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# Housing and the Mental Health Services Act

An Appendix to  
*Between the Lines:  
A Question and Answer Guide on Legal  
Issues in Supportive Housing  
(California Edition)*

Prepared by Goldfarb & Lipman LLP  
and the  
Corporation for Supportive Housing

[www.csh.org](http://www.csh.org)

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# HOUSING AND THE MENTAL HEALTH SERVICES ACT

AN APPENDIX TO *BETWEEN THE LINES: A QUESTION AND ANSWER GUIDE ON LEGAL ISSUES IN SUPPORTIVE HOUSING (CALIFORNIA EDITION)*

PREPARED BY GOLDFARB & LIPMAN, LLP FOR THE CORPORATION FOR SUPPORTIVE HOUSING

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## CHAPTER 1: OVERVIEW OF DOCUMENT AND THE MENTAL HEALTH SERVICES ACT

### 1. Who Should Use This Appendix?

This appendix was developed to assist developers, lenders, county mental health service providers, other social service providers, investors and property managers who work with housing financed with Mental Health Services Act funds and/or who work with and seek housing for persons with severe mental illness.

### 2. How Does This Appendix Relate To *Between The Lines: A Question And Answer Guide On Legal Issues And Supportive Housing*?

This Appendix is intended to be a "pull-out" supplement for those working with Mental Health Services Act financed housing and/or households eligible to live in this housing. Users of this Appendix should also review *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing (California Edition)*, prepared by Goldfarb & Lipman, LLP for the Corporation for Supportive Housing, in its entirety to understand the basic legal issues related to providing supportive housing and housing for persons with disabilities. In particular, a careful reading of the Chapter entitled "Legal Overview" of *Between the Lines*, will provide important background on the laws discussed in the Appendix. *Between the Lines* is available for free download at [www.csh.org/publications](http://www.csh.org/publications).

CSH is currently working on a 2009 update of the 2001 California Edition of *Between the Lines*. The 2009 update will reflect changes in California law, and recent interpretations from California and Federal courts concerning various fair housing laws.

### 3. What Is The Mental Health Services Act?

In the November 2004 election, California voters approved Proposition 63, the Mental Health Services Act ("MHSA" or the "Act"). MHSA was intended to transform the mental health system in California. The Act provides a dedicated source of funds to reduce the long term impacts of untreated serious mental illness and to expand successful, innovative, service programs for people with serious mental illness. MHSA funds are generated by a tax imposed on millionaires in California, who are required to pay a 1% tax on their annual income in excess of \$1,000,000, with the funds dedicated to use for services and supports for persons with serious mental illness (Revenue and Taxation Code § 17043).

MHSA is codified in Welfare and Institutions Code and the California Revenue and Taxation Code. Under the California Act, MHSA funds are used for a variety of components, including prevention and early intervention programs, education and training of individuals who will provide services people with serious mental illness, and capital facilities and technologies needed to provide services and programs (Welfare and Institutions Code § 5847). A portion of the funds are dedicated to "innovative" programs developed by counties and designed to increase access to underserved groups, expand access to services, improve the quality of services provided and outcomes, and promote interagency collaboration (Welfare and Institutions Code § 5830). The Act also requires that funding be provided for services and supports which are intended to promote recovery and wellness for adults and older adults with severe mental illness and resiliency for children and youth with serious emotional disorders and their household members (Welfare and Institutions Code §§ 5878.1-5878.3 and § 5813.5). Notably, the Act prioritizes the use of MHSA funds for persons who are unserved or underserved by the existing mental health system (Welfare and Institutions § 5878.3 and § 5847(e)) and specifically prohibits using MHSA funds to supplant other sources of state or county funds that have been used to provide mental health services (Welfare and

Institutions Code § 5891.)

Under the Act, each county must develop a three-year plan and use its MHSAs funds in a manner that is consistent with such three-year plan. (Welfare and Institutions Code § 5847.) The three year plan includes a "Community Services and Supports" part which describes the services and supports which will be provided to adults, seniors, children, and transition age youth with serious mental illness (9 Cal. Code of Regulations 3200.080). The "Community Services and Supports" consists of four categories: Full Service Partnerships, General Systems Development, Outreach and Engagement, and the use of funds under the MHSAs Housing Program. (9 Cal. Code of Regulations §§ 3200.225 and 3615.)

In planning to provide services with MHSAs funds, counties must also adopt the following five core elements intended to promote the overall MHSAs goals (the California Code of Regulations define each at Title 9, Chapter 14, § 3200, et. seq.):

- (1) A focus on wellness and recovery;
- (2) Cultural competency, which means providing equal access to equal quality services without disparities, planning for and evaluating treatment and outreach interventions that effectively engage and retain diverse populations, incorporating an understanding of diverse belief systems and of the impact of discrimination on programs and clients' mental health, training staff to address the needs and values of populations being served, and developing strategies to promote equal opportunities among those delivering services;
- (3) Community collaboration, which means including clients, family members, agencies, organizations, and businesses in the process of sharing information and resources to reach a shared county vision and goals;
- (4) Client and family-driven processes that provide the client with the primary decision-making role in identifying needs and in planning for and providing services; and
- (5) An integrated service experience that allows a client to access a full range of services from multiple agencies and organizations in a coordinated, comprehensive manner.

#### **4. What is the Mental Health Services Act Housing Program?**

California Executive Order S-07-06 created the Mental Health Services Act Housing Program. The goal of the Mental Health Services Housing Program is to create 10,000 supportive homes. The MHSAs Housing Program uses MHSAs funds to finance permanent supportive housing developments for homeless people with serious mental illness. The Department of Mental Health is collaborating with the California Housing Finance Agency ("CalHFA") and California counties on the Program. In connection with the MHSAs Housing Program, county mental health departments allocate a portion of MHSAs funds to CalHFA to administer the Program on the counties' behalf. A portion of these funds are being used for capitalizing operating subsidies and the balance will be used for the development costs of housing. The Executive Order proposes up to \$75 million in MHSAs funds be allocated to the MHSAs Housing Program per year to finance development costs associated with the development, acquisition, construction and rehabilitation of housing for MHSAs households. While the Executive Order did not call for capitalized operating funding, the MHSAs Housing Program includes an additional \$40 million per year in MHSAs funds for capitalizing operating subsidies for some of the units created by the MHSAs Housing Program. The application packet for the MHSAs Housing Program funds was released on August 6, 2007 (the "MHSAs Housing Program Application"), which included funding for a \$75 million capital allocation and a \$40 million operating reserve allocation per year for three years. The MHSAs Housing Program Application includes extensive information regarding MHSAs Housing Program requirements. The MHSAs Housing Program Application packet

and all other documents related to the MHSA Housing Program may be found on the MHSA Housing web page at the California Department of Mental Health Website at [http://www.dmh.ca.gov/Prop\\_63/MHSA/default.asp](http://www.dmh.ca.gov/Prop_63/MHSA/default.asp). Applications for MHSA Housing Program funds may be submitted by counties at any time. The state review process is non-competitive but each proposed housing project must be consistent with the Community Services and Supports component of the county's three year plan. Counties may continue to submit applications to CalHFA until they have committed all funds.

The MHSA Housing Program will provide funds for permanent financing and operating subsidies for "rental housing developments" and "shared housing developments." All housing must be permanent supportive housing. Transitional housing and licensed facilities do not qualify for financing under the MHSA Housing Program, nor do master-leased units.

- "Rental Housing Developments" are buildings with five or more units, at least 10% of which (or no fewer than five) must be set aside for members of the target population (homeless people with serious mental illness). One unit may be made available for a manager's apartment/bedroom at the Housing Provider's option. If the rental housing development has 100 or more units, a minimum of 10 units must be set aside for members of the target population. Each unit in a rental housing development must include a sleeping area, kitchen area, and a bathroom. Rental Housing Developments smaller than five units may be considered on an exception basis.
- "Shared Housing Developments" consist of buildings with four or fewer units. One unit buildings such as single family homes and condominiums must have at least two bedrooms in order to qualify as a shared housing development. Each unit in a shared housing development must be a "shared housing unit" occupied by two or more unrelated MHSA-eligible adults. Each bedroom in a shared housing unit must be targeted to an MHSA-eligible adult. Shared housing units may be one-bedroom units with only one tenant, provided that other larger units in the shared housing development are also shared housing units. Shared housing developments are intended primarily to serve unrelated adult roommates; however, the spouse or child of an MHSA-eligible tenant is permitted to share a bedroom with the tenant. A shared housing development must provide a separate lockable bedroom for each adult, and each adult must have a lease and be responsible for paying rent. Finally, each shared housing unit must also contain a kitchen and bathroom (units with three or more bedrooms must contain a full bathroom and a half bathroom and units with five or more bedrooms must contain two full bathrooms).

More information about rental housing and shared housing developments may be found on the MHSA web page on the California Department of Mental Health website at [http://www.dmh.ca.gov/Prop\\_63/MHSA/default.asp](http://www.dmh.ca.gov/Prop_63/MHSA/default.asp).

The MHSA Housing Program is not the only manner in which MHSA housing may be financed. The MHSA Housing Program rules may not be applicable to all housing funded by the Mental Health Services Act. For example, prior to the creation of the MHSA Housing Program, many counties financed housing programs with MHSA funds. As a result, MHSA funding paid for a variety of housing models, including transitional housing, even though the MHSA Housing Program provides funding only for permanent supportive housing. In addition, DMH Information notice 08-12 and 08-31 set forth a variety of housing activities that may be financed with MHSA funds, including master leasing and tenant subsidies. While, under the Act, counties may choose to use non-Housing Program MHSA funds for master leasing and tenant subsidies, MHSA Housing Program funds may not be used to finance these activities.

## 5. Who Is Eligible To Reside In Housing Financed With MHSA Housing Program Funds?

Both the Act and DMH regulations make clear that individuals receiving MHSA-funded services and supports must

be adults with severe mental illness or seriously emotionally disturbed children. A household may only qualify to occupy an MHSA Housing Program unit if the household includes an adult who has serious mental illness or a child with serious emotional disturbance. Under the MHSA Housing Program, the individual or family must also be homeless or is at risk of homelessness.

Counties are also able to impose their own eligibility requirements, so long as those requirements are consistent with their three year plans and do not violate federal and state housing laws. The county's mental health department shall determine whether an individual or family is eligible for tenancy and must certify households as meeting eligibility criteria.

- (a) Seriously Mentally Ill Adult or Seriously Emotionally Disturbed Child. If the household is a single individual, the single individual must qualify as an adult with serious mental illness. If the household is a family or group operating as a single housekeeping unit, the household must include at least one person who is an adult with serious mental illness or a child who is seriously emotionally disturbed.
- (1) Seriously Mentally Ill Adult. A seriously mentally ill adult must have a "serious mental disorder" or require or be at risk of requiring "acute psychiatric inpatient care, residential treatment, or outpatient crisis intervention because of a mental disorder with symptoms of psychosis, suicidality, or violence." (Welfare and Institutions Code §§ 5813.5(c) and 5600.3(b) and (c).) The following additional definitions apply:
- A "serious mental disorder" for adults and seniors is a severe and persistent disorder that may cause behavior that substantially interferes with the primary activities of daily living and may result in an inability to maintain a stable adjustment and independent functioning without an extended term of treatment, support and rehabilitation.
  - The disorder must be identified in the "Diagnostic and Statistical Manual of Mental Disorders," excluding substance use disorders, developmental disorders, or certain types of traumatic brain injury (unless that person also has a serious mental disorder).
  - The person with the disorder must have "substantial functional impairments or symptoms, or a psychiatric history which demonstrates that without treatment there is an imminent risk of decompensation to having substantial impairments or symptoms" resulting from the disorder. (Welfare and Institutions Code §§ 5600.3(b) 3)(B)(i).)
  - "Functional impairment" is defined as substantial impairment (as a result of the mental disorder) in independent living, social relationships, vocational skills or physical condition, caused by the mental disorder. (Welfare and Institutions Code §§ 5600.3(b) 3)(B)(ii).
  - A person with a serious mental disorder must also be likely to become, because of his or her mental functional impairment and circumstances, so disabled as to require public assistance, services or entitlements. (Welfare and Institutions Code §§ 5600.3(b)(3)(C)).
- (2) Seriously Emotionally Disturbed Child. Under the Act, minors under 18 years of age who are "seriously emotionally disturbed" are qualified to receive MHSA-funded housing and other services. "Seriously emotionally disturbed" is defined as a mental disorder identified in the "Diagnostic and Statistical Manual of Mental Disorders," excluding primary substance use disorders or development disorders. (Welfare and Institutions Code §§ 5600.3(a).) Such mental illness must also result in behavior inappropriate to the child's age and meet at least one of the following criteria:
- The mental illness must substantially impair any two of the following: (a) the child's self-care; (b) the child's school functioning; (c) the child's family relationships; and (d) the child's ability to

function in the community. In addition, the child must have been removed from home or be at risk of removal from home or the mental illness must have been present for more than six (6) months and be likely to continue for more than one (1) year without treatment (Welfare and Institutions Code § 5600.3(a)(2)(A)); or

- The child displays psychotic features, risk of suicide or risk of violence due to mental illness. (Welfare and Institutions Code § 5600.3(a)(2)(B)); or
- The child meets the special education eligibility requirements set forth in Chapter 26.5 of the California Government Code (see § Government Code 7570 et seq.).

(b) Homelessness and at Risk of Homelessness. The MHSA Housing Program imposes additional criteria that must be met for households to be eligible to reside in housing funded with MHSA funds obtained through the MHSA Housing Program. The MHSA Housing Program Application for August 6, 2007 includes the following statement:

The State of California recognizes that there is currently, and will continue to be for the foreseeable future, inadequate funding to provide permanent supportive housing for all those with serious mental illness who need it. The MHSA Housing Program is primarily intended to provide funding to create permanent supportive housing and services for individuals with serious mental illness who are homeless. Secondly, and in keeping with the values of MHSA, the State believes that individuals should not have to 'fail first' and become homeless in order to become eligible for the housing and supports available under this program. (Application, § 2.2)

Therefore, the Housing Program requires eligible tenants to be homeless or at risk of homelessness to be eligible for housing financed with Housing Program funds.

