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MCLE SELF-STUDY

Physical Disability in Employment Accorded Greater Protection under the FEHA than the ADA

*By Phyllis W. Cheng, Esq.**

I. INTRODUCTION

On February 20, 2003, the California Supreme Court issued a unanimous decision in Colmenares v. Braemar Country Club, Inc.,[1] holding that the definition of "physical disability" under California's Fair Employment and Housing Act ("FEHA")[2] has always been and continues to be broader than that of the federal Americans with Disabilities Act ("ADA").[3] The court ruled that, even prior to 2001 amendments under the Prudence Kay Poppink Act,[4] "a plaintiff seeking to establish physical disability under the FEHA had to show: (1) a physiological disease or condition affecting a body system; and (2) the disease or condition limited (as opposed to substantially limited, as required under federal law) the plaintiff's ability to participate in major life activities."[5] The court also explained the seeming inconsistencies in its 1983 opinion in Cassista v. Community Foods, Inc.,[6] dictum that some lower tribunals have interpreted with opposite conclusions.

II. BACKGROUND OF COLMENARES

Colmenares arose from a decision by Division One of the Second Appellate District of the Court of Appeal, which held that the Poppink Act's definition of physical disability applies only prospectively to the FEHA.[7] Where an employee with a bad back was discharged in 1997, prior to enactment of the Poppink Act, the Division One panel found no physical disability violation under the FEHA because the back problem did not "substantially" limit a major life activity.[8]

Division Seven of the Second Appellate District of the Court of Appeal subsequently issued a contrary holding in Wittkopf v. County of Los Angeles.[9] In a case involving the 1998 termination of an employee whose loss of vision did not substantially limit a major life activity, the Division Seven panel found the FEHA's physical disability standard applicable even prior to the Poppink Act "[b]ecause, both before and after its amendment in 2000, FEHA's definition of physical disability requires only a mere limitation, and not a substantial one . . . ."[10]

The California Supreme Court granted review to resolve this conflict regarding the correct definition of "physical disability" as it existed prior to the Poppink Act.

III. 1992 AMENDMENTS TO THE FEHA

Historically, physical disability has been more broadly defined under the FEHA than the ADA, which was enacted a decade after the state law. In 1982, the California Supreme Court interpreted the FEHA's statutory definition of "physical handicap"[11] in an expansive manner under American National Ins. Co. v. Fair Employment & Housing Com. ("ANI").[12] In ANI, the high court held that, for purposes of coverage under the FEHA, a "physical handicap" is any physical impairment that is disabling in that it makes "achievement unusually difficult."[13]

In 1992, the Legislature enacted sweeping legislation covering many California laws

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addressing discrimination based upon disability.[14] At this time, the Legislature replaced the term "physical handicap" with the term "physical disability."[15] Government Code Section 12926 defined "physical disability" as a condition that *"[l]imits* an individual's ability to participate in major life activities."[16] Nowhere in this definition is the term "substantially limits" found. Legislative history of the 1992 amendments discloses that this omission reflected two deliberate choices: (1) to avoid the more restrictive language of the ADA; and (2) to incorporate the definition of "physical handicap" established in ANI.

The ADA, as it read in 1992, defined "physical disability" as a condition that "substantially limits" a major life activity.[17] The statutory revisions of the FEHA had not previously required a showing that a limitation be "substantial" in order to sustain a claim of disability discrimination, and the Legislature expressly stated its choice to retain that less-restrictive standard.[18]

Moreover, the Legislature specifically referenced ANI in its revision to former Government Code Section 12926.[19] That reference indicates the Legislature's intention not to retreat from the definition of "physical handicap" adopted under ANI, which is broader than the more restrictive definition adopted in the ADA. Further, by referencing this landmark decision declaring the expansive scope of the FEHA respecting disability discrimination in employment, the Legislature declared that the purpose behind the 1992 amendments was *not* to adopt the more restrictive definitions of the ADA, but rather to adopt a more liberal definition of "physical disability."

