


# ATTACHMENT H

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CHANGE THE WORLD FROM HERE

Background and History of Residential  
Occupancy Standards

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**Goals of this Presentation**

- ❖ Overview of history of regulation of residential space
- ❖ Clarify the problem and concerns
- ❖ History of law
- ❖ Current situation
- ❖ Answer your questions

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**ROS = Rule Limiting Number of Persons Who May Legally Occupy a Given Space**



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**Two Sources of ROS**

**Government**



Usually in form of minimum required square footage per person


**Private Owners**



Usually in the form of number of persons per bedroom or per unit

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**Overview of Regulation of ROS**



Pre 1900's: Unregulated Market (Private ROS only)





1900's – 1988: Government ROS and Private ROS

After 1988: Government ROS and Private ROS Both Subject to FHAA and FEHA



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**“What is crowded to some is exactly what is comfortable to others; what is comfortable to some is exactly what is lonely to others.” Prof. Ellen Pader**



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## FHAA and FEHA

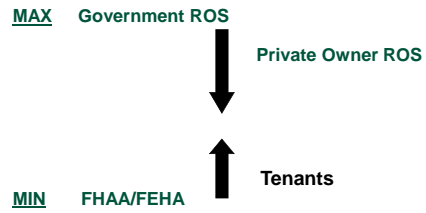
FHAA (42 U.S.C. 3601 et seq.) forbids housing discrimination against members of protected classes, including race, religion, national origin and familial status.

FEHA (Cal Govt 12900 et seq.) forbids housing discrimination against classes protected under FHAA plus ancestry and more.

Courts have recognized both disparate treatment and disparate impact claims to prove violations



*FHAA increases conflict because gives legal force to tenants' claims based upon familial status and other protected classes*



## What's the harm of restricting housing choice by ROS?

Must reconfigure desired household composition  
OR

Select some combination of:

- Forced purchase
- Inferior location
- Inferior quality

Added search time and costs

Discrimination harms



## Who can be harmed?

Generally, families with children



Larger families, "non-traditional" families, extended families and blended families

Particularly, households of people of color with children



## Concerns of Landlord/Owners about Occupancy Standards

Individual and Cumulative Effects Over Time on:

- ❖ Property: excessive wear and tear, more physical damage, potential nuisance, overwhelmed building systems, increased management costs, reduced profits and property value and potential legal liability
- ❖ Other Tenants: quiet enjoyment and access to shared amenities



## Concerns of Neighbors and Local Governments about Occupancy Standards

- ❖ Neighbors: potential for nuisance or near nuisance
- ❖ Municipalities: health and safety; infrastructure and levels of services assume certain densities



**“Overcrowding”: Several and Ambiguous Uses**

1. **Housing needs studies**
  - Aspirational
  - Multiple measures
  - Have become more restrictive
2. **Sociology, Medicine, and Other Disciplines**
  - Typically, as purported cause of multiple harms
3. **Informally as “Too many occupants in a unit”**
  - Sometimes with reference to a particular governmental or private ROS, and sometimes not
  - Sometimes assuming harms scientifically proven



**Why are ROS conflicts so difficult?**



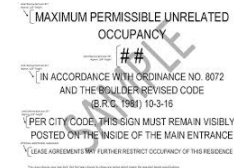
**Current Significance**

- More intergenerational households and “boomerang kids”
- More “blended households” and divorced parents with partial custody
- Predicted increase in Latino & Asian households in California
- More “doubling-up” due to chronic rental housing crisis in some regions and ongoing effects of mortgage and foreclosure crises
- Micro-housing: Local governments revising housing codes in response to developers and consumer demand for living in smaller spaces and respond to homelessness



**How do conflicts about governmental ROS arise?**

Enforcement of housing code violation



Challenge to governmental code by private party



**FHAA exemption for governmental occupancy standards**

Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

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



**Meaning of “Reasonable” Unsettled**

HUD Preamble to 1989 regulations echoes FHAA House Report:

[The exemption] is intended to allow reasonable governmental limitations on occupancy to continue as long as they are applied to all occupants, and do not operate to discriminate on the basis of race, color, religion, sex, handicap, familial status or national origin. [emphasis added]



**Limited case law**

*City of Edmonds v. Oxford House*, 514 U.S. 725 (1995):  
only numerical total occupancy limits are eligible for exemption, not zoning definitions of family

*Fair Housing Advocates Assn v. City of Richmond Heights*  
209 F.3d 626 (6<sup>th</sup> Cir. 2000):  
places burden of proof on government and equates "reasonable" to rational basis review



**Governmental ROS in California**

California has adopted the Uniform Housing Code as its statewide governmental occupancy code for health and safety purposes

Cal. H&S Code 17922(a); 25 Cal. Code of Regs Sect. 32

Local governments have the authority to adopt more restrictive occupancy standards if they follow statutory procedure and make certain findings.