- Homelessness. The MHSA Housing Program Term Sheet defines homelessness as living on the streets or lacking a fixed, regular, and adequate night-time residence, including living in a shelter, motel, or other temporary living situation in which the individual has no tenant rights.
- At risk of homelessness. The MHSA Housing Program Application defines "at risk of homelessness" to include: (i) transition-age youth exiting the child welfare or juvenile justice systems; (ii) individuals discharged from institutional settings, including hospitals, acute psychiatric hospitals, psychiatric health facilities, skilled nursing facilities with a certified special treatment program for the mentally disordered, mental health rehabilitation centers, and crisis and transitional residential settings; (iv) individuals released from local city or county jails; (v) individuals temporarily placed in residential care facilities upon discharge from one of the institutional settings cited above; and (vi) individuals who have been assessed and are receiving services at the County Mental Health Department and who have been deemed to be at imminent risk of homelessness, as certified by the County Mental Health Director. (MHSA Housing Program Application, § 2.2)

## CHAPTER 2: SERVING MHSA-ELIGIBLE HOUSEHOLDS

### 1. May Housing Be Reserved For Or Restricted To MHSA-Eligible Households?

In many instances, yes. MHSA Housing Program funding requires that housing providers designate or reserve MHSA funded units for persons who are MHSA-eligible. Complying with this requirement may raise fair housing issues for providers. To determine whether housing may be reserved or restricted to MHSA-eligible households, providers must consider the fair housing implications of such a reservation as well as the restrictions that may be imposed by other sources of funding used by the provider to develop and operate the housing. The fact that the MHSA program, which is sanctioned by the state of California, restricts the housing funded with MHSA dollars to persons who are MHSA-eligible may not protect a provider from fair housing complaints.

The federal Fair Housing Act prohibits 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"). Additionally, the Fair Housing Act provides 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"<sup>1</sup> (42 U.S.C. 3601(c)). 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, as well as the language of the section itself, emphasizes that, with respect to disability-based discrimination, the actions prohibited are discriminatory acts against persons with disabilities, rather than a requirement that a person's disabled or non-disabled status must be ignored with regards to housing decisions. This is reinforced by the preamble to the Fair Housing Act which specifically states that a housing provider "may lawfully restrict occupancy to persons with handicaps."<sup>2</sup> Additionally, the federal regulations which implement the federal Fair Housing Act imply that it is permissible to designate units as available only for people with disabilities. 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, indicates that such restriction is permissible. The Fair Housing Act also requires that persons with disabilities receive reasonable accommodations that may be necessary for them to enjoy the full benefits of the housing, giving further evidence that the Fair Housing Act provisions regarding disability based discrimination were not intended to require housing providers to remain neutral in meeting the needs of the disabled community.

Under Title II of the Americans with Disabilities Act (the "ADA"), public entities are 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. Although the ADA does not specifically address housing programs, it does apply to public entities and publicly-supported programs. The provisions of the ADA that allow for separate benefits for persons with disabilities or particular types of disabilities 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, and so long as the public entity also

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<sup>1</sup> The Fair Housing Act allows occupancy in certain housing developments to be limited to senior citizens (42 U.S.C. 3607(b)(2)).

<sup>2</sup> Preamble II 24 CFR ch.1, subch A, app. I, 54 Fed. Reg. 3246 (Jan. 23, 1989).

provides housing available without restrictions on the basis of disability. (See 28 CFR 35.130 and Appendix A to 38 CFR Part 35.)<sup>3</sup>

The state Fair Employment and Housing Act, unlike the Fair Housing Act, does not differentiate 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, the MHSA statute specifically targets assistance to persons with severe mental disabilities. The MHSA authorizing statutes have equal priority with the Fair Employment and Housing Act. Under the rules of statutory interpretation, the specific authorization provided by the MHSA statute for services to be provided to a specific segment of the population, will carry greater weight than the general language of the Fair Employment and Housing Act. Thus, under state law, the reservation of units for MHSA-eligible tenants would be allowed.

The Unruh Civil Rights Act (California Civil Code §§ 51 et seq.) prohibits arbitrary discrimination in all "business establishments." 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. Restriction of housing to MHSA-eligible residents would not be considered arbitrary discrimination. First, the funding available to providers for MHSA housing requires that the provider restrict the housing. This funding requirement alone will provide a defense to an arbitrary discrimination claim since it is part of the provider's business purpose to restrict the housing, as evidenced by its receipt of MHSA funds. Secondly, MHSA funds require that the housing include services beneficial to persons with severe mental disabilities. This service component provides a non-arbitrary reason for excluding people outside the target population.

If the development receives federal financial assistance, additional fair housing considerations apply, as discussed in the next question below.

## 2. May Housing Be Financed With Federal Financial Assistance And MHSA Funds?

Housing units in a federally-funded development that are also assisted with MHSA funds may be reserved for MHSA-eligible households if necessary to provide MHSA-eligible households with access to housing that is equal to the access currently enjoyed by non-MHSA-eligible households. To support an "equal access" argument, housing providers should disperse the MHSA units throughout a development or, if all units in a project are MHSA-restricted, the project itself must be small. In each instance (whether the development is a large "mixed" population development or a small development with 100% units restricted to MHSA households), providers need to document why reserving units for MHSA households is necessary to provide equal access to housing. Housing providers reserving MHSA units should also offer access to voluntary services which are appropriate for MHSA-eligible households.

If a project, whether publicly or privately owned, receives federal financial assistance, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) applies. Section 504 provides that no otherwise qualified individual with handicaps shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. Each federal department is required to adopt regulations implementing Section 504 with respect to its department's activities and programs. HUD has adopted such regulations which apply to HUD-funded housing programs, including the HOME, CDBG, HOPWA, Section 8, Shelter Plus Care and Section 811 programs. Tax

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<sup>3</sup> *Easley v. Snider*, 36 F.3d 297 (3<sup>rd</sup> Cir. 1994).

credit and bond financing are not considered "federal financial assistance" under Section 504 and therefore are not covered by the HUD Section 504 Regulations.<sup>4</sup>

Section 504 was the first federal legislation to recognize the rights of persons with disabilities to be free from discrimination, and was widely hailed as major civil rights legislation when it was adopted in 1973. As such, both Section 504 and the HUD regulations which implement it reflect a strongly "integrationist" policy: persons with disabilities, to the greatest extent possible, are to be integrated into the mainstream of society and not isolated into separate "disabled-only" institutions.

Within these "integrationist" regulations, HUD specifically contemplates that housing providers may limit occupancy to the disabled or to people with a particular type of disability if a federal statute or executive order authorizes such limitation. If a housing provider does not have such federal authority, the Section 504 regulations limit that providers' ability to house only persons with disabilities or persons with a particular type of disability.

The limitations faced by providers of federally-assisted housing who seek to serve only disabled persons or persons with a particular type of disability is complicated by the fact that the HUD regulations also permit, and in some instances require, distinctions on the basis of disabilities and between disabilities in order to promote integration. The regulations specifically permit distinctions based on disabilities if such distinctions are necessary "to provide qualified individuals with handicaps with housing, aid, benefits, or services that are as effective as those provided to others."<sup>5</sup> Another provision of the regulations state that in order for housing, aids, benefits, and services, to be equally effective, such housing, aids, benefits and services "are not required to produce the identical result or level of achievement for individuals with handicaps and non-handicapped persons, but must afford individuals with handicaps equal opportunity to obtain the same result, to gain the same benefit or to reach the same level of achievement."<sup>6</sup> The Section 504 Regulations also include the concept of reasonable accommodation.<sup>7</sup> The concept of reasonable accommodation (or reasonable modification) recognizes that persons with disabilities, in order to obtain equal opportunity or equal access, sometimes require individualized treatment that is different and distinct from practices applied to non-disabled persons or persons with other types of disabilities. Reasonable accommodations may be made at times through physical modifications and at other times through waivers of generally-applicable rules or policies.

Using MHSA funds in federally-assisted housing developments raises questions under Section 504. There is no federal authority which authorizes housing providers to limit their programs to persons with serious mental illness. Yet, the Mental Health Services Act requires housing providers using MHSA funds to serve persons with serious mental illness (MHSA-eligible households).

In enacting Proposition 63, however, the voters of the state of California not only identified mental illness as a serious problem of many of the state's citizens and dedicated a permanent source of revenue to assist persons with serious mental illness, the voters of California also recognized that people with serious mental illness have access to fewer resources than persons with other disabilities and remain largely excluded from existing affordable housing programs. The requirement that MHSA funds be utilized only to fund programs to specifically serve persons with mental illness flows from these policies in the Act. The voters of California intended to provide benefits to MHSA-eligible persons at the exclusion of other persons, including non-disabled persons and persons with other types of disabilities. The voters acknowledged the extreme need faced by seriously mentally ill people and the severe problem posed to California by the lack of housing and services for persons with mental illness.

The voters' position is supported by studies which show that when housing is available to the general public but

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<sup>4</sup> The HUD Section 504 Regulations are found at 24 CFR 8.1 et seq.

<sup>5</sup> 24 CFR 8.4(b)(iv).

<sup>6</sup> 24 CFR 8.4(b)(2).

<sup>7</sup> 24 CFR §§ 8.33.

includes units limited to persons within a category of disability, coupled with the provisions of voluntary social services, "that limitation is effective in reducing barriers to stable housing for people whose disabilities might otherwise be a barrier to equal access."<sup>8</sup> In addition, supportive housing designed for seriously mentally ill people, offering voluntary services and emphasizing independent living modeled on a regular landlord-tenant relationship, rather than an institutionalized or group home approach, helps ensure ongoing access to housing. It is important that services associated with such housing be voluntary because mandatory services detract from the landlord-tenant relationship and mimic institutionalized settings which conflict with Section 504's integrationist requirements.<sup>9</sup>

The great majority of federally funded housing units which are also funded with MHSA funds will be scattered units in larger projects (for example a 50 unit affordable housing development may include five MHSA-funded units). Where a small number of units in a larger federally funded project are restricted to MHSA-eligible households, the restriction should not violate Section 504 because the restriction is clearly necessary to provide persons with serious mental illness with housing opportunities that are as effective as those provided to others. Stated differently, the MHSA restrictions are necessary to ensure that persons with serious mental illness and their families (a population that is widely recognized as having difficulty finding and maintaining housing) are able to occupy the same housing developments that other persons without disabilities or with different disabilities are able to occupy. MHSA-restricted units scattered throughout a larger project promote, rather than defeat, the integrationist policies of Section 504.

Other housing financed with MHSA funds will be small rental housing developments and "shared housing" where each MHSA-eligible person will have his or her own room (or will share a room with another MHSA-eligible person), but there may be a shared kitchen and common areas. In these small rental developments and shared housing situations, all units may be reserved for MHSA-eligible households. In such situations, if federal funds are involved, housing providers will need to demonstrate why developments limited to MHSA-eligible households are necessary to help such households achieve a successful tenancy. For example, housing providers might demonstrate that these living situations are "safe havens" with easy access to social services and supports targeted to persons with severe mental illness and that the tenants are likely to have limited success in a more integrated and traditional landlord tenant situation.<sup>10</sup> Housing providers of shared housing might also demonstrate that a particular shared housing development is necessary because other housing in the community is generally unavailable to seriously mentally ill people. Such housing providers could argue that without the shared housing development, seriously mentally ill households in the community will remain unserved and face homelessness. The relatively small size of these 100% MHSA-occupied projects (limited to four or fewer units within the MHSA Housing Program) also supports an argument that the MHSA-restricted units promote integration of persons with severe mental illness into the community because these small buildings will be located in residential

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<sup>8</sup> See Opening Doors, November 26, 2006, "Best Practice Principals for Achieving Civil Rights in Permanently Supportive Housing", by Henry Korman. (See also, "Clash of the Integrationists: The Mismatch of Civil Rights Imperatives in Supportive Housing for People with Disabilities" by Henry Korman, where Korman outlines why making distinctions among disabled persons and providing categories of disabled persons with special rights is sometimes necessary to make inclusion and participation possible. 26 St. Louis U. Pub. L. Rev. 3 pages 30-31.)

<sup>9</sup> See US Dept. of Health and Human Services, 1994: "Making a Difference: Report of the McKinney Research Demonstration Program for Homeless Mentally Ill Adults"; See Housing Policy Debate, Vol. 13, Issue 1. 2002: "Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing" by Dennis Culhane and Stephen Matraux; See "The Benefits of Supportive Housing: Changes in Residents' Use of Public Services," where Harder and Company Community Research show supportive housing for the seriously mentally ill lead to a 56% decline in emergency room use, a 37% reduction in hospital inpatient days, a near total elimination of residential mental health care outside of hospitals, an 89% decline in days spent in residential alcohol and drug treatment, and a 44% reduction in days sentenced to incarceration.

<sup>10</sup> See "Olmstead and Supportive Housing: A Vision for the Future" (Page 8) by Ann O'Hara & Stephen Day, Center for Health Care Strategies, Inc. Consumer Action Series.

neighborhoods where all the other units on the block will be likely private and unrestricted.

In light of the above, housing units in developments assisted with federal funds may be reserved for MHSA-eligible households, if the reservation of such units is necessary to provide MHSA-eligible households equal access to affordable housing. For MHSA-eligible households, the equal access argument is most easily made where MHSA-restricted units comprise only a relatively small percentage of the units in a development. If all units in the project are MHSA-restricted, the project should be limited to a small number of units and there must be strong evidence that the project's MHSA-eligibility restrictions are necessary for the MHSA-eligible tenants to have a successful housing experience. Large developments where 100% of the units are restricted to MHSA-eligible households are likely to be indefensible because they mimic segregated institutionalized care facilities generally prohibited by Section 504.

