at the end of the lease because a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises.

§ 100.204 Reasonable accommodations.

(a) It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

(b) The application of this section may be illustrated by the following examples:

Example (1): A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a *no pets* policy. It is a violation of §100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a *first come first served* basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of §100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

§ 100.205 Design and construction requirements.

(a) Covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site. For purposes of this section, a covered multifamily dwelling shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991, if the dwelling is occupied by that date, or if the last building permit or renewal thereof for the dwelling is issued by a State, County or local government on or before June 15, 1990. The burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example (1): A real estate developer plans to construct six covered multifamily dwelling units on a site with a hilly terrain. Because of the terrain, it will be necessary to climb a long and steep stairway in order to enter the dwellings. Since there is no practical way to provide an accessible route to any of the dwellings, one need not be provided.

Example (2): A real estate developer plans to construct a building consisting of 10 units of multifamily housing on a waterfront site that floods frequently. Because of this unusual characteristic of the site, the builder plans to construct the building on stilts. It is customary for housing in the geographic area where the site is located to be built on stilts. The housing may lawfully be constructed on the proposed site on stilts even though this means that there will be no practical way to provide an accessible route to the building entrance.

Example (3): A real estate developer plans to construct a multifamily housing facility on a particular site. The developer would like the facility to be built on the site to contain as many units as possible. Because of the configuration and terrain of the site, it is possible to construct a building with 105 units on the site provided the site does not have an accessible route leading to the building entrance. It is also possible to construct a building on the site with an accessible route leading to the building entrance. However, such a building would have no more than 100 dwelling units. The building to be constructed on the site must have a building entrance on an accessible route because it is not impractical to provide such an entrance because of the terrain or unusual characteristics of the site.

(c) All covered multifamily dwellings for first occupancy after March 13, 1991 with a building entrance on an accessible route shall be designed and constructed in such a manner that—

(1) The public and common use areas are readily accessible to and usable by handicapped persons;

(2) All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(3) All premises within covered multifamily dwelling units contain the following features of adaptable design:

(i) An accessible route into and through the covered dwelling unit;

(ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower, stall and shower seat, where such facilities are provided; and

(iv) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(d) The application of paragraph (c) of this section may be illustrated by the following examples:

Example (1): A developer plans to construct a 100 unit condominium apartment building with one elevator. In accordance with paragraph (a), the building has at least one accessible route leading to an accessible entrance. All 100 units are covered multifamily dwelling units and they all must be designed and constructed so that they comply with the accessibility requirements of paragraph (c) of this section.

Example (2): A developer plans to construct 30 garden apartments in a three story building. The building will not have an elevator. The building will have one accessible entrance which will be on the first floor. Since the building does not have an elevator, only the *ground floor* units are covered multifamily units. The *ground floor* is the first floor because that is the floor that has an accessible entrance. All of the dwelling units on the first floor must meet the accessibility requirements of paragraph (c) of this section and must have access to at least one of each type of public or common use area available for residents in the building.

(e) Compliance with the appropriate requirements of ANSI A117.1–1986 suffices to satisfy the requirements of paragraph (c)(3) of this section.

(f) Compliance with a duly enacted law of a State or unit of general local government that includes the requirements of paragraphs (a) and (c) of this section satisfies the requirements of paragraphs (a) and (c) of this section.

(g)(1) It is the policy of HUD to encourage States and units of general local government to include, in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraphs (a) and (c) of this section.

(2) A State or unit of general local government may review and approve

newly constructed multifamily dwellings for the purpose of making determinations as to whether the requirements of paragraphs (a) and (c) of this section are met.

(h) Determinations of compliance or noncompliance by a State or a unit of general local government under paragraph (f) or (g) of this section are not conclusive in enforcement proceedings under the Fair Housing Amendments Act.

(i) This subpart does not invalidate or limit any law of a State or political subdivision of a State that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subpart.

[54 FR 3283, Jan. 23, 1989, as amended at 56 FR 11665, Mar. 20, 1991]

Subpart E—Housing for Older Persons

§ 100.300 Purpose.

The purpose of this subpart is to effectuate the exemption in the Fair Housing Amendments Act of 1988 that relates to housing for older persons.

§ 100.301 Exemption.

(a) The provisions regarding familial status in this part do not apply to housing which satisfies the requirements of §§ 100.302, 100.303 or § 100.304.

(b) Nothing in this part limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

§ 100.302 State and Federal elderly housing programs.

The provisions regarding familial status in this part shall not apply to housing provided under any Federal or State program that the Secretary determines is specifically designed and operated to assist elderly persons, as defined in the State or Federal program.

§ 100.303 62 or over housing.

(a) The provisions regarding familial status in this part shall not apply to housing intended for, and solely occupied by, persons 62 years of age or older. Housing satisfies the requirements of this section even though:

(1) There are persons residing in such housing on September 13, 1988 who are under 62 years of age, provided that all new occupants are persons 62 years of age or older;

(2) There are unoccupied units, provided that such units are reserved for occupancy by persons 62 years of age or over;

(3) There are units occupied by employees of the housing (and family members residing in the same unit) who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(b) The following examples illustrate the application of paragraph (a) of this section:

Example (1): John and Mary apply for housing at the Vista Heights apartment complex which is an elderly housing complex operated for persons 62 years of age or older. John is 62 years of age. Mary is 59 years of age. If Vista Heights wishes to retain its "62 or over" exemption it must refuse to rent to John and Mary because Mary is under 62 years of age. However, if Vista Heights does rent to John and Mary, it might qualify for the "55 or over" exemption in § 100.304.

Example (2): The Blueberry Hill retirement community has 100 dwelling units. On September 13, 1988, 15 units were vacant and 35 units were occupied with at least one person who is under 62 years of age. The remaining 50 units were occupied by persons who were all 62 years of age or older. Blueberry Hill can qualify for the "62 or over" exemption as long as all units that were occupied after September 13, 1988 are occupied by persons who were 62 years of age or older. The people under 62 in the 35 units previously described need not be required to leave for Blueberry Hill to qualify for the "62 or over" exemption.

§ 100.304 55 or over housing.

(a) The provisions regarding familial status shall not apply to housing intended and operated for occupancy by at least one person 55 years of age or older per unit pursuant to this section.

(b) In order to qualify as housing for older persons under this section, at least 80 percent of the units in the housing facility must be occupied by at least one person 55 years of age or older, except that a newly constructed housing facility for first occupancy

after March 12, 1989, need not comply with this section until 25 percent of the units in the facility are occupied.

(c) Housing satisfies the requirements of this section even though:

(1) On September 13, 1988, under 80 percent of the occupied units in the housing facility are occupied by at least one person 55 years of age or older per unit, provided that at least 80 percent of the units that are occupied after September 13, 1988, are occupied by at least one person 55 years of age or older.

(2) There are unoccupied units, provided that at least 80 percent of the occupied units are occupied by at least one person 55 years of age or older.

(3) There are units occupied by employees of the housing provider (and family members residing in the same unit) who are under 55 years of age, provided the employees perform substantial duties directly related to the management or maintenance of the housing.

[61 FR 18249, Apr. 25, 1996]

Subpart F—Interference, Coercion or Intimidation

§ 100.400 Prohibited interference, coercion or intimidation.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful under section 818 of the Fair Housing Act.

(b) It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part.

(c) Conduct made unlawful under this section includes, but is not limited to, the following:

(1) Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.

(3) Threatening an employee or agent with dismissal or an adverse employment action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction, because of the race, color, religion, sex, handicap, familial status, or national origin of that person or of any person associated with that person.

(4) Intimidating or threatening any person because that person is engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by this part.

(5) Retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act.

Appendix 6

Citations for Definitions of "Disability" and Related Terms

The term "disability" and related terms such as "handicap" and "person with handicaps" are defined in several different laws. One law's definition may be the same as another law's definition, or a law's definition may be unique. The United States Supreme Court is currently reviewing the complex interaction of the different definitions in the employment law context, and is expected to offer guidance soon. However, the imminent guidance is unlikely to apply to housing.

This document lists citations for these definitions under several different laws.

I. Fair Housing Act.

A. The statutory definition is at 42 U.S.C. 3602(h).

B. HUD's regulatory definitions of "handicap" and related terms (including "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having an impairment") are at 24 CFR 100.201.

II. Section 504.

HUD's regulatory definitions of "handicap" and related terms (including "individual with handicaps," "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having an impairment") are at 24 CFR 8.3.

III. Americans with Disabilities Act.

A. The statutory definition of "disability" is at 42 U.S.C. 12102.

B. With respect to Title I of the ADA, the Equal Employment Opportunity Office's regulatory definitions of "disability" and related terms (including "physical or mental impairment," "major life activities," "substantially limits," "has a record of such an impairment," and "is regarded as having an impairment") are at 29 CFR 1630.2 and 1630.3. Helpful interpretive guidance accompanies the regulations.

