

Sober Living Businesses in Residential Zones

BY CHRISTI HOGIN



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Christi Hogin is city attorney for Lomita, Malibu and Palos Verdes Estates. She serves as second vice president for the League's City Attorneys' Department and chaired the editorial committee for the League's *Municipal Law Handbook*, 2014 edition. Hogin can be reached at CHogin@LocalGovLaw.com.

About Legal Notes

This column is provided as general information and not as legal advice. The law is constantly evolving, and attorneys can and do disagree about what the law requires. Local agencies interested in determining how the law applies in a particular situation should consult their local agency attorneys.

Current law limits local regulation of sober living homes and residential alcohol and drug rehabilitation (rehab) facilities. These uses have become lucrative businesses in many instances, and their operation in single-family neighborhoods is sometimes controversial. This article presents the current legal constraints and considerations for cities related to these homes and facilities.

1. Licensed residential rehab programs are subject to the same (and no more) local laws as single-family homes.

Cities may regulate land uses to protect the character of residential neighborhoods.¹ This authority is not unfettered. State and federal law can pre-empt local regulation.² State licensing statutes expressly exempt certain residential rehab facilities from local zoning regulations. Alcohol and drug programs³ (ADPs) that provide 24-hour residential nonmedical⁴ services

to adults⁵ who are recovering from alcohol and/or drug abuse must obtain a state license. If a licensed ADP facility serves six or fewer patients, state law prohibits cities from regulating it any differently than a single-family home.⁶

2. State law imposes fewer restrictions on licensed residential rehab programs than other licensed group homes.


State-licensed group homes are subject to different restrictions. The Community Care Facilities Act, from which alcohol and drug rehabs are exempt, imposes various restrictions that protect the character of residential neighborhoods. For example, under the act, licensed foster homes cannot be for-profit businesses.⁷ ADPs, however, may operate as for-profit enterprises in residential zones without business licenses because licenses generally are not required of other single-family uses.

Cities receive written notice of a proposed Community Care Facilities Act facility, and “any city or county may request denial of the license ... on the basis of overconcentration of residential care facilities.”⁸ The state does not provide any notice to cities before a new ADP license is issued.

Under the Community Care Facilities Act, “overconcentration” exists when two care facilities are located within 300 feet of one another.⁹ The statute provides for a balanced policy “to prevent overconcentration of residential care facilities that impair the integrity of residential neighborhoods.”¹⁰ The state “shall deny” a new group home license under the Community Care Facilities Act if approval would result in overconcentration.¹¹ By contrast, the state’s policy for alcohol and drug rehab programs is that “each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need.”¹²

The attorney general has opined that the state “may not deny an application for licensure or suspend or revoke the license of a treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need.”¹³ With that conclusion, the attorney general determined the Legislature’s reference to consideration of “local need” in approving ADP treatment facility licenses did not establish a basis to limit their numbers in any neighborhood.

*Social Model Facilities in Single-Family Residential Zones:
A Quick Reference Guide*

|  | Legal authority | Limited to six or fewer residents? | Require a state license? | Pre-empted by statute from local regulations different than single-family residence? | Protected class under fair housing anti-discrimination laws? | Allowed in Single-Family zone? |
|---|--|------------------------------------|--------------------------|--|--|--|
| Sober Living Home | Constitutional right to privacy: A “family” as defined by courts (where applicable); Federal law defines recovering alcoholics/addicts as “disabled” and protects them from discrimination on that basis; and ADA requires “reasonable accommodation.” | NO | NO | NO | YES | YES (may be subject to local regulation if consistent with the Fair Housing Act) |
| Alcoholism or Drug Abuse Recovery/Treatment Program (ADP) | Health & Safety Code §11834.01 <i>Nonmedical, residential</i> | YES | YES | YES | YES | YES |
| Community Care Act Residential Facility | Health & Safety Code §1500, <i>Nonmedical, residential</i> | YES | YES | YES | YES | YES |

3. Sober living homes do not require a license and are not limited to six or fewer residents. A sober living home provides a substance-free, mutually supportive living environment for adult recovering alcoholics and drug addicts. No services are provided but residents may engage in self-help programs individually or with others. The state licenses

residential facilities that provide nonmedical treatment and detoxification services. Where no treatment is provided to residents, no license is required. The limitation to six patients is part of the state statute. Because the license statute does not apply, sober living homes are not limited to six residents per single-family home. Also because the statute does not apply, cities are not pre-empted by state law from regulating these uses. However, as noted below, other legal considerations apply.