### **3. May All Units In A Development Be Restricted To MHSA-Eligible Households?**

If a project is federally-funded and large in size, restricting all units to MHSA-eligible tenants would likely violate Section 504 for the reasons discussed in detail under Chapter 2, Question 2 above. A small federally funded project (6-8 units) integrated into a typical residential neighborhood could probably be restricted to 100% MHSA-eligible tenants without violating Section 504, also as discussed under Chapter 2, Question 2 above. There is no bright line distinguishing "large" from "small;" however 6-8 units for a small project appears to be a reasonable number.

If a project does not receive federal funds, Section 504 will not apply, and all units may be restricted to MHSA eligible households, without violating Section 504. However, developers are cautioned that large projects restricted to 100% MHSA or special needs households may present management and community integration challenges and could raise segregation and re-institutionalization issues.

While the MHSA Housing Program does not currently include an income restriction, a county may desire to impose an income restriction in connection with MHSA housing units that it finances directly. In the event a county wishes to require that all or a majority of residents in an MHSA development be low-income, Article XXXIV of the California Constitution may require voter approval of the project. In some instances, Article XXXIV requires voter approval when a public agency, such as a county or city restricts occupancy of a majority of housing units in a project to low-income tenants. However, many jurisdictions possess Article XXXIV "authority", which allows a project to move forward without voter approval. In other cases, exceptions to Article XXXIV exist that allow a jurisdiction to avoid Article XXXIV vote requirements. Developers should consult with housing officials within their jurisdictions, and/or obtain assistance from experienced legal counsel, before including income restrictions on a majority of residents in MHSA sites.

### **4. How Is Eligibility To Reside In MHSA-Funded Housing Verified?**

As discussed in Chapter 3, Question 1 below, housing providers are limited in the types of questions that they may ask tenant applicants. With respect to an applicant's disability, a provider may only ask whether the applicant is disabled and may not ask about the nature or severity of the disability. Because of this limitation, a housing provider should not try to determine on its own if an individual has a serious mental illness that will make the individual MHSA-eligible. Instead, a housing provider should rely on a certification of MHSA eligibility from the county mental health division in which the housing is located or from the county's designee. The MHSA Housing Program requires that developers who apply for MHSA Housing Program funds describe and include evidence of the applicable county's MHSA eligibility certification process. (See Section D.3 ("Tenant Selection Plan") of the MHSA Housing Program Application and the attachment entitled "Additional Guidance for Counties on Tenant Referral and Certification.")

## 5. May MHSa Funding Be Combined With Project-Based Section 8?

Yes, a provider may use MHSa funding in a development that is also assisted by Project-Based Vouchers (formerly called project-based Section 8) and may be able to provide preferences to MHSa-eligible applicants. To combine MHSa funds with Project Based Vouchers ("PBV"), providers will need to coordinate with the appropriate Public Housing Authority ("PHA") to ensure that the MHSa occupancy requirements are compatible with the PHA's Administrative Plan and tenant referral practices.

PBV subsidies are administered through PHAs. Developers of MHSa-housing should contact the appropriate PHA to determine if and how PBV subsidies are being administered within their jurisdiction. To implement Project-Based Vouchers, a PHA may need to amend its PHA Plan and submit it to HUD for approval, identifying plans to implement Project Based Vouchers and their policies for that implementation.

HUD regulations governing Project-Based Vouchers include waiting list requirements that govern the selection of tenants, and provide PHAs with the following options (24 CFR 983.251(c)):

- The PHA may use a separate waiting list for admission to PBV units or may use the same waiting list for both tenant-based assistance and PBV assistance. If the PHA chooses to use a separate waiting list for admission to PBV units, the PHA must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for PBV assistance.
- The PHA may use separate waiting lists for PBV units in individual projects or buildings (or for sets of such units) or may use a single waiting list for the PHA's whole PBV program. In either case, the waiting list may establish criteria or preferences for occupancy of particular units.
- The PHA may merge the waiting list for PBV assistance with the PHA waiting list for admission to another assisted housing program.
- The PHA may place families referred by the PBV owner on its PBV waiting list.

Given these options, the best course of action for a provider combining MHSa funds with Vouchers will likely be to request a site-based waiting list. A site-based waiting list would allow a provider to limit the waiting list to persons with disabilities and to give a limited preference for MHSa-eligible households. Depending upon the jurisdiction and the current provisions of its administrative plan, the housing authority may have to amend its administrative plan and obtain HUD approval to allow for site-based waiting lists limited to the preference population. HUD's approval of the amendments will depend upon whether the HUD regional office determines that the site-based waiting list causes people in a protected class under the Fair Housing Act to be segregated in a particular area or to have a lesser opportunity to benefit from Vouchers.

If the Project Based Vouchers are issued with an authorization for the owner to limit occupancy to disabled households, the owner may establish preferences for disabled households who are in need of the services offered at the housing, if the preference is limited to such families and individuals (24 CFR 983.251(d)):

- (a) with disabilities that significantly interfere with their ability to obtain and maintain housing;
- (b) who would not be able to obtain or maintain housing without appropriate supportive services; and
- (c) for whom the services cannot be provided in a non-segregated environment.

Further, projects cannot require disabled residents to accept services offered - the services must be voluntary and not a condition of tenancy. The prohibitions on granting preferences to persons with specific diagnoses or disabilities (at 24 CFR 982.207(b)(3)) applies as well. In advertising the project, the owner may advertise the project as offering services for a particular type of disability, but the project must be open to all otherwise eligible

persons with disabilities who may benefit from the services provided. (24 CFR 983.251(d)). As such, projects may not exclusively limit occupancy of these units to persons with serious mental illness.

## 6. May MHSa Funding be Combined With Shelter Plus Care Assistance?

Yes, and project owners may find it easier to combine MHSa restrictions with Shelter Plus Care assistance than with Project-Based Voucher assistance. This is because the Shelter Plus Care program is limited by statute to homeless persons with disabilities, and one of the target groups listed in the statute is persons who are "seriously mentally ill" (42 U.S.C. 11403g). The Shelter Plus Care regulations authorize housing providers to establish an admissions preference for one or more of the "statutorily targeted populations," but also state that "other eligible disabled homeless persons must be considered for housing designed for the target population unless the recipients can demonstrate that there is sufficient demand by the target population for the units, and other eligible disabled homeless persons would not benefit from the primary services." (24 CFR 582.330). In other words, the regulations indicate that a housing provider must, in most circumstances, permit occupancy by any disabled person who is not a member of the targeted group. In practice, administering jurisdictions report that their contracts with HUD require occupancy by only the selected target group and require additional HUD approval to serve disabled persons outside of the target population. Shelter Plus Care also allows the administering jurisdictions a fair amount of discretion in how they distribute Shelter Plus Care certificates or vouchers, allowing project owners to work out individualized referral systems for particular projects.

## 7. May MHSa Funding Be Used With HUD's Section 811 program?

Project owners may also be successful in combining MHSa funds with HUD's Section 811 program. 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, 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 Section 811 handbook specifically identifies chronic mental illness as a disability for which occupancy can be limited. The definition of chronically mentally ill under the Section 811 should generally be compatible with the definition of MHSa-eligible adults. (See HUD Handbook 4571.2.) Approval of the Secretary to serve a particular category of disabled persons typically comes in the Section 811 reservation of funds letter delivered by HUD to housing providers.

Despite the fact that the HUD handbook permits housing providers to limit occupancy to people with chronic mental illness, housing providers are cautioned that the HUD regulations implementing Section 811 state 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)). In practice, the handbook requirements appear to prevail over this provision of the Section 811 regulations: if the provider desires to admit a person who does not meet the requirements of the particular category approved by HUD in the Section 811 reservation of funds letter, additional approval from HUD will be required to admit that person.

Finally, HUD regional offices sometimes provide different interpretations of statutory requirements. HUD staff sometimes raise concerns when local government funders impose occupancy restrictions on Section 811 and 202 projects that require some or all of the units in a project to be occupied by persons with lower incomes than the very-low income requirements imposed by HUD. In these instances, HUD staff have questioned project feasibility because extremely low income tenants will cause a project to "use up" its budgeted Project Rental Assistance Contract ("PRAC") operating subsidy allocation more quickly (the PRAC is used to pay the difference between

tenant rents, which are 30% of actual household income, and HUD-approved operating costs). This issue could be raised if a county imposes an extremely low income requirement when using MHSA funds or if HUD views the homeless targeting requirement of the MHSA Housing Program as likely to result in a preponderance of extremely low income tenants. If HUD staff raise concerns in MHSA-funded projects, the concerns will need to be resolved on a case by case basis.

## 8. May Housing Be Financed With Low Income Housing Tax Credits And MHSA Funds?

Housing may be financed with both low income housing tax credits and MHSA funds; however, certain special issues may arise if these two programs are combined. Tax credit investors, whose primary goal is to preserve the tax credits generated by a project generally will take a conservative approach in interpreting tax law and regulations relating to issues that arise in supportive housing projects which may affect their tax credits, including fair housing issues. Special issues that may arise when combining MHSA funds with tax credits include:

- (a) Restriction of Units to MHSA-Eligible Households. Only residential rental units that are "available 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. A provision in the Housing and Economic Recovery Act of 2008 clarified that a project will not fail to meet the "available to the general public" requirement solely because it has an occupancy restriction or preference for tenants (1) with special needs, (2) who are members of a specified group under a Federal or State program or policy that supports housing for such group, or (3) who are involved in artistic or literary activities. As persons with serious mental illness (and children with serious emotional disturbances) are members of a specified group for which the Mental Health Services Act supports housing, a restriction of some or all units in a project to MHSA-eligible households would not automatically cause a project to fail the "public use" requirement. However, it is still necessary to analyze MHSA restrictions in tax credit projects on a case by case basis, using the Fair Housing Act analysis described under Chapter 2, Question 1 above. If only a relatively small percentage of units in a tax credit project are restricted to occupancy by MHSA-eligible households, this restriction is not likely to jeopardize the project's tax credits. Finally, in tax credit projects, developers may be reluctant to hold MHSA-restricted units open if no MHSA-eligible households are available to move in; consequently, providers will need an aggressive marketing, referral, and waitlist program to ensure that MHSA-restricted units can always be rented to eligible households.
- (b) Master Leasing of MHSA Units. If MHSA funding has been provided for a tax credit project, the provider may wish to lease designated units in the project to a mental health service provider who will then arrange and manage group occupancy of the unit by MHSA eligible persons in a shared housing type of situation. This practice is called "master leasing" because the social service provider will hold a "master lease" on the unit and then will sublease the unit to MHSA eligible individuals who live together as one household. In the past, master leased units have been eligible for tax credits, and master leasing is a fairly common practice in tax credit projects, so long as all low income housing tax credit requirements are met with respect to the actual occupants of the unit. In particular, the aggregate income of all unit occupants and the aggregate rent paid by all unit occupants cannot exceed the applicable tax credit rent and the occupants cannot all be full time students, as defined by the IRS (see discussion in (c) below).

Unfortunately, a relatively new position of some IRS staff concerning the "available to the general public rule" has caused some ambiguity in the practice of master leasing in tax credit projects. The publication

of a revised Guide for Completing Form 8823 Low-Income Housing Credit Agency Report of Noncompliance or Building Disposition, by the IRS in February of 2007, resulted in some IRS staff taking the position that any "exclusionary criteria that limits access" to tax credit units violates the "available to the general public" rule and makes such units ineligible for tax credits. The IRS chief compliance officer has stated that she deems master leasing as an "exclusionary" practice which limits access to tax credit units. However, staff at the California Tax Credit Allocation Committee (TCAC) have indicated that TCAC does not agree with this interpretation and that master-leasing of units will not, in and of itself, result in a compliance violation. TCAC will require, however, that any master leased units be subleased to qualifying tenants pursuant to rental arrangements that ensure the tenants have standard tenant protections.

Readers should note that the MHPA Housing Program prohibits master leasing of MHPA-funded units; however, counties may permit master leasing when using MHPA funds that do not come through the MHPA Housing Program.

- (c) Full Time Students. A unit will not qualify for tax credits if it is inhabited entirely by full-time student tenants (Internal Revenue Code § 42(i)(3)). IRC Section 151(c)(4) defines a "student" as an individual who is enrolled in an educational organization for any five months of a given tax year. Elementary schools, junior and senior high schools, colleges, universities, and technical, trade, and mechanical schools all meet the IRC § 170(b)(1)(A)(ii) definition of "educational organization." Participants in on-the-job training courses offered by private employers to their employees are not considered students under these rules. If a student is enrolled at a qualifying educational organization, that organization's internal criteria are used to determine the meaning of "full-time." A course load of twelve or more credit hours per term, approximately equal to three courses, is a common demarcation between part-time and full-time status. Finally, there are a number of exemptions to the full time student prohibition: All married couples who jointly file income tax returns and most single parents automatically qualify for an exemption, as do single individuals who are receiving certain types of government assistance or who are participating in certain publicly funded job training programs (see IRC § 42(i)(3)(D)(i)). In addition, The Housing and Economic Recovery Act of 2008 added an additional exception for units comprised of students previously under the care and placement responsibility of a state foster care program. This provision is effective for buildings placed in service after the July 30, 2008.

It is important to note that it is possible, with advice from knowledgeable legal counsel, to structure occupancy of a tax credit unit so that at least some tenants can be enrolled in school without causing the unit to lose its tax credit eligibility, so a blanket prohibition against student status is overbroad and should not be imposed on the unit by the investor or provider.

## **9. May MHPA-Funded Housing Be Restricted To MHPA Eligible Households Referred From The County Or Another Social Service Organization Or To MHPA Eligible Tenants Who Are Enrolled In A Full Service Partnership Program?**

Generally, MHPA-funded housing units can be restricted to MHPA-eligible households referred from one particular social service organization or county full service partnership if the referrals are part of an overall county referral plan that is balanced and, taken as a whole, does not have a discriminatory disparate impact on any protected class of people.