C. With respect to Title II of the ADA, the Department of Justice has regulatory definitions of "disability" and related terms (including "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having an impairment") at 28 CFR 35.104, and with respect to Title III of the ADA, the Department of Justice has regulatory definitions at 28 CFR 36.104. The Department of Justice's Title II and Title III regulatory definitions are identical to each other, and similar but not identical to the Equal Employment Opportunity Office's definitions (which for example define "substantially limits" while the Department of Justice definitions do not). Helpful interpretive guidance accompanies the regulations.

IV. Social Security Act.

A. The statutory definition of "aged, blind, or disabled individual" is at 42 U.S.C. 1382c.

B. The regulatory definition of "aged, blind, or disabled individual" is at 20 CFR 416.

V. Section 811.

A. The statutory definition of "person with disabilities" is at 42 U.S.C. 8013.

B. HUD's regulatory definition of "person with disabilities" is at 24 CFR 891.305.

C. HUD Handbook 4350.3 (on multifamily occupancy) defines "disabled" at Exhibit 2-1.

US Code as of: 01/26/98

Sec. 12102. Definitions

As used in this chapter:

- (1) Auxiliary aids and services
  The term "auxiliary aids and services" includes -
  - (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
  - (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
  - (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.

- (2) Disability
  The term "disability" means, with respect to an individual -
  - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
  - (B) a record of such an impairment; or
  - (C) being regarded as having such an impairment.

- (3) State
  The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands

VI. California Fair Employment and Housing Act.

A. The statutory definition of "disability" is at Government Code Section 12955.3.

B. The Fair Employment and Housing Commission has not adopted a regulatory definition for housing, although for employment the definition is at 2 California Code of Regulations 7293.6.

Appendix 7

Documentation of Homelessness for Program Eligibility

(CPD Information Bulletin dated October 3, 1995)

U.S.Department of Housing and Urban Development{PRIVATE

Pacific/Hawaii Office
450 Golden Gate Avenue
San Francisco, California 94102-3448

{PRIVATE} HUD Information Bulletin

CPD-96-001

MEMORANDUM FOR: All Homeless Assistance Grantees Within the San Francisco Office's Jurisdiction

FROM: Steven B. Sachs, Director, Community Planning and Development Division, 9AD

SUBJECT: Guidance on Documentation of Participant Eligibility Under Homeless Assistance Programs

This Information Bulletin is being sent to all U.S. Department of Housing and Urban Development (HUD) homeless assistance grantees concerning a recent audit by the Department's Office of Inspector General. This audit indicates the need to maintain adequate documentation on the eligibility of persons to be served by HUD homeless assistance programs. In addition, the audit found that some grantees did not have documentation to verify whether clients were part of the specific population targeted in the approved application.

PARTICIPANT ELIGILIBILITY

The audit identified that a number of grantees have not adequately documented the eligibility of clients. Without adequate documentation, the Department cannot determine if the programs and limited resources they provide are reaching the homeless persons intended to be served by these programs. Below is specific guidance on what documentation the Department considers as adequate in determining whether someone is eligible to be served by HUD's homeless assistance programs. This documentation needs to be maintained by grantees and available for review by HUD.

Persons Coming From the Streets

HUD recognizes that the homeless persons that may present the most difficult challenge to document as eligible for our assistance are those living in public or private places not designed for, or ordinarily used as, regular sleeping accommodations (i.e., on the streets, in cars, or other inappropriate places).

The grantee should verify this type of living condition by information obtained during the intake process. This may include names of other organizations or outreach workers who have assisted them in the past, names and addresses of friends or relatives, whether the client receives any general assistance checks, where the checks are delivered and any other information regarding the client's activities in the recent past which might provide a means of verification. If you are unable to verify this type of living condition, prepare a short written statement about the client's previous living place, have the client sign the statement and date it.

Persons Coming From Emergency Shelter or Referral Agency

If persons indicate that are coming from an emergency shelter, you should receive written verification from that shelter's staff. A record of this verification should be dated and filed.

For persons referred by intake or social services agencies, the grantee should receive written verification (e.g., intake forms) from the referring organization's staff as to where the persons have most recently been living. This verification should be dated and filed.

Persons Coming from Transitional Housing for Homeless Persons

For persons who come from a transitional housing facility you must receive written verification from that facility's staff that the person lived on the streets or in an emergency shelter prior to living in the transitional facility. A record of this verification should be dated and filed.

Persons At Risk of Becoming Homeless

In cases where persons are at imminent risk of homelessness because they face immediate eviction, and do not have sufficient resources to find replacement housing, there should be evidence of eviction proceedings and information regarding the income of the persons.

If persons are living in an institution and are at risk of homelessness because they are about to be released from the institution with no subsequent residence identified and on resources or support network necessary to obtain housing, the file should contain evidence regarding income, as well as documentation of attempts made by the individual and/or institution to identify other housing and/or support network such as family, friends, religious and social groups, and similar organizations.

SERVING THE TARGET POPULATION

The audit also concluded that some participants being served were not part of the population explicitly targeted in the grantee's approved application.

HUD wishes to emphasize that its regulations for homeless assistance programs (i.e., supportive Housing and Shelter Plus Care Programs) with target populations (families with children, persons with mental illness, etc.) currently require that significant proposed changes to an approved program must receive prior HUD approval. The category of persons to be served, or target population, is one specifically mentioned significant change. As such, before changing the target population of its program, a grantee must contact the local field office and receive written approval for the change.

For further assistance regarding participant documentation requirements, please contact your Community Planning and Development Representative

Appendix 8

HUD General Counsel Memorandum Regarding Medical Use of Marijuana in Public Housing

(September 24, 1999)

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

September 24, 1999

MEMORANDUM FOR: William C. Apgar, Assistant Secretary, Office of Housing/Federal Housing Commissioner, H

Harold Lucas, Assistant Secretary, Office of Public and Indian Housing, P

FROM: Gail W. Laster, General Counsel, G

SUBJECT: Medical use of marijuana in public housing

The Office of Housing requested our opinion with respect to whether a section 8 tenant's use of medical marijuana[1] requires an owner to terminate the tenancy of the medical marijuana user. It further inquired whether the cost of medical marijuana is deductible for purposes of determining adjusted income under applicable section 8 regulations.[2] Several HUD Field Offices have also requested guidance on this matter. Because these issues are also relevant to the public housing program and the section 8 programs operated by the Office of Public and Indian Housing, this memorandum is also addressed to that office. As more fully articulated below, we conclude that State laws purporting to legalize medical marijuana directly conflict with the admission and occupancy requirements of the Quality Housing and Work Responsibility Act of 1998 ("Public Housing Reform Act") and are thus subject to preemption.[3]

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[1] The term "medical marijuana" in this memorandum means marijuana which, when prescribed by a physician to treat a serious illness such as AIDS, cancer, or glaucoma, is legal under State law.

[2] These issues arose in the wake of Washington State's November 3, 1998 referendum in which voters approved the medical use of marijuana. According to the Office of National Drug Control Policy ("ONDCP"), the following States have enacted laws purporting to legalize medical marijuana to date: Alaska, Arizona, California, Connecticut, Massachusetts, New Hampshire, Nevada, Oregon, Vermont, Virginia, and Washington and, depending on the interpretation of the law in Louisiana, may also be legal there under certain circumstances. See ONDCP's web page, "Status of State Marijuana Initiatives" (copy attached).

[3] The Public Housing Reform Act amended the United States Housing Act of 1937 ("Act"), 42 U.S.C. § 1437. As more fully discussed below, it also contains four freestanding sections, sections 576

I. Admissions Standards

Section 576(b)(1) of the Public Housing Reform Act requires public housing agencies ("PHAs") and owners to establish standards that:

> ***prohibit*** admission to . . . federally assisted housing for any household with a member--
> (A) who the public housing agency or owner determines is illegally using a controlled substance; or
> (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such a household member's illegal use (or pattern of illegal use) of a controlled substance . . . may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. §13661(b)(1) (emphasis added). We interpret the word "prohibit" in this context to mean that the admission standards which the statute prescribes require that PHAs and owners ***must*** deny admission to the first class of households, i.e., those with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a controlled substance.[4] See 64 Fed. Reg. 40262, 40270 (1999) (to be

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through 579, which apply across the board to all federally assisted housing. Three of these four sections, section 576 ("Screening of Applicants for Federally Assisted Housing"), section 577 ("Termination of Tenancy and Assistance for Illegal Drug Users and Alcohol Abusers in Federally Assisted Housing"), and section 579 ("Definitions"), govern the questions articulated above. They are codified in Chapter 135 ("Residency and Service Requirements in Federally Assisted Housing") of Title 42 of the United States Code, 42 U.S.C. §§ 13661, 13662, & 13664, rather than with the Act itself.

[4] None of the three applicable freestanding provisions identified in footnote 3 contains a definition of "controlled substance." Section 579(a)(1) of the Public Housing Reform Act, however, attributes the related phrase, "drug-related criminal activity," with the meaning specified in section 3(b) of the Act. 42 U.S.C. § 13664(a)(1). Section 3(b)(9) of the Act defines "drug-related criminal activity" as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as such term is identified in section 102 of the Controlled Substances Act.)" 42 U.S.C. § 1437b(9). The Controlled Substances Act in turn

codified at 24 C.F.R. §§ 5.853(a)(1)) (proposed July 23, 1999). Id. at 40274 (to be codified at 24 C.F.R. § 882.518(a)(1)(i).