By tracing this legislative history, the California Supreme Court in Colmenares determined that the FEHA "used the term 'limits,' not the federal law's 'substantially limits' language, *before and after* its amendment by the Poppink Act."[20]

IV. ADMINISTRATIVE INTERPRETATION OF 1992 AMENDMENTS

Subsequent to the 1992 amendments, the Fair Employment and Housing Commission ("FEHC"), the agency responsible for administrative adjudication of FEHA complaints, amended its relevant regulation to conform to the statutory definition of "physical disability." It also issued two precedential decisions applying the "limits" standard adopted by the 1992 amendments. These decisions "serve as precedent in interpreting and applying the provisions of [the FEHA]."[21]

In 1995, the FEHC issued a regulation to interpret the 1992 amendments' definition of "physical disability." This regulation mirrors the "limits" language contained in Government Code Section 12926 and references ANI. In doing so, the FEHC interpreted the 1992 amendments to adopt a broader definition of "physical disability" than the definition set forth in the ADA.[22]

In 1997, in DFEH v. Silver Arrow Express, Inc. (Maniago), a case involving a physical disability (post-bypass heart surgery and a ruptured disc), the FEHC defined the term "physical disability" as "having a physiological disease or disorder that: (1) affects the musculoskeletal or cardiovascular system; and (2) limits an individual's ability to participate in major life activities."[23] Likewise, in 2000, in DFEH v. Seaway Semiconductor (Hensley), a case involving a physical disability (Graves' disease), the FEHC declared that "'[p]hysical disability' includes, but is not limited to . . . [a condition that] [l]imits an individual's ability to participate in major life activities."[24]

In Colmenares, the California Supreme Court recognized that the FEHC's 1995 regulations and its precedential decisions, issued prior to the enactment of the Poppink Act, support the conclusion that the Poppink Act did not introduce the requirement that a condition "limit" a major life activity to qualify as a "physical disability."[25]

V. THE CASSISTA DICTUM

In Cassista, the California Supreme Court considered the narrow question of whether the FEHA prohibited employment discrimination on the basis of an employee's obesity.[26]

Because the 1992 amendments to the FEHA changing the term "physical handicap" to "physical disability" had just taken effect, the Cassista court reviewed pre-amendments and post-amendments language as well as the FEHC's 1988 regulation defining "physical handicap."[27] The court considered these provisions because it felt constrained by the Legislature's stated intent that there be continuity between the two definitions and, most importantly, that the definition of "physical disability" not retreat from the broad definition given "physical handicap" in ANI.

In attempting to harmonize the old and new definitions, the Cassista court commented on the former definition for "physical handicap" that was set forth in the FEHC's 1988 regulation.[28] In so doing, the court used both the "limits" and "substantially limits" terminology.[29] This passage had been construed by the Division One panel to suggest that, in Cassista, the high court had required that a condition "substantially limit a major life activity" in order to qualify as a physical disability.

The Colmenares decision laid to rest any further debate on this matter by explaining that the language at issue in Cassista was mere dictum.[30] The California Supreme Court held that "by 1997 when Colmenares was fired, the law as described in *Cassista* required only that the physical condition limit, not substantially limit, participation in major life activities."[31] In so holding, the high court also disapproved a line of cases that had erroneously followed the "substantially limits" standard for determining the existence of a "physical disability."[32]

VI. EFFECT OF THE POPPINK ACT AMENDMENTS

The Poppink Act amendments left unchanged the definition that a condition need only "limit" a major life activity to constitute a "physical disability" under the FEHA.[33] Although the Poppink Act did not inject for the first time the definition that a "physical disability" need only "limit" a major life activity under the FEHA, it did add language intended to provide guidance in determining whether a condition "limits a major life activity." Specifically, the statute provides that a condition "limits" a major life activity if it "makes the achievement of the major life activity difficult."[34]

Moreover, in enacting the Poppink Act, the Legislature further reiterated its firm commitment to offering broader protections under the FEHA than the ADA. Government Code Section 12926.1(d) states:

> "Notwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the Americans with Disabilities Act of 1990, (2) to require a 'limitation' rather than a 'substantial limitation' of a major life activity, and (3) by enacting paragraph (4) of subdivision (i) and paragraph (4) of subdivision (k) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity."