MHPA-funded housing is required to comply with the priorities identified in the particular county's Community Services and Support portion of the three year plan. Presumably each county's plan will identify a target

population most in need of MHSA services. MHSA housing providers are expected to serve this targeted population. However, the requirements of fair housing laws may not always allow providers to meet the priorities of a particular county. For example, a county may identify men of a particular ethnic group as the most in need and expect housing providers applying for MHSA funds to serve this population. The fact that a county has identified a particular segment of the population as most needing services will not insulate a housing provider from fair housing liability. Social service agencies providing services to the MHSA-eligible population who desire to expand their services to include housing, may face similar fair housing challenges if their target population is restricted to a particular ethnic or cultural group, gender, or other category triggering fair housing protection.

Fair housing and civil rights laws prevent discrimination in housing on the basis of race, color, religion, national origin, gender, familial status, disability, sexual orientation and source of income. Under the limitations of the fair housing laws, any restrictions in housing that intentionally discriminate based on one of the above classifications is illegal, although, as noted in Chapter 2, Questions 1 and 2 above, fair housing laws do not necessarily prohibit housing providers from discriminating in favor of MHSA-eligible households. Additionally, any restriction or policy that unintentionally discriminates against members of one of the above classifications may be found to have a "disparate impact" on a protected class and therefore be found to violate fair housing laws.<sup>11</sup>

Under fair housing laws, a housing provider targeting its housing to conform to the county-identified priorities or to clients of a particular social service organization may only do so 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; and (c) the tenant selection practice is not "arbitrary" under the California Unruh Act. These conditions may be difficult to satisfy if a provider limits housing to the priority population identified by a county or to the clients of a particular social service agency.

For example, consider a county where the Community Services and Support Plan identifies as the priority population Hispanic men because they are identified as a separate, unserved or underserved group. A provider accessing MHSA funds for housing may be expected to target the county-identified priority population. However, in this situation, the provider would be violating fair housing laws by the intentional exclusion of both women and ethnic groups other than Hispanics. Even a program that is targeted rather than restrictive would violate fair housing laws if the targeting is based on any of the classes protected by fair housing laws. Despite the fact that certain ethnic groups or genders are underserved and in great need, the fair housing laws do not recognize any concept of affirmative action that would override the prohibitions on marketing and restricting housing on the basis of ethnic groups or gender.

Housing providers limiting housing to applicants referred from a county or a particular social service organization should also consider whether the process used by the county's mental health department or the social service provider to select clients to refer to the provider has a disparate impact on any protected class. Some outreach and screening policies may result in certain ethnic groups being excluded unintentionally. Housing providers may subject themselves to fair housing claims if they fail to examine the basis for the referrals. For example, a social service agency designated by a county to provide MHSA-funded services may be located in a neighborhood with a majority ethnic population and may advertise its services in both English and the language of the neighborhood ethnic group. The social service agency's bias toward a particular ethnic group may deter MHSA-eligible persons from other ethnic groups from using that agency's services. The result could be that certain protected groups are unintentionally excluded from the MHSA-funded housing resulting in a disparate impact on those groups. In this

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<sup>11</sup> In determining whether or not certain classifications of people are excluded from a housing program, the housing provider should compare the demographics of the population intended to be served to the general public of the applicable county or broader market area.

example, the housing provider may face liability for fair housing violations if there is no business necessity justifying the housing provider's acceptance of referrals from a particular provider that results in the disparate impact. If the county has identified the social service provider as its designee for screening MHSA-eligible persons because the designee has been judged as the most competent provider to do this, this may serve as a legitimate business justification and overcome the disparate impact. However, it should be noted, that the issue of whether a county-imposed priority creates a legitimate business purpose sufficient to overcome a disparate impact claim, is untested. Generally, in order to overcome a finding that a policy has a disparate impact, the business justification must be compelling and the policy must be very narrowly drafted to serve that business interest.

As the above discussion illustrates, the intersection of housing and social services does not always result in a clear legal process for housing providers or counties administering MHSA funds to follow. Fair housing laws applicable to housing providers do not always inform decisions made by social service providers or counties in determining the best method of serving the MHSA-eligible population. A housing provider accessing MHSA funds will need to carefully review the county's identified priorities as well as the underlying selection process for any referrals from counties or social service agencies to determine if they result in intentional or unintentional violations of fair housing laws.

The above example also illustrates the differences between the analysis a county may undertake in crafting the Community Services and Support Plan and the analysis a housing provider must consider in establishing a housing program using MHSA funds. The county that designates the social service provider in the above example may have a variety of priorities for funding throughout the county, which may vary depending upon needs in different parts of the county. The county may designate a variety of service providers and establish goals for certain targeted populations that, when examined from the perspective of the county's entire program, do not result in discrimination. The county's allocation of funds to a particular housing provider may be just one piece in its much larger county-wide housing program that addresses needs of the population experiencing mental illness as a whole. However, the housing provider in the above example is using these funds in a single housing development, resulting in the exclusion by that particular housing provider of a protected segment of the population from housing benefits. The housing provider's risk under fair housing laws is much greater due to the limited nature of its program than the county's.

In the situation where the housing provider is required by the county to accept referrals from one particular service provider (who is also designated to provide services for the project), the provider may well have a legitimate business purpose that can overcome a disparate impact claim. It should be noted, however, that if the service provider intentionally discriminates against a protected class, then a claim of intentional discrimination (rather than a disparate impact claim) could be filed against the housing provider and the legitimate business purpose defense would not be available.

When combining MHSA funds with other sources of local, state or federal funds, even where there is no violation of fair housing or civil rights laws, funding program and policy requirements may prevent a provider from relying exclusively or primarily on referrals from the county or particular social service organizations. For example, many funding programs have affirmative fair housing marketing requirements. 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 county-referred clients. HUD programs generally prohibit participating providers from granting special preference to clients of the provider. Social service organizations providing housing to the MHSA-eligible population should carefully review their target population to ensure that there is not an unintentional discriminatory impact of a preference in any housing provided. Housing providers should also consider whether relying upon referrals from a single service provider or

even multiple service providers for their MHPA units violates the MHPA prohibition on mandatory services. Although in this situation the housing provider is not mandating the services, an MHPA tenant may argue that the requirement for a service agency referral is a backdoor method for mandating services. Some practitioners believe relying on referrals from a single service provider violates the MHPA prohibition on mandatory services.

## **10. Should A Housing Provider Designate Specific MHPA Units?**

To avoid discrimination claims that may arise from segregating MHPA-eligible households, housing providers must make efforts to disburse and integrate MHPA units throughout a development. Efforts must also be made to ensure that MHPA-funded units are of comparable size and quality to other units in the development.

Housing providers should also avoid designating specific units as MHPA-eligible units. For example, if an MHPA-eligible household no longer qualifies as MHPA-eligible due to death of the eligible person or due to the eligible person's vacation of the unit, a provider may want the flexibility to permit the remaining members of the household to continue to occupy a unit and to classify another unit as an MHPA-eligible unit. As another example, if a housing provider designates certain units as MHPA units, but an MHPA-eligible household desires to reside in another unit, the housing provider will violate fair housing laws if the MHPA-eligible tenant meets the qualifications to rent that other unit and the housing provider tries to limit the household's occupancy to designated MHPA units.

## **11. May A Housing Provider Maintain Separate Waiting Lists For Different Populations, Including MHPA-Eligible Populations?**

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 are financed with MHPA funds. The housing provider may seek to maintain two waiting lists, one for MHPA-eligible households and one for other households. This approach facilitates the housing provider's leasing process: when an MHPA-eligible unit is vacant, the applicant at the top of the MHPA waiting list is offered the unit, and when a non-MHPA 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 MHPA waiting list (who are a protected class under the fair housing laws) because they are not being offered the non-MHPA units. Such an approach may result in discrimination against MHPA-eligible households. A more defensible approach would be to maintain a single waiting list in which an applicant's MHPA-eligibility is noted: when an MHPA-assisted unit is vacant, the highest MHPA-eligible applicant on the waiting list is offered the unit, and when a non-MHPA unit is vacant, the applicant at the top of the waiting list (whether or not MHPA-eligible) is offered the unit. Another defensible approach would be to maintain a separate MHPA waiting list, but also to permit MHPA-eligible applicants to apply for the general waiting list as well as the MHPA waiting list.

## **12. Are There Special Legal Issues Associated With Marketing Units Financed With MHPA Funds?**

Both 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 § 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. 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., "supportive housing project providing services for persons with serious mental illness seeks tenants"). Finally, all advertisements should include the HUD equal housing opportunity logo or statement.

Providers combining MHSA funds with federal funds should also be aware of any affirmative fair marketing requirements that may be imposed by the particular funding program. Affirmative marketing is project advertising which is designed to reach underserved 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. 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.

In addition to the general HUD Affirmative Marketing Regulations, some HUD financed programs, such as HOME, HOPWA and various McKinney Act programs have their own specific affirmative fair marketing requirements. HUD's Limited English Proficiency Guidance may also require that providers translate marketing materials in order to ensure that the housing is accessible to populations with limited English.

It should be possible to comply with affirmative marketing requirements in a project designated for MHSA-eligible persons if the project is structured in a manner that does not violate fair housing law. If units in a project are lawfully restricted to MHSA-eligible households, including compliance with the fair housing laws and Section 504, as discussed above in Chapter 2, Questions 1 and 2, the affirmative marketing plan may provide for affirmative marketing within the targeted disability group.

### **13. May A Housing Provider Disclose To Other Tenants That A Tenant Is MHSA- Eligible Or Resides In An MHSA Unit? May A Housing Provider Disclose That Certain Units Are Financed With MHSA Funds?**

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. Moreover, if one application is used, applicants are likely to notice questions that pertain to MHSA eligibility.

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 either to other tenants or to service providers, the housing provider should ensure it is in writing. Then the housing provider can inform other tenants, but caution should be exercised that any information is disclosed only to people authorized to receive the information by the tenant. Additionally, the information disclosed should only be the information that the tenant has authorized to be disclosed. Providers should be particularly careful of these privacy concerns in considering tenant participation plans, which are required as part of the MHSA Housing Program. Peer counseling and other tenant-to-tenant programs may inadvertently result in disclosure of private information.

In addition to general privacy concerns that would compel a housing provider to keep confidential information about a tenant's disability, MHSA housing providers should be concerned about the requirements of the Health Insurance Portability and Accountability Act (HIPAA) which may regulate the disclosure of information regarding a tenant's condition. HIPPA regulates the transmittal of information regarding health care via electronic means. The entities covered by HIPPA include any entity that provides health care, including counseling services related to physical or mental conditions. Although HIPPA was primarily intended to apply to health insurers and medical providers, the broad definitions in the statute could be interpreted to apply to supportive housing providers engaging in counseling and other supportive service activities with residents. Under HIPPA, information regarding a patient's medical care may not be released to other entities or persons without the patient's permission. Additionally, when releasing information pursuant to a patient approved release, the release must inform the receiving party that the information is not to be further disclosed to others. Although housing providers are not the intended target of HIPPA, it might be wise for supportive services providers to have residents using services complete HIPPA type release forms.

## CHAPTER 3: SELECTION OF INDIVIDUAL TENANTS

### 1. What Questions May A Housing Provider Ask of Applicants For MHSA Units?

The Fair Housing Act Regulations set forth questions that may be asked of applicants for housing (See 24 CFR 100.202). These questions are limited to the following categories:

- 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. (Presumably this would include inquiries as to whether or not someone is MHSA-eligible.)
- 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.

If these questions are asked of any applicant for an MHSA unit, then they should be asked of each applicant for a housing unit in the development, regardless of whether the housing provider believes the applicant qualifies for an MHSA unit. 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.

If a person is applying for an MHSA housing unit, the housing provider may ask the applicant to document or provide a certification of MHSA eligibility. If the applicant provides the requested certification of MHSA eligibility, the housing provider should not further inquire into the severity of the disability or the applicant's medical status. Since fair housing laws prohibit a housing provider from asking for medical records, asking questions about an applicants' medical condition or requiring any verification other than a doctor's or medical professional's letter stating that the applicant is disabled, housing providers should not attempt to determine if someone is MHSA-eligible on their own. They should rely on a certification from a county or from a medical professional.

### 2. Can A Housing Provider Use A Different Application For An MHSA Unit?

Housing providers offering MHSA-financed units will need to determine if an applicant for such unit is MHSA-eligible. Despite the fact that MHSA-eligible households must provide a certification of their MHSA eligibility, housing providers should use one application for all units in the development. This application could list the qualifications for all housing in the development, including the qualifications for the MHSA units. A single application is preferable to a separate application for MHSA-eligible households since determining which application to provide to an applicant would require the provider to make an assessment of whether the applicant is qualified for an MHSA unit before the application is complete. Such a determination in itself can lead to

discrimination claims. (See Chapter 3, Question 2 below for more information regarding applications.)

### 3. What Is “One Strike” And How Does It Apply To MHSA Units During The Application Process?

A set of federal laws and regulations that govern pre-occupancy screening of applicants for drug and alcohol abuse and certain criminal activity in some federally funded housing programs are often referred to collectively as “One Strike” policies.<sup>12</sup> One Strike policies also require tenant lease provisions that address circumstances related to drugs, alcohol, and criminal activity. HUD has published regulations, notices and handbooks which implement the One Strike requirements. One Strike policies are applicable to housing funded by certain federal housing programs, including public housing, Section 202, Section 811, Section 236, Section 221(d)(3) and (5), Project-Based Section 8, Tenant-Based Section 8, and Section 514 and 515 rural housing. If MHSA funds are combined with any of these HUD-administered funds, One Strike policies will apply. One Strike policies do not currently apply to HOME, CDBG funds, or McKinney-Vento Act programs (with the exception of McKinney-Vento Act Section 8 Moderate Rehabilitation for Single Room Occupancy Dwellings and the moderate rehabilitation SRO component of Shelter Plus Care.)