With respect to the determination as to whether a person is illegally using a controlled substance, the Act does not indicate a minimum length of time that must have transpired since the last illegal use of a controlled substance for an applicant to be deemed eligible to receive Federal assistance. Legislative history to the Americans with Disabilities Act ("ADA"), which similarly excludes "current users of illegal drugs" from its protections, indicates that in excluding such persons from coverage, Congress intended to exclude persons "whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current." H.R. Conf. Rep. No. 101-596, at 64, reprinted in 1990 U.S.C.C.A.N. 267, 573. See also, D'Amico v. City of New York, 955 F. Supp. 294, 298 (S.D. N.Y. 1997) (Rehabilitation Act's prohibition against current illegal use of controlled substances encompasses illegal uses occurring recently enough to justify reasonable belief that illegal drug use is current), aff'd 132 F.3d 145 (2d Cir.), cert. denied, 118 S.Ct. 2075 (1998). We thus interpret the Public Housing Reform Act's prohibitions against "current" illegal use of a controlled substance as encompassing uses occurring recently enough to warrant a reasonable belief that the use is ongoing.

The courts of appeal which have addressed this issue in cases brought under Federal civil rights statutes have reached different conclusions regarding the length of time that must have passed since the last instance of illegal use for a person not to be considered a "current" illegal user. Most agree, however, that the issue of whether or not a person is a "current" illegal user under Federal civil rights laws requires a highly individualized, fact-specific examination of all relevant circumstances. See, e.g., Shafer v. Preston Memorial Hospital, 107 F.3d 274, 278 (4th Cir. 1997) (employee whose last illegal use of drugs occurred three weeks prior to termination held to be "currently engaging in the illegal use of drugs" under ADA); Collins v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995) (passage of "months" between last illegal use of controlled

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defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 42 U.S.C. § 802(6). Schedule I includes marijuana. 21 U.S.C. § 812(c) (Schedule I) (c)(10). We therefore attribute the latter definition of "controlled substance" to that phrase, as used in sections 576 and 577 of the Public Housing Reform Act. Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same Act are intended to have the same meaning") (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934)).

substance and termination held insufficient for employees to escape classification of current illegal users under ADA); United States v. Southern Management Corp., 955 F.2d 914, 918 (4th Cir. 1992) (persons drug-free for one year held not "current" users under Fair Housing Act). In any event, it is likely that when issues arise with respect to medical marijuana, the person in question will be currently using the controlled substance.

With respect to the second class of households addressed in section 576(b)(1)(B), i.e., those including a member for whom the PHA or owner determines that reasonable cause exists to believe that the member's pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment[5], section 576(b)(2) of the Public Housing Reform Act affords PHAs and owners limited discretion to admit such households. That section provides as follows:

> ***Consideration of Rehabilitation.***--In determining whether, pursuant to paragraph (1)(B), to deny admission to the program or federally assisted housing to any household based on a pattern of illegal use of a controlled substance or a pattern of abuse of alcohol by a household member, a public housing agency or an owner may consider whether such household member--
>
> (A) has successfully completed a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable);
>
> (B) has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable); or
>
> (C) is participating in a supervised drug or

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[5] Section 576(b)(1)(B) of the Public Housing Reform Act does not expressly limit the reasonable cause determination to ***past*** illegal use or a ***past and noncontinuing*** pattern of illegal use, of a controlled substance. But given section 576(b)(1)(A)'s prohibition against admitting any household with a member who the PHA or owner determines is illegally using a controlled substance, i.e., at the time of consideration for admission or recently enough to warrant a reasonable belief that a household member's illegal use is ongoing, we interpret section 576(b)(1)(B) to require PHAs and owners to deny admission to households based on a reasonable cause determination that the household member's ***past*** illegal use or ***past and noncontinuing*** pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment of the premises. 42 U.S.C. § 13661(b)(1)(B).

> alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable).

42 U.S.C. § 13661(b)(2). A PHA or owner may admit such a household under this provision after having determined that both conditions in one of the three considerations enumerated above have been met, i.e., some evidence of drug rehabilitation and no current illegal use. See 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(a)). As with households including a member who the PHA or owner determines is illegally using a controlled substance, a PHA or owner may admit a household under section 576(b)(1)(B) on the condition that the household member for whom reasonable cause exists to believe that such person's past and noncontinuing illegal use may interfere with other residents' health, safety, or right to peaceful enjoyment, may not reside with the household or on the premises. 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)).

The law of preemption provides that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985). Moreover, a State statute "is invalid to the extent that it 'actually conflicts with a . . . federal statute.'" International Paper Co., v. Ouellette, 479 U.S. 481, 492 (1987) (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978). "Such a conflict will be found when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Ouellette, 479 U.S. at 492 (quoting Hillsborough County, 471 U.S. at 713).

It is our opinion that State statutes which purport to legalize marijuana stand as such an obstacle to the accomplishment of the purpose of section 576(b)(1) of the Public Housing Reform Act, i.e., to require owners of federally assisted housing to "establish standards that prohibit admission to federally assisted housing" for the two categories of households identified in section 576(b)(1). To the degree that a PHA may look to these State laws for authorization to admit families with a member who is using medical marijuana on the grounds that under State law the use of medical marijuana is not the illegal use of a controlled substance, we believe that the PHA would not be in compliance with section 576. We therefore conclude, with regard to required standards prohibiting admission to federally assisted housing of households with members who are illegally using a controlled substance, that State medical marijuana statues which purport to remove medical marijuana from classification as a controlled substance are preempted by section 576 of the Public Housing Reform Act.

II. Termination of Tenancy and Assistance

With regard to existing public housing tenants and program participants, section 577(a) of the Public Housing Reform Act requires that PHAs and owners:

> establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that ***allow*** the agency or owner . . . to terminate the tenancy or assistance for any household with a member--
>
> (1) who the public housing agency or owner determines is illegally using a controlled substance; or
>
> (2) whose illegal use (or pattern of illegal use) of a controlled substance . is determined by the [PHA] or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13662(a) (emphasis added). Unlike the prescribed admission standards, which "prohibit" admission of households identified in section 576(b)(1), the prescribed continued occupancy and assistance standards merely "allow" termination when a PHA or owner determines that a household member is illegally using a controlled substance or when a household member displays a past and noncontinuing pattern of illegal use which is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment. See 64 Fed. Reg. at 40274 (to be codified at 24 C.F.R. § 882.518(b)(1)(i)).

As discussed above, with respect to the classification of medical marijuana, Federal law preempts any discretion on the part of the PHA or owner from determining that medical marijuana is not a controlled substance. Therefore, an owner or PHA could not make a determination that use of medical marijuana per se is never grounds for termination of tenancy or assistance. And, consequently, could not establish standards or lease provisions that generally permit occupancy of Federally assisted housing by medical marijuana users.

That being said, the statute provides the PHA and the owner with the discretion to determine on a case-by-case basis when it is appropriate to terminate the tenancy or assistance of a household. The propriety of any decision to evict a household or to terminate assistance for past or current illegal use of a controlled substance, or for a stated or demonstrated intent by a resident prospectively to use medical marijuana, requires a highly individualized, fact-specific analysis that is tailored to the relevant circumstances of each case. See Southern Management Corp., 955 F.2d at 918; Forrisi v. Bowen, 794 F.2d 931, 933 (4th

Cir. 1986) (decided under Rehabilitation Act). It is therefore not practicable to articulate specific guidance which is relevant to all cases where a PHA is considering eviction or termination of assistance for past or current illegal use of a controlled substance or for a resident's stated or demonstrated intent prospectively to use medical marijuana.

In determining how to exercise the discretion which section 577 of the Public Housing Reform Act affords, however, PHAs and owners should be guided by the fact that historically, HUD has not extensively regulated the area of eviction and termination of assistance, leaving the ultimate determination of whether to evict or terminate assistance to their reasoned discretion. HUD intends that PHAs and owners utilize their discretion under section 577 to make consistent and reasoned determinations with respect to eviction and termination of assistance determinations. In cases where a household member states or demonstrates an intent prospectively to use medical marijuana, PHAs and owners should consider all relevant factors in determining whether to terminate the tenancy or assistance, including, but not necessarily limited to: (1) the physical condition of the medical marijuana user; (2) the extent to which the medical marijuana user has other housing alternatives, if evicted or if assistance were terminated; and (3) the extent to which the PHA or owner would benefit from enforcing lease provisions prohibiting the illegal use of controlled substances.

For households with a member who a PHA or owner determines to be illegally using a controlled substance or whose past and noncontinuing pattern of illegal use of a controlled substance is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment, the prescribed continued occupancy and assistance standards, like the prescribed admissions standards, must allow the PHA or owner to consider evidence of successful rehabilitation or current participation in a supervised drug rehabilitation program when determining whether to terminate tenancy or assistance to such a household. Section 577(b).