VII. POLICY IMPLICATIONS

Though not discussed in the decision itself, Colmenares has broad policy implications beyond its holding that a "physical disability" need only "limit" a major life activity.

Both the FEHA and the ADA define "physical disability" as an underlying "physiological . . . disorder, condition, cosmetic disfigurement, or anatomical loss" that "[a]ffects one or more . . . body systems," including the musculoskeletal system.[35] In order to come within the protection of the ADA, however, the ADA requires, in addition, that the disease, disorder or condition "substantially limit" the individual's ability to participate in "major life activities."[36] The Supreme Court in Sutton v. United Airlines[37] and its progeny further noted that "there may be some conceptual difficulty in defining 'major life activities' to include work."[38] Moreover, under the "substantially limits" standard of the ADA, persons with physical disabilities are less likely to be employed or stay employed, because the federal law does

not recognize their treated conditions or mitigation as disabilities. Such persons may have no recourse when they are refused jobs, dismissed or experience other adverse job actions because of their disabilities.

Under the broader "limits" standard of the FEHA, persons with physical disabilities are more likely to become employed and stay employed, even if their disabilities are treatable. Under this standard, persons with physical disabilities whose conditions are being treated will still be considered disabled and be protected from disability discrimination in employment.

Hence, persons with physical disabilities are more apt to be productive members of the work force under the "limits" standard, because they are less likely to encounter the "Catch 22" situation of having the treatment of their disabling conditions work against their employment discrimination rights.