In connection with tenant selection, providers of public housing and Tenant-Based Section 8, as well as housing financed with Section 202, Section 811, Section 236, Section 221(d)(3) and (5), and Project-Based Section 8, must establish the admission standards set forth below. One Strike requires housing providers to create admission standards, but the rules grant housing providers discretion in their admission decisions. In fact, One Strike does not require blanket exclusions for all individuals with histories of criminal and/or drug activities. Under One Strike:

- Housing providers must prohibit admission to a household if any member of the household has been evicted from federally-assisted housing for drug-related criminal activity within the past three years. However, housing providers have the discretionary authority to admit the applicant if (1) the circumstances leading to the earlier eviction no longer exist; or (2) the applicant has successfully completed an approved supervised drug rehabilitation program.
- Housing providers must establish admission standards that prohibit admission of a household if the provider determines that any member is currently engaging in an illegal use of a drug.
- Housing providers must establish admission standards that prohibit admission of a household if the provider determines that a household member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- Housing providers must establish admission standards that prohibit admission of a household if the provider determines that a household member's pattern of alcohol abuse may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- Housing providers must establish admission standards that prohibit admission of a household if any member of the household is subject to a lifetime registration requirement under the sex offender

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<sup>12</sup> In 1996, President Clinton expressed concern in his State of the Union Address about increases in crime in public housing communities, and 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. The President’s “one strike and you’re out” remarks served as the impetus for laws enacted by Congress addressing criminal behavior and drug and alcohol abuse in public housing and the regulations adopted by HUD for enforcement purposes. Some of the regulations which still govern eligibility and termination policies, however, pre-date Clinton’s State of the Union Address, such as the Anti-Drug Abuse Act of 1988.

registration programs in the state in which the housing is located or in the state or states in which the sex offender has previously lived.

In Public Housing, and for Tenant-Based Section 8 and certain Project-Based Section 8 Programs, housing providers must also permanently prohibit admission to the program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing. Providers should review the regulations for the Section 514 and 515 to determine how One Strike arises in those programs.

In establishing standards for admission, housing providers have discretion and may consider numerous mitigating factors including: (1) the seriousness of the offending action; (2) the effect of the community of denial or termination or the failure of the housing provider to take such action; (3) the extent of participation by the leaseholder in the offending action; (4) the effect of denial of admission or termination of tenancy on households members not involved in the offending action; (5) the demand for assisted housing by families who will adhere to lease responsibilities; (6) the extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending actions; and (7) the effect of the housing provider's action on the integrity of the housing program. (24 CFR 5.852.)

In addition, when establishing admissions standards regarding applicants with histories of illegal drug use or alcohol abuse that may pose a threat to the health and safety of other residents, housing providers may also take into account whether or not an applicant has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully. Providers may establish a reasonable period<sup>13</sup> before the admission decision during which the applicant must not have engaged in the prohibited criminal activity.

The One Strike regulations also authorize, but do not require, housing providers to prohibit admission for drug-related criminal activity, violent criminal activity or other criminal activity that would threaten the health, safety or right to peaceful enjoyment of the premises by other residents or by the owner of the housing, or any employee, subcontractor, contractor or agent of the owner who is involved in the housing operation.

It is important to note that One Strike regulations do not require a criminal conviction in order for an owner to deny application for tenancy and do not offer guidance on the type of evidence an owner should rely on to determine if an applicant has engaged in criminal activity. In making judgments about criminal activity, housing providers should be certain to rely on objective criteria. Housing providers should also ensure that such criteria, more likely than not, demonstrates that the applicant has engaged in criminal activity. As such, providers should have at least "reasonable cause" to believe that an applicant is actually engaging in illegal drug use or has a history of drug or alcohol abuse that will threaten the health, safety and right to peaceful enjoyment of the premises by other residents, prior to denying admission to an applicant. 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.

Denial of admission decisions may be appealed by program applicants, and PHAs and housing providers are also granted discretion to reconsider an applicant who has previously been denied admission. Housing providers should review HUD Handbook 4350.3 Chapter 4, Section 2 for requirements concerning reconsideration. Housing providers combining MHSA funds with any of the programs to which One Strike regulations apply will want to tailor their One Strike policies to allow latitude for the MHSA-eligible population.

One Strike issues often arise in mixed-financed projects where some units are federally funded and subject to One Strike while other units do not receive federal funds and thus are not subject to One Strike. In such a

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<sup>13</sup> Providers have discretion as to the length for the "reasonable period" and there is currently no minimum required length. HUD has commented that five years is "reasonable" but the courts have indicated that a period as long as 14 years may be "reasonable".

situation, rather than have multiple admission policies, all applicants should be provided with the same application which may include questions related to One Strike and the housing provider should perform the same background checks on all applicants. However, the provider may decide to apply the One Strike prohibitions only to those units actually funded with federal funds.

Information regarding how One Strike is applied during tenancy is discussed in greater detail in Chapter 5, Question 4.

#### **4. May A Housing Provider Prohibit Admission To An MHSA-Eligible Household If A Member Of The Household Is A Registered Sex Offender?**

Admission of sex offenders to MHSA units may be prohibited if the One Strike rules described in answer to Chapter 3, Question 3 above apply. Even if the One Strike rules do not apply, housing providers may still prohibit admission of sex offenders if necessary to protect a person at risk.

California's Megan's Law requires certain sex offenders to register with the law enforcement agency of the city in which they reside (California Penal Code §§ 290 and 290.4). The California Department of Justice is required to compile this information and make it available through a "900" telephone number, CD-ROMs at local police stations, and the Internet (collectively, the "Megan's Law Database"). Members of the public may access the Megan's Law Database to determine if a particular individual is a registered offender. Pursuant to Megan's Law, police officers are permitted to disclose certain information regarding registered sex offenders to the community if the police determine that the registered sex offender is a risk to a child or person (California Penal Code §§ 290 and 290.45). The law, however, prohibits the use of information from the Megan's Law Database for purposes relating to housing, except to protect a person at risk. The federal One Strike rules preempt this prohibition on the use of the Megan's Law Database for housing purposes for those units subject to One Strike.

If One Strike is not applicable, then California law will control. Housing providers seeking to prohibit admission of sex offenders face a few hurdles. First, housing providers may only use information regarding sex offenders obtained from Megan's List to protect a person at risk. Housing providers desiring to exclude sex offenders should obtain the information regarding the individual status as a sex offender from sources other than Megan's List, such as criminal records. Second, it is uncertain how the courts will view a landlord's prohibition of sex offenders. The California Attorney General has issued an opinion stating that the provision which prohibits the use of Megan's List for housing decisions, except when necessary to protect a person at risk, does not make sex-offenders a protected class (see California Attorney General Opinion No. 5-301). The courts have not yet weighed in on this issue. Moreover, the California Attorney General did not opine as to whether prohibiting admission of sex offenders would be deemed arbitrary and therefore impermissible under California's Unruh Act. Given the lack of legal clarity as to treatment of sex offenders with regards to housing decisions, housing providers should be careful to craft tenant selection policies that factor in both the risks the particular applicant may pose, as well the obligation a housing provider may have to protect other tenants in the development.

Housing providers should also be aware that California's "Jessica's Law" (also known as Proposition 83), which was enacted by the voters of California in November of 2006, bars any person required to register as a sex offender from living within 2,000 feet of any school or park where children regularly gather (Cal. Penal Code 3003.5). Certain high-risk sex offenders are subject to an even greater distance requirement of 2,640 feet from a school or park. One federal district court ruled that Jessica's law could not be implemented against sex offenders who were convicted, paroled, given probation or released from incarceration prior to the law's effective date.<sup>14</sup>

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<sup>14</sup> Doe v. Schwarzenegger 476 F. Supp. 2d 1178 (2007).

## 5. May A Housing Provider Prohibit Admission To An MHSA-Eligible Household If A Member Of The Household Has A Criminal Record?

A housing provider may deny housing to a person with a record of criminal convictions, as opposed to arrests, if the convictions 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 or otherwise relates to an applicant's ability to meet tenancy obligations. 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. Criminal records of check forgery or other check fraud reflect upon an applicant's ability to pay monthly rent and may be a basis for denial. The housing provider must use judgment to evaluate the age of the convictions and other mitigating factors. If the housing is subject to One Strike, applicants with certain criminal convictions must be excluded, as discussed in response to Chapter 3, Question 3 above.

## 6. May A Housing Provider Rent An MHSA Unit To A Parolee?

No. Welfare and Institutions Code Section 5813.5(f) prohibits the use of MHSA funds for parolees from state prisons. The DMH Regulations prohibit the use of MHSA funds for parolees from state and federal prisons (9 California Code of Regulations 3610). People who are on probation after serving terms in county jails, and who are not on parole are eligible for MHSA funds.

## 7. Should Existing Tenants Assist In Selecting Future Tenants?

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. Additionally, in the context of MHSA-funded housing, where applicants must be MHSA-eligible, the information on the tenant's qualifying status may be confidential and under general privacy laws as well as HIPPA should not be disclosed to other tenants.

In certain housing, 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. In such a situation, the tenant screeners should only be provided information about the applicant that is not confidential, so information regarding the applicant's mental health history should not be disclosed to the tenant screeners. 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.

Housing providers of unlicensed shared housing may be required to permit tenants to advertise for and select co-tenants. As discussed in Chapter 5, Question 1, supportive housing as defined by Health and Safety Code Section 1504.5 provides an exception to the community care licensing requirements. In order to qualify as supportive housing under Section 1504.5, a tenant must have his or her own room or apartment and be individually responsible for arranging any shared tenancy, which mandates some degree of tenant participation in an approval of the selection of roommates. Since the MHSA Housing Program will only fund unlicensed facilities, housing providers will need to craft tenant screening programs for shared housing, carefully taking into account privacy and liability issues.

## 8. What Happens If A Housing Provider Cannot Find a Qualified MHSA-Eligible Tenant To Reside In An MHSA Unit?

Owners will need to avoid renting MHSA units to households who are not MHSA-eligible. Housing financed with MHSA funds is intended to be occupied by MHSA-eligible households. Permitting a non-MHSA-eligible household to reside in an MHSA unit is likely to lead to default under MHSA financing documents, legal claims, and requests for the return of MHSA funds. Owners with MHSA units will need to engage in diligent marketing efforts and work with social service providers to ensure MHSA units are filled in a timely manner. As described in greater detail in Chapter 5, Question 8, the MHSA Housing Program will reduce its subsidy if an MHSA unit is left vacant or if the MHSA-eligible household member vacates the unit. Counties financing MHSA units on their own will have to develop their own procedures regarding vacancies, but they are likely to mirror the MHSA Housing Program requirements.

## 9. May A Housing Provider Restrict Occupancy To MHSA Units On The Basis Of Age?

Yes, a housing provider may restrict occupancy based on age in limited circumstances. MHSA housing providers may want to develop housing restricted to certain age groups such as seniors or youth. Age restrictions generally violate Fair Housing laws and HUD regulations. However, there are specific exceptions under both federal and state fair housing laws that allow for senior housing and additional exceptions under state law that allow for youth housing. MHSA housing providers will need to comply with these specific fair housing requirements to age-restrict housing.

The definition for "Older Adult" used for MHSA purposes differs from the definition of "senior households" in the fair housing laws. The MHSA Act references the state definition of "Older Adults," which defines older adults as at 60 years old or older. Conflicting fair housing laws require that persons residing in a senior housing development of fewer than 35 units be 62 or older. If a development has 35 or more units, at least one person in each unit must be 55 or older.<sup>15</sup> California Civil Code, Section 51.3 characterizes this type of larger development as "Senior Citizen Housing Developments." The MHSA definition of "Older Adult" (which sets the age limit at 60 years of age or older) for determining qualifications for housing would not comply with the fair housing law exceptions that allow for senior housing. Housing providers desiring to provide senior housing for MHSA-eligible persons should, therefore, age-restrict housing in accordance with the fair housing laws, rather than the MHSA definitions for Older Adults.

Housing providers may also want to provide housing targeted to transition age youth, which is one of the underserved populations targeted by DMH in its draft regulations. As defined in the MHSA Housing Program and the DMH MHSA regulations, transition age youth are youth aged 16 to 25 (Welfare and Institutions Code § 5847(c)). The age limits established by the Housing Program and DMH are slightly inconsistent with California Government Code Section 11139.3, which permits housing to be limited to certain transition age youth and was enacted so that housing for transitioning youth could be provided in compliance with fair housing laws. Government Code 11139.3 defines "Homeless Youth" as persons not older than 24 year of age who are (i) homeless or at risk of homelessness (ii) no longer eligible for foster care on the basis of age or (iii) have run away from home. Where a youth under 18 years of age has been emancipated and is homeless or at risk of homelessness, he or she is also defined as a "Homeless Youth" under Section 11139.3. Without Section 11139.3, housing providers would not be able to limit their housing to young adults without violating the Unruh Act and the Federal Age Discrimination Act.

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<sup>15</sup> Developments with over 35 units may be occupied by persons 62 years of age or older, but such developments must be exclusively occupied by persons 62 years of age or older.

Therefore, in developing housing programs for transition age youth, housing providers must comply with requirements of Government Code Section 11139.3, even though its definition of transition age youth is different from the MHSA Housing Program and DMH definition. In particular, in establishing tenant selection criteria, housing providers should ensure that at the time of application each tenant is (i) homeless or at risk of homelessness (ii) no longer eligible for foster care on the basis of age or (iii) have run away from home. In addition, even though DMH defines transition age youth as youth between 16 and 25 years old, housing providers should ensure that their tenant selection criteria is limited to persons between the ages of 18 and 24 (with the exception that youth between the ages of 16 and 18 may be admitted if they are emancipated).

MHSA housing providers may target their housing to transition age youth as long as the population targeted meets the criteria set forth in Section 11139.3. The age restrictions set forth in Government Code Section 11139.3 were intended to apply to initial occupancy of the youth. Government Code 11139.3 does not require that housing operated for homeless youth remove residents at the age of 25. Housing providers targeting transition age youth should be cautious about designing a program that requires the eviction of a resident upon reaching the age of 25. Such a requirement may result in age discrimination claims since the sole basis for the eviction would be the age of the resident.