Again as discussed above with respect to section 576, State statutes which purport to legalize medical marijuana directly conflict with the quoted provisions of section 577 of the Public Housing Reform Act insofar as they purport to remove marijuana, when used pursuant to a physician's prescription, from the Controlled Substances Act's list of controlled substances. The limited discretion which section 577 affords PHAs and owners to refrain from terminating the tenancy of or assistance for illegal drug use, however, does not include any discretion to determine that marijuana is not a controlled substance within the meaning of the Controlled Substances Act, 21 U.S.C. § 812(b)(1)(c), even if a State statute purports to legalize its use for medical purposes.

If enforced, such laws would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting section 577 of the Public Housing Reform Act, i.e., to require that PHAs and owners "establish standards which allow them to terminate the tenancy or assistance" for either class of households identified in section 577(a). Ouellette, 479 U.S. at 492 (quoting Hillsborough County, 471 U.S. at 713). If given effect, such laws would operate to divest PHAs and owners of the discretion which Congress intended them to have regarding termination of tenancy or assistance for use of a controlled substance. We thus conclude that State medical marijuana statutes, insofar as they may be interpreted to mean that use of medical marijuana is not the illegal use of a controlled substance, are preempted by section 577 of the Public Housing Reform Act.

III. Conclusion

Based on this analysis, we conclude that PHAs and owners must establish standards that require denial of admission to households with a member whom the PHA or owner determines to be illegally using a controlled substance, or for whom it determines that reasonable cause exists to believe that a household member's pattern of illegal use of a controlled substance may interfere with other residents' health, safety, or right to peaceful enjoyment. Section 576(b). The Public Housing Reform Act affords PHAs and owners limited discretion to admit households with a member for whom such a reasonable cause determination is made in the face of evidence of rehabilitation. Section 576(b)(2). HUD's proposed rule would further allow a PHA or owner to impose as a condition to admission a requirement that "any household member who engaged in or is culpable for the drug use . . . may not reside with the household or on the premises." 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)). Because State medical marijuana laws, insofar as they may be interpreted to mean that use of medical marijuana is not the illegal use of a controlled substance, directly conflict with the objective of the Public Housing Reform Act's requirements regarding admissions, they are preempted.

We further conclude that PHAs and owners must establish standards or lease provisions for continued assistance or occupancy which allow termination of tenancy or assistance for any household with a member who the PHA or owners determines to be illegally using a controlled substance or whose past and noncontinuing pattern of illegal use of a controlled substance is determined by the PHA or owner to interfere with other residents' health, safety, or right to peaceful enjoyment. The Public Housing Reform Act affords PHAs and owners limited discretion to refrain from terminating the tenancy or assistance for any household with a member for whom such a determination is made in the face of evidence of rehabilitation. Section 577(b). HUD's

proposed rule would further allow a PHA or owner to impose as a condition for continued assistance a requirement that "any household member who engaged in or is culpable for the drug use . . may not reside with the household or on the premises." 64 Fed. Reg. at 40270 (to be codified at 24 C.F.R. § 5.860(b)).

The standards which section 577 requires must also allow PHAs and owners to terminate the tenancy of or assistance to a household with a member who states or demonstrates an intent prospectively to use medical marijuana. In determining whether to exercise their discretion to evict or terminate assistance for such a household, PHAs and owners should consider all relevant factors particular to each case, including, but not necessarily limited to: (1) the physical condition of the medical marijuana user; (2) the extent to which the medical marijuana user has other housing alternatives, if evicted or it assistance were terminated; and (3) the extent to which the PHA or owner would benefit from enforcing lease provisions that prohibit illegal use of controlled substances.

With regard to the Office of Housing's question concerning the deductibility of the cost of medical marijuana, the Internal Revenue Service has already concluded, based on the premise that marijuana is a Federally controlled substance for which there are no legal uses, that the cost of medical marijuana is not a deductible medical expense. Rev. Ruling 97-9, 1997-9 I.R.B. 4, 1997 WL 61544 (I.R.S.). While for the purposes of HUD's assisted housing programs, PHAs and owners are not technically bound by the IRS Revenue Ruling, consistent with the conclusions in this memorandum, we believe that PHAs and owners should be advised that they may not allow the cost of medical marijuana to be considered a deductible medical expense.

Appendix 9

Obtaining HUD Information and Understanding State and Federal Citations

Part A: Obtaining HUD Information

HUD's Web Page

The HUD Web site at **www.hud.gov** offers information on the Department, its organizational structure and its policies and programs. Particularly useful and potentially research time-saving are the Program Descriptions which contain highlighted links to such information as authorizing statutes, implementing regulations, current income and rent limits, allocation amounts, and other relevant materials. To get to the Program Descriptions from the HUD Home Page, click on "about HUD", then "programs, legislation and research" then "program descriptions" then the division administering the program being researched (e.g., Community Planning and Development" for the HOME Program). Another helpful resource is the HUD telephone book which is searchable by a person's name or the HUD office location. Since the HUD Web site functions both as a public relations tool and an information resource, some information is buried deep within the site and may require diligence on the part of the user to uncover.

HUDCLIPS

HUD's Client Information and Policy System (HUDCLIPS) is HUD's document repository on the world wide web. Located at **www.hudclips.org**, HUDCLIPS contains full text searchable databases of program notices, handbooks, regulations, federal register notices, Notices of Funding Availability (NOFAs), forms, mortgagee letters and related materials. The site is comprehensive and relatively easy to use. Of note: when searching

the HUDCLIPS database, if no result is returned, the user may want to try a number of alternate search terms or "browse" rather than "search."

Community Connections

HUD's Office of Community Planning and Development (CPD) offers on-line information and research on CPD's programs and policies through Community Connections at **www.comcon.org**. Community Connections also provides a 24-hour Fax-on-Demand service for a wide variety of publications, including a catalog of fax-available documents, at 1-800-998-9999. In addition, during business hours (Monday through Friday 8:30 A.M. to 5:30 P.M. ET), staff of Community Connections is available to assist in finding/ordering publications and to make technical assistance referrals at the same number as above.

HUD USER

HUD's Office of Policy Development & Research (PD&R) established HUD User as an information resource for housing and community development researchers and policy makers. Federal government reports, case studies, economic and housing data, and other information are available from HUD User either on-line at **www.huduser.org** or by telephone, 1-800-245-2691, during business hours (Monday through Friday, 8:30 a.m.-5:15 p.m. ET).

Catalog of HUD Directives

HUD publishes a catalog of all Department directives, which include handbooks, forms, notices, and special directives (mortgagee, ethics and labor relations letters). The catalog as well as specific documents may be ordered by calling the Customer Service Center/Directives Distribution Section at 1-800-767-7468 or faxing your order to 202-708-2313 (toll charges apply) or writing: U.S. Department of Housing & Urban Development, Directives Distribution Section Room B-100, 451 Seventh Street, S.W., Washington, D.C. 20410.

Part B: Understanding Federal and State Law Citations

A "citation" is a shorthand description of where a particular law has been published. Citations exist for all types of laws. The following paragraphs introduce how to work with citations, with several examples of federal and state law citations relevant for supportive housing. More information can be found in books such as *Finding The Law* by Cohen, Berring, and Olson (from which some of the examples listed below are drawn) and through publishers such as Nolo Press.

I. Statutes are published chronologically in publications known generically as "**session laws**." Session law publications are usually arranged chronologically, with subject indexes at the back.

A. The official federal session law publication is known as *United States Statutes At Large*, published annually by Little, Brown & Co. under Congressional authorization. Here is an example of a federal session law citation: Public Law 92-195. This citation refers to a statute that was adopted during the 92nd Congress (in 1971), and it is the 195th statute to appear in *United States Statutes At Large* for the 92nd Congress. *United States Statutes At Large* is available in many law libraries. Session laws enacted in recent years are also available on the Internet at **http://thomas.loc.gov/** (a Web site operated by the Library of Congress).

B. State session law citations vary from state to state. An example of a California session law is as follows: Stats.1990, c. 113 (S.B. 504), § 2. This session law was adopted in 1990 (and is therefore part of the California compilation called "Statutes 1990," or "Stats.1990" for short; it is listed under chapter 113; it was proposed as a law in Senate bill 504; and it is listed, in chapter 113, under section 2. Session laws are available in some law libraries. In addition, Internet access varies by state; in California, session laws are difficult to access on the Internet (although with a legislature bill number they are easy to access through various legislative activity Web sites, such as **http://www.leginfo.ca.gov/**, a Web site operated by California's Legislative Counsel).

II. Statutes are also published and arranged by topic in publications known generically as "**codes**." Codes are generally much more useful than session laws publications.

A. The federal statutory code is known as the "U.S. Code," and it is arranged into fifty subject titles, generally in alphabetical order. The U.S. Code can also be Title 42, dealing with the public health and welfare, contains most of the statutes that created federal housing programs. Here is an example of a U.S. Code citation: 42 U.S.C. 3601. This citation refers to a statute that is located at Section 3601 of Title 42 of the U.S. Code. The U.S. Code is available in most law libraries. It is also available on the Internet at **http//uscode.house.gov/usc.htm** (a Web site operated by the House of Representatives).