4. Anti-discrimination laws and “reasonable accommodation” requirements limit categorical regulation of sober living homes. Federal¹⁴ and state¹⁵ fair housing laws protect people with disabilities from housing discrimination. Recovering alcoholics and drug addicts are disabled for purposes of anti-discrimination laws.¹⁶ When people in recovery live together in a “sober living” home, cities cannot discriminate on the basis of the disability, which means an ordinance cannot treat sober living homes differently than other similar uses in single-family¹⁷ residential zones.

Recovering alcoholics and drug addicts are also protected under the federal Americans with Disabilities Act (ADA). The ADA requires cities to reasonably accommodate deviations from zoning laws to afford persons with disabilities equal opportunity to enjoy housing. For example, a city may define “boarding houses” as more than three leases in a single home and prohibit boarding houses in single-family zones. Sober living home residents, however, may seek a waiver from enforcement as applied to them as reasonable accommodation to their disability that may benefit from a substance-free group living environment, allowing the ADA protection to exempt the sober living home from the “boarding house” prohibition.

The Fair Housing Act Amendments of 1988 prohibit local governments, among other things, from discriminating against the disabled by establishing a bedroom/per occupant rule,¹⁹ imposing distance requirements between facilities or prohibiting commercial operators from running sober living facilities in residential neighborhoods. Likewise, requiring a sober living home to obtain a conditional use permit, business license or home occupation permit would impose requirements on the residences of “handicapped” persons that are not imposed on other residences.

5. Even an ordinance that applies equally to group homes for disabled and non-disabled persons may be discriminatory and illegal. A claim of discrimination against a city over a zoning ordinance may challenge its legality on its face or as applied in a particular circumstance. Either way, the claims will fall into one of three categories of illegal discrimination:

- a. *Discriminatory treatment* occurs when a protected class of persons (recovering alcoholics or drug addicts) is subjected to different treatment under a law. Discriminatory treatment is illegal unless the different treatment benefits the protected class or responds to legitimate safety concerns. A facially neutral regulation (that does not treat a protected class of persons differently) may still be illegal if evidence establishes that the intent of the statute is discriminatory. Regulations must be justified by legitimate, nondiscriminatory nonpretextual reasons.
- b. *Disparate impact* occurs when a regulation has a significantly different and adverse impact on a protected class.
- c. *Failure to make reasonable accommodation* of rules, practices, policies and services for persons of a protected class constitutes discrimination. An accommodation is reasonable unless it requires a fundamental alteration in zoning regulations or imposes an undue financial or administrative burden.

A recent case suggests heightened standards for local ordinances challenged as discriminatory. The City of Newport Beach adopted an ordinance that appears neutral because it applies to group living situations (distinguished from single housekeeping units) but does not single out recovering alcoholics or drug addicts. Newport Beach was sued for discrimination by plaintiffs claiming that the ordinance’s intent is to regulate sober living homes in particular. The Ninth Circuit ordered a trial to determine if Newport Beach enacted the ordinance with an intent to discriminate based on certain evidence that it was the city’s purpose and because the ordinance “had the practical effect of prohibiting new group homes from opening in most residential zones.”²⁰ A petition to the U.S. Supreme Court for review of the ruling is anticipated shortly.

6. Regulation to benefit the protected class is allowed. Relying on cases interpreting the federal Fair Housing Act, the

California Legislative Counsel²¹ has opined that “sober living homes” may not be subject to distance requirements, *unless the regulation benefits the protected class* or responds to legitimate safety concerns raised by individuals affected rather than being based on stereotypes.²² The italicized provision marks the intersection between local and state interests. Cities exercise zoning power to protect the character of residential neighborhoods. The policy underlying state law pre-emption is to provide care in a residential setting. The antidiscrimination laws are intended to protect equal opportunity to enjoy housing opportunities. Maintaining the integrity of residential neighborhoods is necessary to provide the beneficial setting and the housing opportunity. Many would argue that distancing requirements *both* respond to the biggest concerns of local government *and* advance state policy.²³ As more communities gain experience with the effect of unregulated uses, implementing antidiscrimination statutes may soon demand what they now appear to prohibit.