*Briseno v. City of Santa Ana*, 6 Cal.App.4<sup>th</sup> 1378 (1992)

Some rent control cities not allow eviction if occupancy is consistent with UHC



**How do conflicts about private ROS arise?**

Refusal to rent or renew lease



Eviction



Enforcement of common interest community rule



**Sample facts from familial status cases**

- A family of five is evicted from the three bedroom mobile home unit they had purchased. (*Mountain Side*)
- A landlord refuses to rent a three bedroom house to a family of five persons (*Pfaff*)
- A mother and her daughter are refused the rental of a one bedroom apartment (*Badgett*)



**Summary of HUD's Activity**

- ❖ Preamble of 1989 FHA regulations discusses **reasonable** standard for certain private ROS
- ❖ HUD's informal guidance & enforcement activity apply **reasonable** standard to private ROS
- ❖ To date, no formal rule-making on private ROS
- ❖ But HUD has issued residential occupancy guidance for public housing and certain other HUD-assisted housing



**Brief History of HUD's Activity: Part 1**

**Preamble of 1989 FHA Regulations :**

- ❖ "No support in statute or its legislative history...for development of a national occupancy code..."
- ❖ HUD "believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit" (emphasis added)
- ❖ HUD will "carefully examine" a private ROS to determine if "operates unreasonably to limit or exclude families with children" (emphasis added)



### Brief History of HUD's Activity: Part 2 HUD Internal Memos

- ❖ February 1991: Keating Memo I: "1P/BR plus 1" presumptively reasonable
- ❖ March 1991: Keating Memo II replaces Keating Memo I: "2P/BR" presumptively reasonable plus factors
- ❖ HUD Public and Assisted Housing Occupancy Standard Task Force unable to agree
- ❖ July 1995: Replace Keating Memo II with Diaz Memo; "safe harbor" for ROS based upon BOCA
- ❖ September 1995: Diaz Memo withdrawn; Keating Memo II reinstated; expedited rule-making promised



### Congress Steps In

- 1996: HR 3385 and HR 2406 adopting Keating Memo as national occupancy standard fails to pass
- 1996: Appropriations bill directs HUD to use Keating Memo for its enforcement during FY 1996
- 1997: HR 2 adopting "2P/BR plus infants" fails to pass
- 1998: Welfare Reform law directs HUD to adopt Keating Memo for its familial status enforcement and to publish in Federal Register
- 1999: Bills prohibiting HUD from setting ROS and giving this authority to States and localities fail to pass



### Result:

Since 1998, Keating Memo's reasonableness standard has been HUD's intake standard for familial status cases



### Keating Memo provides:

2P/BR as a general rule is "reasonable"

Reasonableness of any ROS is rebuttable

#### Factors to consider:

- Size & number of bedrooms
- Size and configuration of unit
- Age of children
- Physical limitations of housing
- Applicable ROS from State and local law
- Other relevant factors suggesting pretext include: discriminatory statements, discriminatory rules governing use of common facilities, other steps to discourage



### Courts and litigants have been confused in ROS cases

- ❖ Confusing Disparate Treatment and Disparate Impact tests
- ❖ Disparate Impact cases:
  - Uncertainty over statistics and burden-shifting standards to use
  - Disagreement and inconsistent over what counts as sufficient "defense" and proof required
  - Some courts use some version of "reasonableness" as defense in DT and DI cases
  - Now at least FHAA burden-shifting standards clear



### Beyond the Default 2P/BR Reasonable Standard: Enforcement Using the Keating Factors

Lead agency intake standard does not become liability rule unless adopted by courts or adopted as regulation

No court has adopted Keating Memo as a liability rule, but HUD administrative law judges and courts have used it as a "rule of thumb" and have analyzed cases using its factors



### “Size and configuration of unit” factor

- Landlord’s designation of a room as a “bedroom” is not conclusive
- Rooms designated as “bedrooms” are not the only “habitable rooms” for sleeping purposes.
- Living rooms, dens, etc. may also be acceptable sleeping areas.

Sources: HUD Regulations Preamble; Keating Memo; HUD v. Mercker; HUD v. Florence Tollgate Condo Assn; Fair Hsg Council of Suburban Phila. v. Trucksees; U.S. v. Tropic Seas; U.S. v. Hover; Laurenti v. Water’s Edge Habitat, Pfaff v. HUD; Briseno v. City of Santa Ana; HUD letter



### “Size of bedroom” and “size and configuration of unit” factors

The amount and distribution of “habitable space” in a unit is relevant to how many people should be allowed to live there.

Size of a bedroom or other “habitable room” can justify inclusion of additional occupants

Sources : HUD Regulations Preamble; Keating Memo; U.S. v. Hover; Norville v. Dep’t of Human Rights; HUD v. Draper & Kramer; HUD v. Florence Tollgate Condo Assn; HUD v. Ineichen



### Physical Limitations of Housing Can Justify Limits

Building Systems: the capacity of septic, sewer or other building systems can justify limits

Sources: Mountain Side Mobile Estates v. HUD, U.S. v. Weiss, Chro Ex. Rel Thomas Rowley v. J.E. Ackley



### Relevant Governmental ROS as a Upper Limit and as a Starting Point

Sources : U.S. v. Tropic Seas, Reeves v. Rose, DFEH v. Merribrook and many others



### DFEH precedential cases involving private ROS

1986: *DFEH v. Green*: dicta “problem with Mexican tenants moving relatives in”

1988: *DFEH v. Merribrook*: disparate impact appropriate in private ROS case

1997: *DFEH v. Jevremon*: inquiry regarding children and their ages; refusal to show newer homes because of fear of damage by children

2012: *DFEH v. Steuberg*: intentional familial status discrimination; demand for rent increase and higher security deposit when woman has triplets



### DFEH “Two persons per bedroom plus one” intake standard

Jan. 1989 Notice “Acceptance Guidelines for Occupancy Limitation Complaints”

- Cites *Merribrook Apartments* case
- For “familial status” complaints
- “Guidelines do not create presumptions or standards”



**If complaint accepted, non-exhaustive list of factors to consider to determine if violation:**

- **Number of households with children in complex compared to presence of children in the community**
- **Complex's history of renting to families with children**
- **Treatment of families with children in complex**
- **Provider's reasons for occupancy limitation**
- **Relevant local statutes, policies or regulations**

## Questions?

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