B. State statutory code citations vary from state to state. An example of a California statutory code citation is as follows: Health and Safety Code Section 1502.2. This statute is found in California's Health and Safety Code (one of several dozen California code subject titles) at section 1502.2. This statute also happens to be the statute used in the California session law example above. State statutory codes are generally available in law libraries, but only the largest law libraries maintain state statutory codes from other states. In addition, Internet access varies by state; in California, state statutory codes are available at **http://www.leginfo.ca.gov/calaw.html** (a Web site operated by California's Legislative Counsel). State statutory codes are also available at **http://www.findlaw.com/casecode/state.html** (a difficult-to-use Web site operated by Findlaw).

III. Regulations are sometimes published in **chronicles** similar to session laws for statutes.

A. Federal regulations are published in a daily chronicle of federal administrative activities known as *The Federal Register*. *The Federal Register* publishes not only regulations, but also many other administrative pronouncements, including executive orders and notices (including NOFAs, or notices of funding availability). Here is an example of a *Federal Register* citation: 12 Fed. Reg. 32 (1947). This citation refers to a 1947 administrative pronouncement that appears on page 32 of volume 12 of *The Federal Register*. *The Federal Register* is available in many law libraries. It is also available on the Internet at **http://www.access.gpo.gov/su_docs/aces/aces140.html** (a Web site operated by the National Archives and Records Administration).

B. State practices vary on the publication of regulations. California has no chronicle analogous to *The Federal Register*.

IV. Federal and state regulations are also published and arranged by topic in **codes of regulations**.

A. The code of federal regulations is known, aptly, as the *Code of Federal Regulations*, or CFR. Like the U.S. Code, the CFR is arranged into fifty subject titles. HUD's program regulations are generally located in Title 24 of the CFR. Here is an example of a CFR citation: 24 CFR 100.202. This citation refers to Section 100.202 of Title 24 of the CFR. The CFR is available in many law libraries. It is also available on the Internet at **http://www.access.gpo.gov/nara/cfr/index.html** (a Web site operated by the National Archives and Records Administration).

B. The codes of state regulations vary from state to state. In California, the code of regulations is known, aptly, as the *California Code of Regulations*, or CCR. The CCR is arranged into numerous subject titles. The State Department of Housing and Community Development has program regulations in Title 25 of the CCR. Here is an example of a CCR citation: 25 CCR 6000. This citation refers to Section 6000 of Title 25 of the CCR. Codes of state regulations are generally available in law libraries, but only the largest law libraries maintain codes of state regulations from other states. In addition, Internet access varies by state; in California, the CCR is available at **http://www.calregs.com/** (a difficult-to-use Web site operated by California Office of Administrative Law). In addition, several state agencies have their own Web sites, some of which include relevant regulations of the state agency.

V. Some federal and state administrative agencies, including HUD, publish program-specific **handbooks** that summarize and/or explain the statutory and regulatory requirements that govern the applicable program. While handbooks are not official parts of the law, they are given great weight by the courts that interpret statutes and regulations, because they represent official executive branch interpretations of the statutes and regulations. Handbooks are generally available only from the agency that published them (sometimes, as with HUD's handbooks, including through the agency's Web site).

VI. **Judicial decisions** or cases are published chronologically in collections known as "reporters."

A. Reporters of federal court cases exist at each level of federal court.

1. There are three common reporters for the United States Supreme Court: *U.S. Reports*, which is published by the government; *United States Supreme Court Reports, Lawyers' Edition*, which is published by a commercial publisher; and *Supreme Court Reporter*, which is published by a commercial publisher. All three reporters are commonly used. Here is an example of a case citation in U.S. Reports: Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984). This citation refers to the 1984 Supreme Court decision in the case of Clark versus Community For Creative Non-Violence, published at page 288 of volume 468 of *U.S. Reports*. This case can also be cited as Clark v. Community For Creative Non-Violence, 82 L. Ed. 2d 221 (1984). This citation refers to the same case, published at page 221 of volume 82 of the Second Series of *United States Supreme Court Reports, Lawyers' Edition.* Finally, this case can also be cited as Clark v. Community For Creative Non-Violence, 104 S.Ct. 3065 (1984). This citation refers to the same case, published at page 3065 of volume 104 of *Supreme Court Reporter*. Supreme Court reporters are available in most law libraries. *U.S. Reports*, one of the Supreme Court reporters, is also available on the Internet at **http://findlaw.com/casecode/supreme.html** (a Web site operated by Findlaw).

2. For lower federal courts, the reporters are known as *Federal Reporter* (for appellate court cases) and *Federal Supplement* (for district court cases). Here is an example of a case citation in *Federal Reporter:* Keith v. Volpe, 855 F.2d 467 (9th Cir. 1988). This citation refers to the 1988 decision of the Ninth Circuit Court of Appeals in the case of Keith versus Volpe, published at page 467 of volume 855 of the Second Series of *Federal Reporter*. Here, too, is an example of a case citation in *Federal Supplement:* Independent Housing Services v. Fillmore Center Associates, 840 F. Supp. 1328 (N.D. Cal. 1993). This citation refers to the 1993 decision of the District Court for the Northern District of California in the case of Independent Housing Services versus Fillmore Center Associates, published at page 1328 of volume 840 of the *Federal Supplement*. Lower federal court reporters are available in most law libraries. Circuit court opinions are also available on the Internet at **http://findlaw.com/casecode/courts/index.html** (a Web site operated by Findlaw), and district court opinions are available on the Internet at

http://www.findlaw.com/10fedgov/judicial/district_courts.html (a difficult-to-use Web site operated by Findlaw).

B. State court case reporters vary from state to state. In addition, within a state, there may be different reporters for the different levels of court. However, the conventions for state court citations are similar to those for federal court citations. For example, the case cited in footnote 10 of the body of ***Between the Lines*** was cited as Harris v. Capital Growth Investor XIV, 52 Cal.3d 1142 (1991). This citation refers to the 1991 California Supreme Court decision in the case of Harris versus Capital Growth Investor XIV, published at page 1142 of the 52nd volume of the third series of the *California Reporter*. State court case reporters are generally available in law libraries, but only the largest law libraries maintain state court case reporters from other states. In addition, Internet access varies by state. A general-purpose Web site for finding state court cases is **http://www.findlaw.com/casecode/state.html** (a difficult-to-use Web site operated by Findlaw).

Appendix 10

Choosing and Working with a Lawyer in Operating Supportive Housing

I. Choosing a lawyer.

A. You may already work with a lawyer with whom you want to continue to work. However, you may need to seek a different lawyer if your problem is outside your existing lawyer's areas of expertise. For example, it is common for different lawyers to handle corporate operations issues, personnel matters, and evictions.

B. Determine what is most important to you in a lawyer.

1. Expertise in the relevant areas of law?
2. Experience with the same or similar problems?
3. Experience with you or your organization?
4. Experience with organizations like your organization?
5. Accessibility and responsiveness?
6. Clarity and plain English?
7. The fee arrangement?

C. Obtain referrals from colleagues in your field (or from your existing lawyer, if appropriate under the circumstances).

II. Working with your chosen lawyer.

A. Determine what you want your lawyer to do, and then tell your lawyer.

1. Do you want an explanation of risks, or help in reducing or shifting risks, in a planned course of action?

2. Do you want a description of possible courses of action given a particular problem situation?

3. Do you want to know whether you lawfully can take certain steps?

4. Do you want to know whether you lawfully must take certain steps?

5. Do you want help negotiating or documenting a particular arrangement or relationship?

6. Do you want help communicating with a government agency with jurisdiction over your issues?

B. Understand and manage the costs of your lawyer's participation in a particular issue.

1. The main costs are (a) indirect costs of delay while you involve your lawyer, and (b) direct costs associated with paying your lawyer.

2. Tell your lawyer your budget and deadline for each request or activity. If your lawyer cannot accommodate the requested budget and deadline, then do at least one of the following:

(a) Reduce the request to what you need (as opposed to what you want), which may allow your lawyer to accommodate the budget and deadline. Make a conscious choice about how carefully you want documents edited or legal issues researched, for example.

(b) Increase your budget and/or extend your deadline.

(c) Find an alternate lawyer who can both (i) provide what is most important to you in a lawyer, and (ii) accommodate your budget and deadline.

(d) Accept the risks associated with the reduced scope of services that can be provided within your original budget and deadline.

3. Understand the extent to which increased legal costs translate into lower total costs. Optimally, you will pay your lawyer as much as necessary to lower your total costs (including lawyer costs) to the greatest degree. Unfortunately, it is not always easy to do the calculation.