ENDNOTES

1. 29 Cal. 4th 1019 (2003).
2. Cal. Gov.C. § 12900 et seq.
3. 42 U.S.C. § 12101 et seq.
4. Assem. Bill No. 2222, 1999-2000 Reg. Sess., ch. 1049, § 5. Among other things, the Poppink Act amended the certain definitions of mental and physical disability, and medical condition. It applied these revised definitions to provisions prohibiting discrimination in public accommodations, business transactions, access to public places, and employment in the state civil service system.
5. Colmenares, supra note 1 at 1031-2.
6. 5 Cal.4th 1050 (1993). "*Cassista* does contain language that, at first glance, appears to support the Court of Appeal's conclusion here. But a closer look reveals that the comment in question, made in passing, was unnecessary to resolve the issue in that case and therefore was mere dictum." Colmenares, supra note 1 at 1028.
7. Colmenares v. Braemar Country Club, 89 Cal.App.4th 778, 782-784 (2001), judgment vacated, 29 Cal. 4th 1019 (2003).
8. Id. at 784.
9. 90 Cal.App.4th 1205 (2001), review granted, 33 P.3d 446; 113 Cal. Rptr. 2d 23 (2001).
10. Id. at 1216.
11. Former Cal. Gov.C. § 12926(h).
12. 32 Cal.3d 603 (1982).
13. Id. at 609 (citation omitted).
14. Assem. Bill No. 1077, 1991-92 Reg. Sess., ch. 913, § 21.3.
15. Id.
16. Former Cal. Gov.C. § 12926(k)(1)(B) (emphasis added).
17. 42 U.S.C. § 12012; 29 C.F.R. § 1630.2(g).
18. "It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101-336) and to *retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990*." Assem. Bill No. 1077, 1991-92 Reg. Sess., ch. 913, § 21.3 (emphasis added).
19. "It is the intent of the Legislature that the definition of 'physical disability' in this subdivision shall have the same meaning as the term 'physical handicap' formerly defined by this subdivision and construed in *American National Ins. Co. v. Fair Employment & Housing Com.*, 32 Cal.3d 603." Former Cal. Gov.C. §12926(k); Assem. Bill No. 1077, 1991-92 Reg. Sess., ch. 913, § 21.3.
20. Colmenares, supra note 1 at 1027.
21. Cal. Gov.C. § 12935(h).
22. 2 Cal. Code of Regs. § 7293.5 (e), Register 95, No. 38.
23. DFEH v. Silver Arrow Express, Inc. (Maniago), FEHC Dec. No. 97-12, at pp. 7-8 [1996-97 CEB 2; 1997 CAFEHC LEXIS 11] (1997) (emphasis added).
24. DFEH v. Seaway Semiconductor (Hensley), FEHC Dec. No. 00-03P, at p. 13 [2000 CEB 1; 2000 CAFEHC LEXIS 2] (2000) (emphasis added).
25. Colmenares, supra note 1 at 1030.
26. Cassista, supra note 6 at 1052. As the court explained, the question presented was narrow: "It is important to emphasize at the outset the limited nature of our inquiry. We do not intend, nor indeed are we at liberty, to define 'physical handicap' in terms we believe to be morally just or socially desirable. Our task, rather, is to determine the boundaries of that provision which the Legislature intended." Id. at 1056.
27. Id. at 1056-1060.
28. The 1988, 1986 and 1980 FEHC regulations included language conforming to that of the pre-ADA federal definition of disability embodied in Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794. These definitions described a physically handicapped individual as one who "[h]as a physical handicap which *substantially limits one or more major life activities.*" See former 2 Cal. Code Regs. § 7293.6(i), Register 88, No. 18; former 2 Cal. Admin. Code § 7293.5(l), Register 86, No. 45; former 2 Cal. Admin. Code § 7293.5(l)(2), Register 80, No. 25 (emphasis added).
29. Cassista, supra note 6 at 1052, 1059, 1060, 1061.
30. Colmenares, supra note 1 at 1028-29.
31. Id. at 1029.
32. "We disapprove the following cases to the extent they hold or suggest the federal law's *substantial limitation* test applies to claims of physical disability brought under the FEHA: *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1039-1040, 101 Cal. Rptr. 2d 353 [holding that applicant for deputy sheriff who was unable to see the color red was not substantially limited in life activity of working, and, therefore, was not physically disabled under the FEHA]; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 629, 86 Cal. Rptr. 2d 497 [holding that employee opposing a summary judgment motion who offered evidence of 'only minor limitations' but not of substantial limitations, did not have a physical disability under the FEHA]; *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 442, 71 Cal. Rptr. 2d 573 [asserting that in 1992 'the Legislature intended to conform California's employment discrimination statutes to the ADA']; *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 721, 70 Cal. Rptr. 2d 531 [suggesting the substantial limitation test must be met to prove physical disability under the FEHA]; and *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813, 59 Cal. Rptr. 2d 339 [stating 'a covered *disability* under the FEHA ... incorporates the definition of disability listed in the Americans with Disabilities Act ...']." Id. at 1031 n. 6.
33. Id. at 1027.
34. Cal. Gov.C. § 12926(k)(1)(B)(ii) & (i)(1)(B).
35. Cal. Gov.C. § 12926(k)(1); 29 C.F.R. § 1630.2(h), interpreting 42 U.S.C. § 12101, sec. 3(2).
36. 42 U.S.C. § 12101, sec. 3(2)(A).
37. 527 U.S. 471 (1999) (no disability discrimination found where applicant for a pilot position was not hired because he had severe myopia treated with appropriate lenses).
38. Id. at 492; see also Murphy v. United Parcel Serv. Inc., 527 U.S. 516 (1999) [no disability discrimination found where mechanic with hypertension on blood pressure medication was dismissed even though employer feared employee ran risk of suffering heart attack or stroke]; Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999) [no disability discrimination found where an employer refused to rehire truck driver because he had an eye condition even though a waiver was available].

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MCLE SELF-ASSESSMENT TEST

1. The Poppink Act changed the definition that a condition need only "limit" a major life activity to constitute a "physical disability" under the FEHA.

❑ True ❑ False

2. In Colmenares v. Braemar Country Club, Inc., the California Supreme Court issued a unanimous decision that the definition of "physical disability" under the FEHA has always been and continues to be broader than that of the ADA.