## **10. May A Housing Provider Provide A Preference To Or Refuse To Rent To MHSA-Eligible Tenants With A Particular Diagnosis?**

No, a housing provider may not distinguish between persons with different diagnoses who are MHSA-eligible without violating fair housing laws.

As discussed under Chapter 2, Question 1 above, providers may legally restrict housing units under the Fair Housing Act, the Fair Employment and Housing Act, and the Unruh Act to persons who are MHSA-eligible because state law has created a funding stream dedicated to serving people with serious mental illness and this population is recognized under state law as a discrete population of persons with disabilities who will benefit from a discrete set of services. Housing providers have no legal authority to make distinctions among different diagnoses of MHSA-eligible persons. In addition, housing providers may not refuse housing to MHSA-eligible persons who may have been diagnosed with other conditions (e.g., people with co-occurring, developmental, or physical disabilities).

## **11. Are “Clean And Sober” Requirements Enforceable in MHSA Units?**

Although some “clean and sober” policies may be legal, enforcement can present problems for housing providers and courts may reject evictions based upon violations of such policies. Persons currently using illegal drugs may be excluded from a project, but a housing provider generally cannot require an applicant to be sober. Further, clean and sober requirements are not compatible with Project-Based Section 8 assistance and HUD has suspended Project-Based Section 8 contracts for projects with clean and sober requirements, even though such requirements were imposed through other HUD-funded programs that required operation of a “clean and sober” facility.

Though housing providers can prohibit use of illegal drugs on the premises, alcohol is a legal substance, and alcoholics who are still drinking are persons with a disability. Enforcement of a no alcohol policy may be problematic because housing providers must make reasonable accommodations in the application of rules, policies, and procedures for people with disabilities, “when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling.” (Joint Statement of the Department of Justice and the Department of Housing and Urban Development: Group Homes, Local Land Use, and the Fair Housing Act. July 2008. [http://www.usdoj.gov/crt/housing/final8\\_1.php](http://www.usdoj.gov/crt/housing/final8_1.php).) If a provider tried 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 is a reasonable accommodation. However, a housing provider could reasonably argue that, in a clean and sober facility, any waiver of a sobriety rule would be a fundamental alteration of policy and therefore is not a reasonable accommodation.

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 the provider believes is indicative of illegal drug use without having actual proof of the use of drugs on the premises may not be successful.

Additionally, though providers may exclude from a project people currently using illegal drugs, “currently using illegal drugs” is not well defined. The Americans with Disabilities Act provides that “current use” means the use 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.) Courts and housing providers interpret this standard differently.

A carefully crafted policy that sets forth a standard based on evidence and allows potential tenants to rebut these presumptions may prevent some challenges. 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 flexible application of clean and sober rules.

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, a landlord may impose requirements on a tenant as part of a reasonable accommodation, such as attending recovery support meetings or other treatment. Finally, a housing provider can evict for behaviors that interfere with tenancy that may be caused by the use of alcohol, such as excessive noise. But 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.

## CHAPTER 4: REASONABLE ACCOMMODATIONS

### 1. How Do Reasonable Accommodation and Reasonable Modification Rules Apply To MHPA Units And MHPA-Eligible Households?

- (a) What are reasonable accommodation and a reasonable modification? 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 reasonable changes to their rules, policies, and procedures and are also obligated to make or permit reasonable structural changes to housing in order to allow persons with disabilities to enjoy the benefits of the housing on an equal basis with persons who are not disabled. A "reasonable accommodation" is a change to a rule, policy or procedure made to permit a person to enjoy the benefits of housing on an equal basis. A "reasonable modification" is a structural change to the premises which allows the tenant to enjoy the benefits of the housing on an equal basis.

Such accommodations or modifications 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.<sup>16</sup> Housing providers must determine what constitutes an undue financial or administrative hardship or a fundamental alteration in the nature of a housing providers program on a case-by-case basis. The HUD Multifamily Housing Handbook provides numerous examples of when a requested accommodation may be unreasonable and suggests that an accommodation may constitute an undue financial burden if it costs so much that project's reserves would be depleted and a rent increase would be required to replenish the reserves within one year. Recent Department of Justice and HUD Joint Statements also provide guidance and examples.<sup>17</sup> Clearly, the provider must make some special provisions for persons with disabilities. Whether or not the provisions are unreasonable will be determined by the particular nature of the request and the particular circumstances of the housing development. Some accommodations or modifications may also place a burden on the tenant to participate or to pay for the modifications.

Housing providers are not required to inform tenants of their rights to a reasonable accommodation or modification, 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

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<sup>16</sup> 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).

<sup>17</sup> Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications Under the Fair Housing Act, March 5, 2008, at [http://www.usdoj.gov/crt/housing/fairhousing/reasonable\\_modifications\\_mar08.pdf](http://www.usdoj.gov/crt/housing/fairhousing/reasonable_modifications_mar08.pdf); Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations under the Fair Housing Act, May 14, 2004 at [http://www.usdoj.gov/crt/housing/jointstatement\\_ra.php](http://www.usdoj.gov/crt/housing/jointstatement_ra.php).

impose a similar reasonable modification requirement on the provider.

In determining what is a reasonable accommodation or modification, courts will balance the financial and administrative burden on housing providers against the benefit to a person with a disability. It is critical that housing providers attempt to understand what accommodations a tenant needs and attempt to provide those accommodations or modifications, if feasible, in order to enable the tenant to enjoy the use and benefits of the housing.

- (b) Reasonable Accommodations During Tenant Screening – MHSA Issues. In the applicant screening process housing providers have two levels of requirements for 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 application process.

The housing provider's second responsibility in applicant screening is to determine if there is a reasonable accommodation or modification 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 or modification, but housing providers also should not ignore obvious disabilities. Nor do housing providers have to try to determine what the reasonable accommodation or modification should be. If an applicant requests a reasonable accommodation or modification as part of the screening process, the housing provider is required to consider the request and implement the accommodation or modification 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 or modification must relate 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 or modification, a housing provider may request documentation or some proof of the disability and the link between the disability and the requested accommodation/modification. 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, proof that an individual receives SSI, 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.<sup>18</sup>

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 to experience disabilities—information

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<sup>18</sup> 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).

about the housing provider's duty to make reasonable accommodations and modifications. 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.

Various reasonable accommodation/modification issues may arise in the screening of MHSA-eligible applicants. Many MHSA-eligible applicants may have a bad tenancy record as a result of their mental disability. Although a negative reference from a previous landlord would typically result in rejection of a housing application, if an MHSA-eligible tenant demonstrates that the previous bad behavior was a result of the mental disability and also provides evidence that the applicant now has programs or services in place that will allow the applicant to reside in the MHSA unit without violating lease provisions, the housing provider may need to waive rules regarding rejection for negative landlord references in order to allow the MHSA-eligible applicant to reside in the unit. Other applicants may have substance abuse issues that result in a poor tenancy record. Rather than reject the applicant, the housing provider may need to focus on the tenant's current behavior and the support programs in place that would allow the tenant to reside in the unit without a repeat of the previous behaviors.

MHSA housing providers may also need to consider applicants who need a greater level of care and supervision than the housing program provides. Providers may ask questions to determine whether the tenant can comply with a lease, and may need to allow accommodations that allow compliance with lease provisions. A provider may exclude someone who cannot comply with these provisions, subject to reasonable accommodation requirements. An applicant requiring care and supervision would have to be allowed to have a care attendant live with them even if such an accommodation required the provider to waive occupancy rules or requirements for occupancy such as age restrictions or requirements that all occupants be MHSA-eligible. Other reasonable accommodations that may be required in a situation where an applicant needs a care attendant may include providing extra keys for the care attendant, providing a parking space for the care attendant and waiving guest and visitor rules in order to allow the care attendant access to the tenant.

- (c) Reasonable Accommodation During Occupancy – MHSA Issues. 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 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. The housing provider may also request that the medical provider indicate whether the reasonable accommodation requested is necessary to allow the resident to enjoy the benefits of the housing. Such an inquiry, though, does not allow the housing provider to request any additional information regarding the disability.

In analyzing a reasonable accommodation request, a housing provider should attempt to determine if the accommodation is necessary to the tenant's equal enjoyment of the housing and whether the accommodation requested is reasonable. Accommodations that infringe on other tenants rights may not be reasonable. Examples of accommodations that may be necessary would include providing additional soundproofing so that a tenant's pacing does not disturb other residents.

Providers should also keep in mind that MHSA-eligible tenants may have multiple disabilities in addition to the mental illness that makes them MHSA-eligible, and that reasonable accommodation may be necessary for an MHSA-eligible tenant for a disability-related reason that is unconnected with his or her mental illness. For example, an accommodation giving a tenant a parking space close to the elevator

may not be necessary for a tenant with mental illness to enjoy full access to a housing unit, but it may be necessary because a tenant with mental illness also suffers from an orthopedic disability.

If a tenant has a substance use problem 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, is more complicated. Alcoholism is considered a disability under the definitions of disability of the Fair Housing Act. A housing provider may have to accommodate some behaviors that often accompany drinking under the reasonable accommodation requirements, as long as the tenant complies with lease provisions, unless the entire project is operated as a "clean and sober" project (see Chapter 3, Question 11 above). 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, as this would infringe on other tenants' rights and constitute a "fundamental alteration" of the housing program in a building that is not officially "clean and sober."

## 2. What Procedures Should A Housing Provider Follow If An Applicant For A MHSA Unit Asks For A Reasonable Accommodation?

If a tenant requests a reasonable accommodation, either during the application process or after the tenant occupies the unit, the housing provider may first require that the tenant provide evidence of a disability by verification from a medical profession. For MHSA-funded units, the tenant will already have documentation of mental illness (via the certification process described in Chapter 2, Question 4 above), so the provider need not require the resident to provide additional verification, if the accommodation requested is related to the mental illness. If the accommodation is related to another disability, the provider may ask for documentation from a health care provider that the tenant is disabled in the manner asserted.

Assuming the tenant is disabled, the housing provider will want to inquire about the nature of the reasonable accommodation being requested. As discussed above, the accommodation requested must relate to the tenant's occupancy and use of the housing unit; that is, the requested accommodation must be something that allows this tenant with his or her particular disability to enjoy equal access to the housing unit. Accommodations that are unrelated to the particular tenant's ability to use the unit do not have to be granted. Assuming that the accommodation will assist the tenant in using the housing, the housing provider then needs to examine whether the accommodation will place an undue financial or administrative burden on the housing provider or cause the provider to fundamentally alter the nature of their program. If the housing is not federally funded and thus does not fall under Section 504, the housing provider is not obligated to incur any costs associated with physical modifications to a unit. If the housing is federally funded, the housing provider may have to incur costs associated with a physical modification, such as the cost of installing additional soundproofing in the example above. (Federal funds include, but are limited to, HUD-funded housing programs such as HOME, CDBG, HOPWA, Section 8, Shelter Plus Care and Section 811 programs. Tax credit and bond financing are not considered "federal financial assistance" under Section 504.) In all reasonable accommodation situations, the housing provider must weigh the needs of the individual tenant with the impact of the request on the overall housing program. Thus, if the request will impose an undue administrative and financial burden, or require the provider to change the nature of the housing or service in a fundamental way, the request will be deemed to be unreasonable.

## CHAPTER 5: OPERATION AND MANAGEMENT

### 1. What Kind Of Licensing Requirements Apply To MHSA Units?

The MHSA Housing Program prohibits funding for any developments that require a license. Because of the prohibition in the MHSA Housing Program, providers should be careful in designing their program to ensure that it does not require a license. Housing financed with other, non-MHSA Housing Program funds, may be licensed housing.

Whether or not an MHSA-funded housing development will require a license depends on the type of care and services that are provided to residents of the program and whether or not the supportive housing exception to state licensing laws is applicable. Generally, facilities that provide care and supervision are considered community care facilities and require a license to operate. However, legislation passed in 2002 provides an exception to this licensing requirement for supportive housing if certain conditions are met. In order to determine whether MHSA housing meets the requirements for supportive housing and thus is exempt from the community care licensing requirements, it is important to first understand what a community care facility is.

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;<sup>19</sup> 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 (22 Cal. Code Regulations 80001).

Health and Safety Code Section 1504.5 provides an exception to the community care licensing requirements for supportive and independent living facilities. In order to qualify for the exception supportive housing must meet the following requirements:

- It is rental housing that is affordable to persons with disabilities;
- Each of the tenants holds a lease or rental agreement in his or her own name and is responsible for paying his or her own rent;
- Each tenant has his or her own room or apartment and is individually responsible for arranging any shared tenancy;
- The housing is permanent, in that the tenant can stay as long as he or she complies with the terms of the lease and pays the rent;
- The housing is subject to state and federal landlord tenant laws; and

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<sup>19</sup> In *Grimes v. State Department of Social Services*, 70 Cal. App. 4th 1065, 1071-72 (1999), the court discussed this trigger for licensing. The court ruled 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.

- Participation in services is not required as a term of tenancy.

Supportive housing meeting the terms outlined above may provide "community living support services" without requiring a license. Community living support services must be voluntary and chosen by the tenant. Services may include

- Support services designed to develop and improve independent living and problem solving skills;
- Education and training in meal planning and shopping, budgeting and managing finances, medication self-management, transportation, vocational and educational development, and the appropriate use of community resources and leisure activities;
- Assistance with the tenant's individual basic needs such as financial benefits, food, clothing, household goods and housing and locating and scheduling appropriate medical, dental and vision benefits and care.

Section 1504.5 was designed to exclude supportive housing from licensing laws and has resulted in providers achieving a level of confidence that their housing program will not be subject to licensing actions. However, it is important for providers to carefully examine their housing program to make sure that it meets the requirements of Section 1504.5. Some program components could result in providers falling outside the safe harbor of Section 1504.5. Program alterations may be necessary in order to fall within the parameters of the Health and Safety Code Section 1504.5 exemption.