C. Involve your lawyer earlier rather than later: an ounce of prevention is worth a pound of cure.

D. Share information with your lawyer: a legal analysis is only as good as the facts being analyzed.

E. Understand what your lawyer tells you. If you don't understand, ask for a better explanation until you understand.

F. Provide constructive feedback when your lawyer does things that you particularly like or don't like.

Appendix 11

Glossary of Commonly Used Legal Terms

This glossary is a tool to help establish a common vocabulary of selected law-related terms for people who work in a supportive housing environment, and to help those people communicate with others (whether colleagues, tenant-clients, lawyers, or others). There's one lawyerly disclaimer: many of the definitions in this glossary are not technically precise or complete.

ADMINISTRATIVE AGENCY means a governmental agency acting under the executive branch. Administrative agencies administer programs, promulgate and enforce regulations, and sometimes resolve disputes in administrative tribunals.

ADMINISTRATIVE DECISION means a decision by an administrative agency, sometimes in the form of a regulation, sometimes in the form of a decision of an administrative tribunal, and sometimes in the form of a notice, directive, memorandum, or other informal form.

ADMINISTRATIVE TRIBUNAL (also known as administrative court) means a quasi-judicial forum for resolving disputes within the general subject area regulated by the administrative agency providing the forum.

AFFIRMATIVE DUTY means a duty to take a specified action (as opposed to a duty to refrain from taking a specified action).

APPEALS COURT (also known as court of appeals) means a court that generally reviews the rulings of a trial court for the limited purpose of considering alleged errors in the trial court's application of the law.

CARE AND SUPERVISION means, under California law governing community care facilities, any of the following activities provided by a facility to meet the needs of its clients/residents: (1) assistance in dressing, grooming, bathing, and other personal hygiene; (2) assistance with taking medication; (3) central storage and/or distribution of medications; (4) arrangement of and assistance with medical and dental care; (5) maintenance of house rules for the protection of clients (as opposed to for the benefit of the housing provider); (6) supervision of schedules and activities; (7) maintenance and/or supervision of cash resources or property; (8) monitoring food intake or special diets; or (9) providing the basic services required to be provided in a community care facility.

CASE means a judicially resolved dispute. It is also often used to mean a published judicial opinion.

CASE LAW means law derived from published judicial opinions.

CIVIL CASE means a non-criminal case.

CIVIL LAW means all areas of law other than criminal law.

CIVIL RIGHTS LAW means the area of law that deals with specific types of discrimination against members of protected classes of people. Fair housing law is a subset of civil rights law.

COMPELLING GOVERNMENT INTEREST means a government interest of the greatest importance. An example is the protection of a person's life or health.

CONDITIONAL USE PERMIT means an administrative approval of a land use that is permitted only with the approval. For example, a zoning law might permit taverns in a certain district only with a conditional use permit.

CONSTITUTION means the document establishing the form of a government, the general processes for operating the government, and the limits within which the government is authorized to act. The most important constitutions are the federal constitution and the state constitution. However, many cities have a constitution (known as a "charter").

CONSTITUTIONAL ACTION means a judicial action based on an alleged violation of a constitution. Constitutional actions usually challenge a governmental actor's authority to act as the governmental actor has acted.

CONTROLLED SUBSTANCE means, for most purposes, a substance whose possession or use is controlled by the federal Drug Enforcement Administration pursuant to Section 102 of the Controlled Substance Act, including medicines for which a prescription is required and drugs for which no prescription is available (such as heroin, cocaine, and marijuana).

CO-TENANT means one of two or more people with concurrent lawful possession of property. Most co-tenancies are either tenancy in common or joint tenancy.

COURT means a formal governmental tribunal, usually within the government's judicial branch, for resolving disputes. There are two main court systems: the federal courts, and the state courts. There are two main levels within each court system: trial courts, and appeals courts. There are three types of disputes considered by courts: criminal, civil, and constitutional.

CRIME means a violation of a law that is characterized as an offense committed against society, resulting in a remedy such as a governmental fine or incarceration.

CRIMINAL CASE means a case involving the government seeking to enforce a governmental remedy as a result of an alleged crime.

CRIMINAL LAW means the area of law dealing with crimes.

DECISION means a governmental decision (usually a judicial decision). Decisions of courts of appeal are often considered to have value as precedents to be followed by other courts.

DISABILITY (or handicap) means, in general, a physical or mental impairment that substantially limits one or more of a person's major life activities. This term has several different context-specific definitions set forth in several different laws.

DISCRIMINATION means the act of treating people or things differently. Not all discrimination is unlawful, but many civil rights laws make it illegal to engage in specific types of discrimination against members of protected classes of people.

DUTY means an obligation required by law.

EVICTION means the expulsion of a tenant from leased premises after the end of the tenancy.

EXECUTIVE ORDER means a directive from the chief executive of a governmental body. Executive orders issued by the president of the United States are commonly used by the federal government in applying and/or enforcing various fair housing and other civil rights laws.

FAIR HOUSING LAW means any of several federal and state civil rights laws that prohibit certain housing-related actions with respect to designated protected classes of people.

FUNDAMENTAL RIGHT means a right that is considered by the courts to be so important that governmental impairment of the right is permitted only to the extent necessary to advance a compelling governmental interest. Examples of fundamental rights include the right to speak and express oneself; the right to practice one's religion; and the right of bodily privacy (including abortion).

HEARING means a legal proceeding in which a governmental decision-maker hears from specified persons. In a judicial hearing, a judge usually hears from people involved in a dispute. In a City Council hearing, the City Council usually hears from interested members of the public.

HOMELESS means, in general, without a fixed residence. HUD defines the term in Section 103 of the McKinney Act (42 U.S.C. 11403g) more specifically as a person who lacks a fixed, regular nighttime residence and whose primary nighttime residence is: (1) a shelter for temporary accommodation, including welfare hotels, congregate shelters, and transitional housing for the mentally ill; (2) an institution providing temporary residence for individuals intended to be institutionalized; or (3) a public or private place not designed for, or ordinarily used as a regular sleeping accommodation for human beings. This definition specifically excludes any individual imprisoned or otherwise detained pursuant to state or federal law. State or local programs may include a different definition of "homeless."

INITIATIVE means a legislative action enacted through a voter-approved ballot measure placed on the ballot by petition.

JUDGE means the government official in a court who decides on matters of law. In a trial where a jury is not involved, the judge also decides on matters of fact.

JURY means a group of persons summoned to court to decide on matters of fact in a trial.

JUST CAUSE means, in some tenancies, the standard by which a landlord can terminate a tenancy. Just cause standards are often found in rent control laws and in housing assistance program regulations.

LAND USE law means the area of law regulating how land is used, typically distinguishing residential from non-residential uses, and within residential uses typically regulating population density.

LANDLORD means a person who owns or manages rental property and leases it to a tenant. In the event of a master tenant leasing property to a subtenant, the master tenant acts as a landlord to the subtenant.

LAW means a governmentally imposed rule. Laws generally provide for duties, rights, and remedies. The word "law" is sometimes used interchangeably with "statute."

LEASE AGREEMENT (or rental agreement) means the oral or written agreement between a landlord and a tenant in which the landlord gives the tenant an exclusive right of occupancy to specified property.

LEASE VIOLATION (or lease default) means a violation of a lease agreement. Most lease agreements provide for the exercise of specified remedies upon a lease violation.

MASTER TENANT means a tenant of leased property who transfers his or her exclusive right of occupancy in the property to another person (a "subtenant") and then acts as a landlord with respect to the subtenant.

OCCUPANCY STANDARD means a limit on the number of people allowed to live in a dwelling.

OPINION means a written explanation of a decision.

ORDINANCE means a statute adopted by a city or county.

PROPOSITION means a legislative action enacted through a voter-approved ballot measure placed on the ballot by the legislature.

PROTECTED CLASS means a class of people sharing a specified characteristic (such as race, sex, nationality, religion, family status, or handicap) who are protected by civil rights laws against denial of specified benefits on account of the characteristic.

QUIET ENJOYMENT means the unimpaired use and enjoyment of leased premises. A tenant generally has a right to quiet enjoyment of leased premises.

REASONABLE ACCOMMODATION is a concept used within certain fair housing laws which require a landlord to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford to a disabled person an equal opportunity to use and enjoy a dwelling.

REASONABLE MODIFICATION is a concept used within certain fair housing laws which requires a landlord to permit a tenant to make, at the tenant's expense, reasonable modifications to leased property when necessary to afford to a disabled person an equal opportunity to use and enjoy a dwelling.

REFERENDUM means a ballot measure for the electorate to ratify or reject a legislative action, placed on the ballot either by petition or by the legislature.

REGULATION means a law formally enacted by an administrative agency to administer a statute. Regulations provide structure, detailed procedures, and specific rules to carry out the requirements of more general statutory provisions.

REMEDY means a legal mechanism to enforce a law or redress an injury.

RENT CONTROL means a locally adopted law that regulates the landlord-tenant relationship, often setting a ceiling on rent payments and prohibiting eviction except where there is just cause.

RIGHT means a claim or title to anything that is enforced by law.

STATUTE means a law enacted with the formal approval of a legislative body (usually the federal Congress or the state legislature).

STRICT SCRUTINY means the standard that a court applies in an action challenging a government attempts to impair a fundamental right or act in a race-conscious fashion. Under this standard, it is not enough for the government to have merely a rational basis for its action, or even an important justification; instead, the government action is permissible only to the extent necessary to advance a compelling government interest.