For more information, visit www.cacities.org/GroupHomes.

Interested in Learning More? September Webinar Will Cover This Topic in Greater Depth

The League will present a webinar for city officials and staff from 10:00 to 11:30 a.m. on Sept. 17, 2014, that examines issues related to sober living homes. Learn more about this topic, and take advantage of this opportunity to have your questions answered by experts. To sign up, visit www.cacities.org/events.

Footnotes

¹ *Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365 (cities may zone property for certain uses and exclude others, e.g. creating residential zones where businesses are excluded).

² See City Attorneys' Department, League of California Cities, *The California Municipal Law Handbook* (Cont.Ed.Bar 2013 ed.) §§1.33-1.41.

³ H&S Code §11834.01 et seq.

⁴ Facilities that provide medical services are *not* residential uses and may be prohibited from residential zones. Also note that licensed community care facilities that serve seven or more patients must be treated exactly the same as a *multifamily* residential use and cannot be defined as a “boarding house.” They may be prohibited from the single family residential zones.

⁵ Alcohol and drug treatment facilities for adolescents are governed by the Community Care Facilities Act. They are licensed, nonmedical and serve six or fewer. H&S Code §1502(a)(1); H&S Code §1566.3.

⁶ H&S Code §11834.23.

⁷ H&S Code §1502(a)(4) (“Private foster family agencies shall be organized and operated on a nonprofit basis.”)

⁸ H&S Code §1520.5(d).

⁹ H&S Code §1520.5(b).

¹⁰ H&S Code §1520.5(a).

¹¹ H&S Code §1520.5(a).

¹² H&S Code 11834.20.

¹³ 90 Ops. Cal. Atty. Gen. 109 at 5 (No. 07-601).

¹⁴ 42 USC § 3604(f)

¹⁵ Gov't Code § 12955(a).

¹⁶ 28 C.F.R. § 35.104; The Fair Housing Act Amendments of 1988 clarify that “handicap” does not include current, illegal use of or addiction to a controlled substance.

¹⁷ For land-use regulation purposes, a “family” is people, whether or not related, who share household chores and expenses, eat meals together, participate in recreational activities together and form close bonds. See *Santa Barbara v. Adamson* (1980) 27 Cal.3d 123. The law prohibits a zoning ordinance from defining “family” by distinguishing between related and unrelated persons or by imposing a numerical limit on the number of persons that constitute a family.

¹⁸ *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996) (however, a group home’s refusal to seek a variance precludes a claim for failure to accommodate).

¹⁹ Per-occupant requirements applied equally to all residential uses within the same zone are valid under the Fair Housing Act. See, e.g., *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (upholding as valid an eight-person restriction).

²⁰ *Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, *rehearing denied en banc*, 746 F.3d 936.

²¹ The Office of Legislative Counsel is a nonpartisan public agency that drafts legislative proposals, prepares legal opinions and provides other confidential legal services to the Legislature and others. According to Legislative Counsel, it maintains an attorney-client relationship with each member of the Legislature and the governor and releases only opinions that have already been released by a client. Excerpts of the 1997 opinion are in the public domain, such as the first page submitted by the Sober Living Network to the City of Los Angeles in 2008 when it considered adopting sober living regulations.

²² The legal test to determine whether an ordinance that subjects a protected class to different treatment — e.g., sober living homes must have conditional use permits to operate but other homes do not — is discriminatory in violation of the Fair Housing Act depends on the government’s ability to establish that the restriction benefits the class or responds to legitimate safety concerns. *Community House, Inc. v. City of Boise* (9th Cir. 2007) 490 F.3d 1041, 1050.

²³ Note that courts have been skeptical of the anti-clustering justifications raised by cities in various cases. However, these cases have largely arisen in purely theoretical contexts. As the “unregulatable” uses cluster and create concrete examples, cities may be able to produce more sound evidentiary records of the adverse effects of clustering.