## **2. May A Housing Provider Require That An MHSA-Eligible Tenant Participate In A Particular Social Service Program?**

The Act and DMH Regulations promote voluntary services and a mandatory service requirement would violate the regulations. A provider may not mandate services in supportive housing projects financed under the Program, unless mandatory services are required by another funding agency.

## **3. May A Housing Provider Require That An MHSA-Eligible Tenant Be Enrolled In A Full Service Partnership?**

A Full Service Partnership ("FSP") is a social service program that creates a "collaborative relationship" between a county and an MHSA-eligible person or household where the county plans for and provides mental health and non-mental health services and supports that will help the client achieve certain goals of recovery, wellness and resilience.

The MHSA Housing Program does not require a tenant to be participating in FSP services to be eligible for MHSA Housing Program housing. On the contrary, DMH Regulations promote voluntary services and prohibit a housing provider from mandating participation in services to obtain or maintain eligibility for housing. Therefore, a provider should not require a tenant to participate in a Full Service Partnership. Additionally, counties should consider the voluntary service provision of the Act along with other fair housing issues when developing a tenant referral or selection policy that relies on referrals from Full Service Partnerships.

Participation in an FSP may be required by a tenant's circumstances, even if none of the housing program lenders or the housing provider require participation. For example, if a housing provider rents to an FSP tenant who can only afford the unit because of the rental assistance that may be available as part of the FSP package of benefits, the tenant will lose the rental assistance and may not be able to pay the rent if the tenant chooses not to participate in the FSP. In such a situation where a housing provider would likely evict the tenant for breaching the covenant to pay rent, the tenant may experience this requirement as a mandate to participate in an FSP program; however, this would not violate the DMH Regulations or the MHSA Housing Program Requirements.

#### 4. How Does “One Strike” Apply To MHSA Units During Tenancy?

In addition to shaping admission decisions, the federal “One Strike” policies address evictions or termination of assistance in response to criminal activity (including illegal drug use) and lease violations resulting from alcohol abuse. As with the regulations governing screening and eligibility criteria (described in Chapter 3, Question 3 above), however, the regulations provide discretionary authority in responding to such criminal activity, and eviction or termination is not a required response to every instance of illegal drug use, criminal activity, or lease violation.

For housing financed with Section 202, Section 811, Project-Based Section 8, Section 236, and Section 221(d)(3) and (5), the One Strike regulations require the following lease provisions:

- Drug-related criminal activity engaged in, on, or near the premises by any tenant, household member, guest or other person under the control of the tenant is grounds for the provider to terminate the lease.
- The provider may terminate the tenancy when it determines that a household member is illegally using a drug or when it determines that a household member's pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- The provider may terminate the tenancy if the provider determines that a household member's behavior resulting from a pattern of alcohol abuse interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
- The provider may terminate a tenancy if any tenant, household member, guest or other person under the control of the tenant engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of (a) the premises by other residents, or (b) the residences of neighbors who reside in the immediate vicinity of the premises.
- The provider may terminate a tenancy if a tenant is fleeing to avoid prosecution, custody, or confinement after conviction of a felony or attempted felony.
- The provider may terminate a tenancy if a tenant is violating a condition of probation or parole imposed under federal or State law.

In addition to the lease requirements described above, in Section 8 Moderate Rehabilitation programs, the housing program administrator must immediately terminate assistance for a household if the administrator determines that any member of the household has ever been convicted of drug related criminal activity for manufacture or production of methamphetamines on the premises of federally assisted housing. Public housing units and Tenant-Based Section 8 units are subject to substantially similar rules, but housing providers working with those programs should be certain to check the applicable regulations for those programs. Owners of housing financed with Section 514 and 515 should also refer to the regulations governing the Section 514 and 515 programs, as One Strike is implemented differently in those programs.

It is important to be aware that under the One Strike regulations: a) entire tenant households can be evicted or terminated from assistance for the activities of one member of the household or a non-household member; and b) tenants can be evicted or terminated regardless of whether the person has been arrested or convicted of such activity. In 2002, the United States Supreme Court in *Department of Housing and Urban Development v. Rucker*, upheld evictions where the One Strike anti-crime or anti-drug lease provisions had been violated. The Supreme Court wrote that One Strike "requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity".

After the Supreme Court ruling, however, HUD emphasized housing providers' discretionary authority to terminate tenancies due to One Strike violations in a letter (dated June 6, 2002) from Assistant Secretary Michael Liu. The letter states (*emphasis added*):

“... [T]he Court unanimously affirmed the right of public housing authorities, under a statutorily-required lease clause, to evict entire public housing households whenever any member of the household, or any household guest, engages in drug-related or certain other criminal activity. The *Rucker* decision upholds HUD regulations that, since 1991, have made it clear both that the lease provision gives PHAs such authority and that **PHAs are not required to evict an entire household--or, for that matter, anyone—every time a violation of the lease clause occurs.... PHAs remain free, as they deem appropriate, to consider a wide range of factors in deciding whether, and whom, to evict as a consequence of such a lease violation.** Those factors include, among many other things, the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy. ...”

The HUD One Strike regulations detail these mitigating factors. Mitigating factors that a housing provider may consider in implementing the One Strike lease provisions include: (1) the seriousness of the offending action, (2) the effect on the community of termination or the failure to terminate, (3) the extent of participation by the leaseholder in the offending action, (4) the effect of termination of tenancy on household members not involved in the offending action, (5) the demand for assisted housing by eligible households that will adhere to lease responsibilities, (6) the extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action, (7) the effect of the housing provider's action on the integrity of the program, and (8) in the case of illegal drug use or alcohol abuse, whether the household member has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully. All of these factors may be taken into account in establishing the lease policies required by the One Strike regulations. However, housing providers should apply these factors consistently.

## 5. How Much Information May A Service Provider Share With A Housing Provider About An MHSA-Eligible Tenant During Tenancy?

What information a case manager or service provider 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. In addition most case managers will be subject to HIPPA which requires the patient to agree to release of information prior to any such release.

Generally, it would be best if the case manager did not disclose information to the housing manager during the tenant screening process. Tenant screening should be based primarily on information that is relevant to the landlord-tenant relationship regarding whether the tenant is capable of meeting the terms and conditions of residency. 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 a defense 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 in writing confidentiality requirements that the case manager may have so that the case manager may provide the housing manager with the necessary information.

## **6. May A Housing Provider Evict An MHSA-Eligible Tenant For Violations Of The Lease That Result From His Or Her Disability?**

MHSA-eligible tenants are entitled to reasonable accommodations both in the tenant selection process and during their occupancy of a residential unit. Reasonable accommodations may require a housing provider to waive rules and conditions of occupancy in order to accommodate the tenant and ensure that the tenant is able to enjoy the full benefits of the housing. Situations may arise where a MHSA-eligible tenant has violated the terms of the rental agreement resulting in the housing provider evicting the tenant. Such an eviction may be prohibited if the violation of the lease is the result of the tenant's disability and waiver of the violation would not fundamentally alter the nature of the housing provider's program. For example, assume an MHSA-eligible tenant violated a term of the lease that calls for the tenant to maintain the apartment to a certain maintenance standard and the tenant's failure to maintain the unit in accordance with the requirements of the lease was a result of the MHSA-eligible tenant's disability. In such an instance, rather than evicting the MHSA-eligible resident for failure to maintain, the housing provider should work with the resident to determine if there is a cleaning service that could be used by the tenant on a regular basis to ensure that the apartment is well maintained. The housing provider is not required to pay for such a service, unless the housing is funded with federal funds, in which case Section 504 may require the provider to incur some costs in order to ensure that the tenant can continue to reside in the apartment. Each situation with regards to lease violations must be considered individually on its merits to determine whether the lease violation was a result of the resident's disability. If the violation was a result of the disability, the housing provider must then consider whether there is a reasonable accommodation that will allow the resident to enjoy the benefits of the housing without causing an undue administrative or financial burden on the housing. Some lease violations may not be overcome by a reasonable accommodation. For example, if the resident is engaging in behavior that is harmful or potentially harmful to other residents, a reasonable accommodation may not be in order.

## **7. May A Housing Provider Establish Housing Rules Regarding Guests And Curfews?**

Reasonable rules and regulations for conduct imposed by landlords for legitimate business purposes are generally legal, unless they violate fair housing laws. Such rules should pertain to the core obligations of tenancy, which include payment of rent, upkeep of the premises, respecting the quiet enjoyment of others, and following basic health and safety rules. Restrictive guest and overnight policies are usually legal and would be allowed under MHSA. However, curfews would not be allowed under MHSA and are questionable under California landlord tenant law.

- (a) Guest 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 under state law, but providers should check whether local laws may restrict landlord-imposed guest policies. For example, a local San Francisco ordinance imposes specific standards on landlord-imposed policies restricting guests and overnight visitors; if a housing provider wants to adopt a guest policy that differs from the "model policy" adopted by the city, it must apply for special approval of the policy.

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 would likely be classified as discrimination based on family status, or a prohibition against visits by people of one gender).

Some guest policies may also violate other 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. Additionally, providers may have to waive guest policies as a reasonable accommodation if a tenant needs a care giver or other services.

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.

- (b) Curfews. If a curfew means that all residents must be in their apartments by a certain time, it is probably not allowed under California landlord tenant law. Such a restriction on the use of a leased apartment would likely not be deemed reasonable, and is rare in non-service related residential complexes. An individual leases an apartment for residential use with the expectation that he/she can come and go freely, and a landlord has no reasonably legitimate purpose for requiring that all the residents be in their units at a certain time. Curfews are typically imposed as part of a requirement for services, when such services are provided in a residential setting. If a lender (like CalHFA and DMH under the MHSA Housing Program) prohibits mandatory participation in services, then imposition of a curfew as part of the service component would not be allowed. Finally, imposition of a curfew may raise fair housing issues; for example, imposition of a curfew only on MHSA-eligible residents, and not on non-MHSA residents, would

be deemed discriminatory.

In contrast, restricting the use of common areas by all residents during certain hours would be a reasonable restriction as it directly relates to other residents' quiet enjoyment of the complex. For the same reasons, imposing certain quiet hours would also be reasonable.

## **8. What Should A Housing Provider Do If An MHSA-Eligible Tenant Leaves A Unit Financed With MHSA Funds And The Remaining Household Stays Or If The MHSA-Eligible Tenant Is No Longer MHSA-Eligible?**

Neither the Act nor the current DMH Regulations describe what steps a housing provider must take if an MHSA-eligible household member leaves an MHSA unit. Therefore, landlords and tenants should come up with reasonable policies to address this issue should it arise. Any policy should be grounded in the purposes of the Act and balance the requirement that the housing unit should be made available to an MHSA-eligible household against the disruption to the previously eligible tenant or household.

The MHSA Housing Program sets forth specific procedures that will apply if an MHSA-eligible person no longer occupies the MHSA Unit. If the development includes some non-MHSA units, the housing provider should allow the tenants to continue to occupy the unit, provided a non-MHSA unit is available for an MHSA-eligible tenant and the tenants agree to the terms of the non-MHSA unit lease. (Remaining household members may experience a rent increase, however, because any MHSA operating subsidy for the unit will terminate after a 90-day grace period.) If the development consists of only MHSA units, or if the development is mixed, but the provider does not have any other units it can make available to the remaining household members, then the remaining household members may continue to occupy the MHSA unit for a grace period of 90 days, presumably beginning the month following the month the MHSA-eligible tenant vacated the unit. During this grace period the housing provider is required to work with the remaining household members to find alternate housing accommodations. The MHSA Housing Program requires housing providers to begin eviction proceedings if, after the 90 day grace period, the remaining household members do not find alternate accommodations.

In addition, the MHSA Housing Program will continue to pay operating subsidies for a unit for up to three months if an MHSA eligible tenant is temporarily institutionalized but has not permanently vacated the unit.

The MHSA Housing Program policy is similar to HOPWA requirements. HOPWA is HUD's "Housing Opportunities for Persons with AIDS" program. The HOPWA regulations require housing providers to establish a reasonable grace period following the death of the household member with AIDS. During the grace period, the surviving household members may continue to reside in the HOPWA unit and participate in available social services. The HOPWA regulations also contemplate that the housing provider will assist the surviving household members in locating new housing. Providers of MHSA units that are not assisted with MHSA Housing Program funds are not tied to the MHSA Housing Program requirements. Therefore, such providers may extend the grace period.

## CHAPTER 6: ZONING AND LAND USE

### 1. What Land Use Restrictions Might A Developer Encounter In Trying To Create Housing For MHSA-Eligible Households?

In California, the restrictions applied to development vary greatly from community to community. For instance, some cities welcome dense, high-rise multifamily projects, while other communities are almost entirely reserved for single-family homes on large lots. Consequently, a developer might encounter a wide variety of land use restrictions. While this section attempts to explain the most common restrictions, in every case developers must review the local land use regulations to determine the particular restrictions that apply to a site that they are considering for MHSA housing.

- (a) Local Land Use Restrictions. Local land use restrictions may be included in a variety of plans and local ordinances that are adopted by cities and counties in California. The State requires every community to adopt a General Plan and a Zoning Ordinance. The General Plan is the community's overall plan for development. It discusses the community's goals, shows the general location of different kinds of land uses, includes a plan for streets and roads, preserves open space, and may discuss a wide variety of topics, such as economic development and agricultural land preservation.

The most important part of the General Plan for a developer of MHSA housing is the *Housing Element*. State law requires that the Housing Element analyze the need for housing for the disabled, identify sites for supportive housing, and remove constraints on the development of supportive housing (Government Code § 65583). The Housing Element often contains local policies that may be helpful in obtaining local approval for MHSA housing.

The local *Zoning Ordinance* divides the city or county into zoning districts where different uses are permitted. In a typical zoning ordinance, some zoning districts are reserved primarily for single-family homes; some for apartments, townhouses, and other multifamily housing; others for stores and other retail commercial uses; and still others for offices, industry, and the like. The local Zoning Ordinance will also usually regulate building height, floor area, housing density, parking and loading, setbacks from property lines, landscaping, and other factors affecting building construction.