SUBTENANT means a tenant of leased property whose landlord is a master tenant and whose right of occupancy in the leased premises is based on the right of the master tenant.

THIRTY-DAY NOTICE means a notice to terminate a tenancy in 30 days. This notice may be issued by either a landlord or a tenant, and is the common mechanism to terminate a tenancy with a term of one month, renewable each month (a "month-to-month" tenancy). Under certain housing assistance programs, this notice is also given to terminate a tenancy in the event of a lease violation.

THREE-DAY NOTICE means a landlord's notice to a tenant to cure a lease violation in 3 days, or else the tenancy will terminate.

TRIAL means a judicial proceeding by which a court seeks to determine facts that are in dispute in a lawsuit.

TRIAL COURT means a court of original jurisdiction, where disputes are first resolved and where all relevant facts (evidence) are to be received and considered. A trial court determines both the facts and the law in a dispute.

UNLAWFUL DETAINER means a civil case to rapidly determine who (as between a landlord and a tenant) has a right of possession of leased premises. Force can be used for an eviction only by a government official enforcing a court judgment in an unlawful detainer.

ZONING means an area of land use law dividing a community into zones in which specified uses are permitted automatically or conditionally. Some fair housing laws regulate the extent to which zoning can exclude from an area housing for protected classes.

Appendix 12

Legal Reference Materials

This legal references list identifies several reference books, articles, manuals, and other publications that are helpful in analyzing legal issues in supportive housing.

I. Materials on landlord-tenant law

All of the following books on landlord-tenant law are published by Nolo Press (also known as Nolo.com), whose address is 950 Parker Street, Berkeley, CA 94710, whose phone number is (510) 549-1976, and whose Web site is **www.nolo.com**:

- *Every Landlord's Legal Guide*, by Marcia Stewart, Ralph Warner, & Janet Portman
- *The Landlord's Law Book, Volume 1: Rights & Responsibilities*, by David Brown & Ralph Warner; *Volume 2: Evictions*, by David Brown
- *Every Tenant's Legal Guide*, by Janet Portman and Marcia Stewart
- *Renters' Rights, Quick and Legal Series*, by Janet Portman & Marcia Stewart
- *Tenants' Rights*, by Myron Moskovitz & Ralph Warner
- *Leases and Rental Agreements, Quick and Legal Series*, by Marcia Stewart & Ralph Warner
- *Taming the Lawyers, What to Expect in a Civil Lawsuit and How to Make Sure Your Attorney Gets Results*, by Kenneth Menendez

II. Materials on zoning and land use law

- *Siting Drug and Alcohol Treatment Programs, Legal Challenges to the NIMBY Syndrome*, Technical Assistance Publication (TAP) Series 14, 1995, U.S. Department of Health and Human Services, Public Health Service, Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, Rockwall II, 5600 Fishers Lane, Rockville MD 20857

- *California Land Use & Planning Law*, 1996, by Daniel Curtin, Jr.

III. Materials on fair housing law

- *Fair Housing Act Design Manual, A Manual to Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act*, August 1996, Developed by Barrier Free Environments, Inc., Raleigh, North Carolina for the U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity.

- *A Guide To California Multi-family Disabled Access Regulations*, January 1997, compiled and edited by California Building Officials and the California Department of Housing and Community Development.

- *A Handbook on the Legal Obligations and Rights of Public and Assisted-Housing Providers under Federal and State Fair Housing Law for Applicants and Tenants with Disabilities, California*, March 1997, Written by: Debbie Piltch, J.D., Piltch Associates, Inc. in consultation with Ann Anderson, M.M.H.S., Massachusetts Housing Finance Agency and John Doherty, J.D., AIDS Legal Services-Santa Clara County Bar Association Law Foundation.

- *A Handbook on the Rights and Responsibilities of Tenants with Certain Disabilities: Psychiatric, Alcohol or Drug Addiction, and HIV/AIDS, California*, March 1997, Written by: Debbie Piltch, J.D., Piltch Associates, Inc. in consultation with Ann Anderson, M.M.H.S., Massachusetts Housing Finance Agency and John Doherty, J.D., AIDS Legal Services-Santa Clara County Bar Association Law Foundation.

- *How to Be Your Own Fair Housing Advocate*, Independent Living Resource Center San Francisco

- *Opening Doors, Recommendations for a Federal Policy to Address the Housing Needs of People with Disabilities*, September, 1996, Prepared by The Consortium for Citizens with Disabilities Housing Task Force, Washington, D.C. and The Technical Assistance Collaborative Inc., Boston, MA.

- *Reasonable Accommodation in Housing for People with Disabilities*, July, 1997, Compiled by Michael Allen, Senior Staff Attorney, Bazelon Center for Mental Health Law.

- *Regulations and Executive Orders, Desk Guide*, Prepared by the U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity.

- *Report to Congress and to the Department of Housing and Urban Development*, April, 1994, Prepared by the Public and Assisted Occupancy Task Force, Available c/o Larry Pearl, U.S. Department of Housing and Urban Development, 451 7th Street SW, Washington, D.C., 20410, (202) 708-4445.

- *What Does Fair Housing Mean to People with Disabilities?*, 1991 (revised 1994), Bazelon Center for Mental Health Law

- *Fair Housing: Discrimination In Real Estate, Community Development and Revitalization*, Second Edition 1995, James A. Kushner

- *Housing Discrimination: Law and Litigation*, 1990 (revised 1999), by Robert Schwemm

- *Americans With Disabilities Act Title II Technical Assistance Manual*, 1993, U.S. Department of Justice, Civil Rights Division

- *Americans With Disabilities Act Title III Technical Assistance Manual*, 1993, U.S. Department of Justice, Civil Rights Division

IV. Materials on other topics

- *Glass Walls: Confidentiality Provisions and Interagency Collaborations*, 1993, by Mark Sholer, Alice Shotton, and James Bell of the Youth Law Center

- *Housing and Development Reporter Reference File*, a periodically updated compilation of relevant federal statutes and regulations as well as editorial explanations published by Warren, Gorham & Lamont.

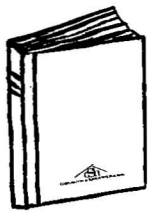
- *Finding The Law*, 1931 (revised frequently), by Morris Cohen, Robert Berring, and Kent Olson

- *Confidentiality: A Manual For The Exchange of Information In a California Integrated Children's Services Program*, (in development), by James Preis for the Cathie Wright Center for Technical Assistance to Children's System of Care

V. Resource Centers

- *Pacific Disability and Technical Assistance Center*, (800) 949-4232

- *Disability Rights Education Defense Fund*, (800) 466-4232



CSH Publications:

In advancing our mission, the Corporation for Supportive Housing publishes reports, studies and manuals aimed at helping nonprofits and government develop new and better ways to meet the health, housing and employment needs of those at the fringes of society.

The Minnesota Supportive Housing Demonstration Program One-year Evaluation Report *Commissioned by CSH, Written by Terry Tilsen, M.B.A of Wilder Research Center. 1998; 81 pages.* **Price: $5**
This report evaluates the success of the Minnesota Supportive Housing Demonstration Program in both improving quality of life for people with special needs and using state dollars more cost effectively. The Program reallocated $2.2 million in state funding toward operating support and service subsidies for 180 supportive housing units.

Under One Roof: Lessons Learned from Co-locating Overnight, Transitional and Permanent Housing at Deborah's Place II *Commissioned by CSH, Written by Tony Proscio. 1998; 19 pages.* **Price: $5**
This case study examines Deborah's Place II in Chicago which combines three levels of care and service at one site with the aim of allowing homeless single women with mental illness and other disabilities to move towards the greatest independence possible, without losing the support they need to remain stable.

Work in Progress...An Interim Report from the *Next Step: Jobs* Initiative *1997; 54 pages.* **Price: $5**
This report provides interim findings from CSH's ***Next Step: Jobs*** initiative, a three-city Rockefeller Foundation-funded demonstration program aimed at increasing tenant employment in supportive housing. It reflects insights offered by tenants and staff from 20 organizations based in Chicago, New York City, and the San Francisco Bay Area who participated in a mid-program conference in October, 1996.

Work in Progress 2: An Interim Report on *Next Step: Jobs* *Commissioned by CSH, Written by Tony Proscio. 1998; 22 pages.* **Price: $5**
Work in Progress 2 describes the early progress of the ***Next Step: Jobs*** initiative in helping supportive housing providers "vocationalize" their residences—that is, to make working and the opportunity to work part of the daily routine and normal expectation of many, even most, residents.

A Time to Build Up *Commissioned by CSH , Written by Kitty Barnes. 1998; 44 pages.* **Price: $5**
A Time to Build Up is a narrative account of the lessons learned from the first two years of the three-year CSH New York Capacity Building Program. Developed as a demonstration project, the Program's immediate aim is to help participating agencies build their organizational infrastructure so that they are better able to plan, develop, and maintain housing with services for people with special needs.

Not a Solo Act: Creating Successful Partnerships to Develop and Operate Supportive Housing *Written by Sue Reynolds in collaboration with Lisa Hamburger of CSH. 1997; 146 pages.* **Price: $15**
Since the development and operation of supportive housing requires expertise in housing development, support service delivery and tenant-sensitive property management, nonprofit sponsors are rarely able to "go it alone." This how-to manual is a guide to creating successful collaborations between two or more organizations in order to effectively and efficiently fill these disparate roles.

Closer to Home: An Evaluation of Interim Housing for Homeless Adults *Commissioned by CSH, Written by Susan M. Barrow, Ph.D. and Gloria Soto of the New York State Psychiatric Institute. 1996; 103 pages.* **Price: $15**
This evaluation examines low-demand interim housing programs, which were developed by nonprofits concerned about how to help homeless people living on the streets who are not yet ready to live in permanent housing. Funded by the Conrad N. Hilton Foundation, this report is a 15-month study of six New York interim housing programs.

In Our Back Yard *Commissioned by CSH, Directed and produced by Lucas Platt. 1996; 18 minutes.* **Price: $10, nonprofits/ $15, all others.**
This educational video is aimed at helping nonprofit sponsors explain supportive housing to members of the community, government representatives, funders and the media. It features projects and tenants in New York, Chicago and San Francisco and interviews a broad spectrum of supporters, including police, neighbors, merchants, politicians, tenants, and nonprofit providers.

Design Manual for Service Enriched Single Room Occupancy Residences *Produced by Gran Sultan Associates in collaboration with CSH. 1994; 66 pages.* **Price: $20**
This manual was developed by the architectural firm Gran Sultan Associates in collaboration with CSH and the New York State Office of Mental Health to illustrate an adaptable prototype for Single Room Occupancy residences for people with chronic mental illnesses. Included are eight prototype building designs, a layout for a central kitchen, recommendations on materials, finishes and building systems, and other information of interest to supportive housing providers, architects and funding agencies.

Next Door: A Concept Paper for Place-Based Employment Initiatives *Written by Julianne Dressner, Wendy Fleischer and Kay E. Sherwood. 1998; 61 pages.* **Price: $5**
This report explores the applicability of place-based employment strategies tested in supportive housing to other buildings and neighborhoods in need of enhanced employment opportunities for local residents. Funded by the Rockefeller Foundation, the report explores transferring the lessons learned from a three-year supportive housing employment program to the neighborhoods "next door."

Understanding Supportive Housing *1997; 58 pages.* **Price: $5**
This booklet is a compilation of basic resource documents on supportive housing, including a chart which outlines the development process; a description of capital and operating financial considerations; tips on support service planning; program summaries of federal funding sources; and a resource guide on other publications related to supportive housing.

The *Next Step: Jobs* Initiative Cost-Effectiveness Analysis *Written by David A. Long with Heather Doyle and Jean M. Amendolia. 1999; 62 pages* **Price: $5**
The report constitutes early findings from a cost-effectiveness evaluation by Abt Associates of the ***Next Step: Jobs*** initiative, which provided targeted services aimed at increasing supportive housing tenants' employment opportunities.

Employing the Formerly Homeless: Adding Employment to the Mix of Housing and Services *Commissioned by CSH, Written by Basil Whiting. 1994; 73 pages.* **Price: $5**
Funded by the Rockefeller Foundation, this report explores the advisability of implementing a national employment demonstration program for the tenants of supportive housing. The paper is based on a series of interviews with organizations engaged in housing, social service, and employment projects in New York City, the San Francisco Bay Area, Washington, D.C., Chicago, and Minneapolis/ St. Paul, as well as a body of literature on programs aimed at alleviating the plight of homelessness.

Connecticut Supportive Housing Demonstration Program — Program Evaluation Report *Commissioned by CSH, Prepared by Arthur Andersen LLP, University of Pennsylvania Health System, Department of Psychiatry, Center for Mental Health Policy and Services Research, Kay E. Sherwood, TWR Consulting. 1999; Executive Summary, 32 pages. Complete Report, 208 pages.*
Executive Summary Price: $5 Complete Report Price: $15
This report evaluates the Statewide Connecticut Demonstration Program which created nearly 300 units of supportive housing in nine developments across the state in terms of tenant satisfaction, community impact — both economic and aesthetic, property values, and use of services once tenants were stably housed.

Miracle on 43rd Street *August 3, 1997 and December 26, 1999.*
60 Minutes feature on supportive housing as embodied in the Times Square and the Prince George in New York City. **To purchase VHS copies, call 1-800-848-3256; for transcripts, call 1-800-777-8398.**

Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing *Commissioned by CSH. Prepared by the Law Offices of Goldfarb and Lipman. 2000; 217 pages.*
Price: $15 or download for FREE at www.csh.org
This manual offers some basic information about the laws that pertain to supportive housing and sets out ways to identify and think through issues so as to make better use of professional counsel. It also offers reasonable approaches to resolve common dilemmas.

COMING SOON:

Closer to Home: Interim Housing for Long-Term Shelter Residents: A Study of the Kelly Hotel *Written by Susan M. Barrow, Ph.D. and Gloria Soto Rodriguez.*
Evidence that a subgroup of homeless individuals have become long-term residents of NYC shelters has spurred a search for new approaches to engage them in services and providing appropriate housing alternatives. The Kelly Hotel Transitional Living Community, developed by the Center for Urban Community Services with first year funding from the Corporation for Supportive Housing, is one pioneering effort to help mentally-ill long-term shelter residents obtain housing.

Supportive Housing and Its Impact on the Public Health Crisis of Homelessness *Written by Tony Proscio*
This publication announces the results of research done between 1994 and 1998 on 300 people living at the Canon Kip Community House and the Lyric Hotel. It also looks at pre-occupancy and post-occupancy use of emergency rooms and inpatient care.

Landlord, Service Provider...and Employer: Hiring and Promoting Tenants at Lakefront SRO *Written by Tony Proscio and Ted Houghton.*
This essay provides a close look at Lakefront SRO's program of in-house tenant employment, as a guide for other supportive housing programs that either hire their own tenants or might want to do so. The lessons of **Landlord, Service Provider...and Employer** are also of potential interest to affordable housing programs whose tenants could become valuable employees given sufficient encouragement, training, and clear policies.

The Next Wave: Employing People with Multiple Barriers to Work: Policy Lessons from the *Next Step: Jobs* Initiative *Written by Wendy Fleischer and Kay E. Sherwood.*
The ***Next Step: Jobs*** initiative tested the premise that a range of employment services targeted to supportive housing tenants can help them access employment. It used supportive housing as the focal point for deploying a range of services to address the multiple barriers to employment that tenants face. It also capitalizes on the residential stability and sense of community that supportive housing offers.

Guide to Developing Family Supportive Housing *Written by Ellen Hart Shegos.*
This manual is designed for service providers and housing developers who want to tackle the challenge of developing permanent supportive housing for chronically homeless families. The manual will provide information on the development process from project conception through construction and rent-up. It also discusses alternatives to new construction such as leased housing. It contains practical tools to guide decision making about housing models, picking partners, and service strategies.

Vocationalizing the Home Front: Promising Practices in Place-Based Employment *Written by Paul Parkhill.*
Accessibility; inclusiveness; flexibility; coordinated, integrated approach to services; high quality, long-term employment; and linkages to private and public sectors are hallmarks of a new place-based strategy to help people with multiple barriers to work, find and keep employment. The 21 place-based employment programs featured in this report represent some of the most comprehensive and innovative approaches to employing persons who are homeless, former and current substance abusers, individuals with HIV/AIDS, those with physical and psychiatric disabilities and other challenges.

The Network: Health, Housing and Integrated Services Best Practices and Lessons Learned *Written by Gerald Lenoir*
This report summarizes the principles, policies, procedures and practices used by housing and service providers that have proven to be effective in serving Health, Housing and Integrated Services tenants where they live.

Forming Local Consortia to Develop Supportive Housing Projects *Written by Tony Proscio*
These three related guidebooks are for those interested in forming local consortia and developing supportive housing projects. Guidebook I discusses the formation and management of the supportive housing consortium. Guidebook II sets out the necessary building blocks for designing and organizing services in developments. Guidebook III provides information on designing, financing, building, and managing housing for people who need ongoing services.

Please mail your request for publications with a check payable to "Corporation for Supportive Housing" for the appropriate amount to: Publications, Corporation for Supportive Housing, 50 Broadway, 17th Floor, New York, NY 10004 (212) 986-2966 x 500 (Tel); (212) 986-6552 (Fax); Or, you can print an order form from our Web site at **www.csh.org.**

How to Contact Us...

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Mission Statement...

CSH supports the expansion of permanent housing opportunities linked to comprehensive services for persons who face persistent mental health, substance use, and other chronic health challenges, and are at risk of homelessness, so that they are able to live with stability, autonomy, and dignity, and reach for their full potential.

We work through collaborations with private, nonprofit and government partners, and strive to address the needs of, and hold ourselves accountable to, the tenants of supportive housing.