Within a zoning district, some uses are "permitted" uses, while others are "conditional" uses. A permitted use does not require any discretionary local government approval. An example would be a single-family home in a residential area. A conditional use requires a public hearing and review, usually by the community's Planning Commission. An example might be schools and churches in residential areas.

Communities may also have adopted other plans and ordinances. Applicable polices may be included in community and specific plans (which apply to a particular area of the city); design guidelines; and special purpose ordinances.

Any project that needs a discretionary approval from local government must also be evaluated under the *California Environmental Quality Act*, which requires that the government examine the environmental impacts of the project. Typical issues considered would be traffic, parking, noise, exposure to flooding, earthquakes, and hazardous wastes, and similar effects.

Each community has a unique and distinctive General Plan, Zoning Ordinance, and other land use regulations. The only way to determine the regulations applicable to a proposed MHSA development is to read carefully the applicable provisions of the local General Plan, Zoning Ordinance, and other

documents. The staff of the local planning department should also be consulted regarding provisions that are applicable to the MHSA development.

- (b) Land Use Restrictions Typically Applied to MHSA Housing. This section describes the most common land use restrictions that a developer of MHSA housing might encounter, recognizing that local restrictions vary widely.

There are two kinds of housing under the MHSA Housing Program: Rental Housing Developments and Shared Housing Developments. MHSA projects funded directly by counties may vary from the exact requirements in the MHSA Housing Program, but most will generally fall under the rental housing or shared housing models. The typical land use restrictions vary somewhat for the two types of housing.

1. Rental Housing Developments are multifamily apartment buildings. In most cases at least five of the dwelling units in Rental Housing Developments must be occupied by MHSA-eligible residents. Each MHSA-eligible resident must have a separate apartment that includes a bathroom and kitchen.

The land use restrictions for new Rental Housing Developments are those applicable to any other multifamily housing development. Typically, cities and counties allow multifamily development only in zoning districts designated for multifamily uses and in some cases in mixed-use zones that also permit commercial development. There are usually limits on the height, floor area, density, and other aspects of the project, and the community may require design review or other discretionary approval.

Cities and counties have at times claimed that the provision of services for the mentally ill means that the Rental Housing Development is something other than a multifamily residence—a treatment facility, for instance—and have insisted on a conditional use permit or other discretionary permit. However, amendments to Housing Element law (Government Code § 65583(a)(5)) effective January 1, 2008 require cities and counties that prepare housing elements to remove constraints so that supportive housing, as defined in the bill, is treated like other residences of the same type. This means that communities must revise their zoning so that the only restrictions that may be applied to Rental Housing Developments are those that apply to other multifamily housing in the same zoning district.

To qualify for this protection, the supportive housing must meet the definition of "supportive housing" contained in Health & Safety Code Section 50675.14. This requires that the supportive housing:

- Have no limit on the length of stay;
- Be linked to onsite or offsite services that assist residents in improving their health status, retaining the housing, and living and working in the community; and
- Be occupied by the "target population." In this instance, the target population includes adults with low incomes having one or more disabilities, including mental illness, HIV or AIDS, substance abuse, or other chronic health problems. The target population also includes persons eligible for services under the Lanterman Development Disabilities Act (the "Lanterman Act"). The Lanterman Act provides services to persons, including children, with developmental disabilities that originated before the person turned 18; it does not provide services to persons with solely physical disabilities. The target population may include, among other populations, families with children, elderly persons, young adults aging out of the foster care system, individuals exiting from institutional settings, veterans, and homeless people.

Since the MHSA Housing Program requires that all households include at least one household member with serious mental illness, that there be no limit on the length of stay, and that

supportive services be available, and since it is likely that MHSA eligible households will be low income, Rental Housing Developments funded under the MHSA Housing Program will fall under the definition of "supportive housing" and so, as communities revise their housing elements and zoning ordinances, must be treated like other multifamily residences in the same zoning district.

2. Shared Housing Developments include structures with one to four dwelling units that house two or more MHSA-eligible adults. All of the residents in a Shared Housing Development must be MHSA-eligible. Each resident must have a separate lockable bedroom, but the kitchen and bath facilities may be shared.

The land use restrictions for new Shared Housing Developments are those applicable to either single-family homes, duplexes (with two units), or three- to four-unit buildings (triplexes and fourplexes). Typically, cities and counties allow single-family homes and duplexes in more zoning districts than triplexes and fourplexes, which are often considered to be multifamily housing. In each zoning district, there are again limits on the height, floor area, density, and other aspects of the project, and the community may require design review or other discretionary approval. Height, setback, and other regulations are often the strictest in single-family zones. On the other hand, design review is less likely to be required for single-family homes and duplexes.

Providers seeking to offer shared housing units are cautioned that some cities and counties may consider Shared Housing Developments to be "group homes" or "residential service facilities." These cities and counties may attempt to impose further regulations, such as requiring the provider to obtain a conditional use permit. However, amendments to Housing Element Law effective on January 1, 2008 (Government Code § 65583(a)(5)) require cities and counties that prepare housing elements to remove constraints so that Shared housing developments that meet the definition of "supportive housing" contained in Health & Safety Code Section 50675.14 (discussed above) are treated like other residences of the same type. This means that communities must revise their zoning so that the only restrictions that may be applied to Shared housing developments are those that apply to other residences of the same type (single-family homes, duplexes, triplexes, or fourplexes) in the same zoning district.

- (c) Limitations on Denial of MHSA Housing. Since MHSA Housing should be defined as "supportive housing," recent amendments to the Housing Accountability Act (Government Code § 65589.5) effective January 1, 2008 do not permit local governments to deny MHSA Housing, or to add conditions that make the housing infeasible, unless they can make one of the following five findings:
  1. The jurisdiction has met its low income housing needs.
  2. The housing would have a specific, adverse impact on public health or safety, and there is no feasible way to mitigate the impact.
  3. Denial is required to comply with state or federal law, and there is no way to comply without making the housing unaffordable.
  4. The housing is proposed on land zoned for agriculture and is surrounded on two sides by land being used for agriculture, or there is inadequate water or sewer service.
  5. The housing is inconsistent with both the zoning and the land use designation of the site and is not shown in the housing element as an affordable housing site.

## 2. Are Shared Housing Units Occupied By MHSA-Eligible Households "Group Homes" That Can Be Prohibited or Restricted By Local Zoning Laws?

Local zoning ordinances often restrict the location of "group homes," which are often called "lodging houses," "boarding houses," or "group residential facilities." For instance, if a single-family home housing a "family" would ordinarily be a permitted use in a zoning district, a single-family home that is defined as a "group home" might require a conditional use permit or not be permitted at all. Because MHSA-eligible residents in Shared Housing Developments have separate rental agreements with the manager, and do not always live as a "family," some communities may consider a Shared Housing Development to be a "group home" for zoning purposes.

However, as discussed in the previous section, recent amendments to Housing Element law will require communities to revise their zoning so that supportive housing is not treated differently from other housing of the same type, and MHSA-funded housing in most cases will be protected from being defined as a "group home."

If residents living in each dwelling in a Shared Housing Development meet the local zoning definition of a "family," then they will be treated like any other occupants of a home. While the definition of "family" varies from city to city, a typical ordinance would define a "family" as related persons or a group of unrelated people, of any size, who jointly occupy a single dwelling unit, share common areas such as the kitchen and living room, jointly participate in ordinary household activities such as meals, chores, and expenses, and have a limited number of rental agreements.<sup>20</sup>

Also, most Shared Housing Developments under the MHSA Housing Program will be defined as "supportive housing" under Housing Element law (Government Code § 65583(a)(5)) effective January 1, 2008 and so, as communities amend their housing elements, they must amend their zoning ordinances so that Shared Housing Developments are treated like other residences of the same physical type (single-family homes, duplexes, triplexes, or fourplexes). (See detailed discussion in Chapter 6, Question 1 above.) Once the rezonings are complete, the only restrictions that may be applied to these Shared Housing Developments are those that apply to the same type of housing in the same zoning district.

While licensed facilities are not eligible for funding under the MHSA Housing Program, counties may fund such facilities directly with MHSA Community Services and Support funds. If a facility is state-licensed, located in a residence, and serves six or fewer persons, it must be treated like a single-family home for zoning purposes.<sup>21</sup> The statutes specifically state that it cannot be considered to be a boarding house or rest home or regulated as such (for example, *see* Health & Safety Code 1566.3 & 11834.23). Staff members and operators may live in the home in addition to a maximum of six clients.

Providers should note that restrictions on "group homes" and "residential service facilities" may or may not comply with the Fair Housing Act and comparable California laws depending on how the local restrictions are designed and applied. Restrictions that apply *only* to housing for the disabled are justified only if they benefit disabled persons or respond to legitimate safety concerns.<sup>22</sup> Restrictions that are *applied* in a discriminatory fashion also

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<sup>20</sup> California case law requires that related and unrelated persons who live as a single housekeeping unit must be treated the same (*see City of Santa Barbara v. Adamson*, 27 Cal. 3d 123 (1980)). Put another way, local governments cannot limit the number of unrelated persons who can live together, so long as they are living as a single housekeeping unit (usually defined as a "family").

<sup>21</sup> This rule appears to apply to virtually all licensed group homes. Included are facilities for persons with disabilities and other facilities (Welfare & Inst. Code 5116), residential health care facilities (Health & Safety Code 1267.8, 1267.9, & 1267.16), residential care facilities for the elderly (Health & Safety Code 1568.083 - 1568.0831, 1569.82 - 1569.87), community care facilities (Health & Safety Code 1518, 1520.5, 1566 - 1566.8, 1567.1), pediatric day health facilities (Health & Safety Code 1267.9; 1760 - 1761.8), and facilities for alcohol and drug treatment (Health & Safety Code 11834.23).

<sup>22</sup> *See Community House v. City of Boise*, 468 F.3d 1118 (9<sup>th</sup> Cir. Nov. 2006; amended June 2007).

violate the Fair Housing Act.<sup>23</sup> For instance, if a community approves triplexes serving non-disabled people, but does not approve similar buildings serving disabled persons, that may be evidence of intentional discrimination. Restrictions that adversely affect disabled persons more than non-disabled persons (e.g. create a discriminatory *impact*) may violate the Fair Housing Act unless they are justified by a strong public interest.<sup>24</sup> Finally, communities must grant a "reasonable accommodation" under certain circumstances when needed by a facility that serves the disabled. This is considered in detail in the next question.

### **3. Can A Housing Provider Obtain Land Use Approval Of An MHSA-Funded Project As A Reasonable Accommodation Under Fair Housing Laws?**

If an application for a Rental Housing Development or a Shared Housing Development does not meet the usual standards for a land use approval, the developer may apply for a "reasonable accommodation" – an exception to the usual zoning standards. For instance, the developer could ask that a Shared Housing Development be permitted in a zone where a group home would usually not be allowed. In the zoning context, the city or county must grant the accommodation under the following circumstances:

- The housing will be used by individuals with a disability protected by the Fair Housing Act.
- The accommodation is *necessary* to give the disabled individuals an equal opportunity to use and enjoy a residence.
- The accommodation will not impose an undue administrative or financial burden; and will not require a fundamental or substantial alteration in the City's land use program.<sup>25</sup>

Many cities and counties in California have set up a process for requesting a reasonable accommodation. The local Housing Element, in particular, must explain how the community will grant reasonable accommodations.<sup>26</sup>

There are a fair number of published federal court decisions regarding reasonable accommodation in the zoning context. In general, requests for a reasonable accommodation appear to be more successful in the context of permitting group homes in residential neighborhoods, where the courts view the accommodation as the only way that disabled persons can live in the community. They have been less successful where the accommodation appears to be a request for a special privilege, such as building an apartment house in a single-family neighborhood, or having sewer line extension fees waived. A provider who desires to request a reasonable accommodation should contact an attorney experienced in fair housing laws.

### **4. What Steps Can A Housing Provider Take If A Local Government Denies A Permit For MHSA-Funded Housing Units?**

If a local government denies a permit for MHSA-funded units, the provider should initially appeal the decision if an administrative appeal is available (for instance, from the Planning Commission to the City Council). An appeal may provide an opportunity to demonstrate to the community that the denial is contrary to the Fair Housing Act, comparable California laws such as FEHA, the Housing Accountability Act, and other state laws. The provider may also be able to modify the project to respond to community objections, or generate community support for the project, or the provider may request a reasonable accommodation as part of the appeal. In any case, a lawsuit often cannot be brought unless the provider has used ("exhausted") all available administrative remedies.

If the project is denied, the provider in most cases must request a reasonable accommodation from the city or

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<sup>23</sup> See *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997).

<sup>24</sup> See *id.* See also Government Code Section 12955.8(b) (Fair Employment and Housing Act).

<sup>25</sup> See, e.g., *McGary v. City of Portland*, 386 F. 3d 1259 (2004).

<sup>26</sup> See Government Code Section 65583(c)(3).

county before bringing a lawsuit.<sup>27</sup>

Once a local government's decision to deny MHSA-funded units is final, the housing provider's only real option is to file a lawsuit against the local government. The provider may have a variety of valid claims based on the Fair Housing Act, FEHA, the Housing Accountability Act, and other statutes, such as a California statute barring discrimination based on the affordability of residence. (See Government Code § 65008.) However, litigation is time-consuming and costly, and the result cannot be guaranteed even in the strongest cases. In getting MHSA-funded units built, the provider's efforts are probably better spent in finding sites where the local land use restrictions allow the project to be built with the fewest discretionary approvals and in educating local officials about the requirements of California and federal law, which may require the community to approve the MHSA-funded housing.

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<sup>27</sup> However, in the case of facial discrimination—an ordinance that on its face treats the disabled differently from the non-disabled (such as a 1,000-foot separation requirement for uses serving the disabled)—it may be possible to file a lawsuit without first applying for a reasonable accommodation. See *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1500 (D. Wash. 1997).