❑ True ❑ False

3. The first element a plaintiff needs to prove in seeking to establish physical disability under the FEHA is that s/he has a physiological disease or condition affecting a body system.

❑ True ❑ False

4. The second element a plaintiff needs to prove in seeking to establish physical disability under the FEHA is that the disease or condition substantially limits the plaintiff's ability to participate in major life activities.

❑ True ❑ False

5. In 1982, the California Supreme Court interpreted the FEHA's statutory definition of the term "physical handicap" in an expansive manner under American National Ins. Co. v. Fair Employment & Housing Com.

❑ True ❑ False

6. The ADA, as it read in 1992, defined "physical disability" as a condition that "substantially limits" a major life activity.

❑ True ❑ False

7. Government Code Section 12926 of the FEHA, as it read in 1992, also defined "physical disability" as a condition which "substantially limits" an individual's ability to participate in major life activities.

❑ True ❑ False

8. In 1995, the Fair Employment and Housing Commission issued a regulation which mirrored the "limits" language contained in Government Code Section 12926 and interpreted the 1992 amendments to adopt a broader definition of "physical disability" than the definition set forth in the ADA.

❑ True ❑ False

9. Cassista v. Community Foods, Inc. resolved that "physical disability" is a condition that "substantially limits" a major life activity.

❑ True ❑ False

10. In the 1992 amendments to the FEHA, the Legislature intended to conform California law to the ADA.

❑ True ❑ False

11. To date, the Fair Employment and Housing Commission has issued two precedential decisions that apply the definition of "physical disability" adopted by the 1992 amendments to require only that a condition "limit" a major life activity in order to qualify as a "physical disability."

❑ True ❑ False

12. The Poppink Act added new language that provides a condition "limits" a major life activity if it "makes the achievement of the major life activity difficult."

❑ True ❑ False

13. The Poppink Act also extended the "limits" standard in determining the existence of a "mental disability."

❑ True ❑ False

14. In Colmenares, the California Supreme Court let stand a line of cases which had ruled that a "physical disability" must "substantially limit" a major life activity.

❑ True ❑ False

15. In enacting the Poppink Act, the Legislature further reiterated its firm commitment to offering broader protections under the FEHA than the ADA.

❑ True ❑ False

16. The Supreme Court in Sutton v. United Airline and its progeny noted that there is no conceptual difficulty in defining "major life activities" to include work.

❑ True ❑ False

17. Under the "substantially limits" standard of the ADA, persons with physical disabilities are more likely to be employed or stay employed, because the federal law recognizes their treated conditions or mitigation as disabilities.

❑ True ❑ False

18. Prior to Colmenares, a split of opinion existed in the Court of Appeal on whether the FEHA mirrored the ADA on what constitutes a "physical disability."

❑ True ❑ False

19. The ADA was enacted earlier than the FEHA.

❑ True ❑ False

20. In Cassista, the California Supreme Court considered the narrow question of whether the FEHA prohibited employment discrimination on the basis of an employee's obesity.

❑ True ❑ False

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Adjusting Local Regulations to Address Prostitution Activity at Chiropractic Offices

*By Stephen M. Fischer, Esq.**

I. INTRODUCTION

A new venue for prostitution activity has emerged in recent years. In a variation on the longstanding problem of brothels masquerading as massage parlors, the illegal sex trade is now thriving in several chiropractic offices in Southern California.[1] Reasons for this shift include loopholes in many local massage regulations and an overburdened state regulatory system.

As cities impose more stringent permitting requirements on traditional massage parlors, the illegal sex trade has enlisted chiropractors to bypass massage ordinances. Because many massage ordinances exempt chiropractic offices from permitting requirements, criminal background checks are often not conducted for persons providing massage services at these offices. Such offices are also often exempt from local requirements regarding disclosure of ownership and inspection. Rather than preventing a business from coming to town in the first place or screening its unlicensed massage therapists, local law enforcement is typically left to rely on undercover vice operations to confront illegal activity occurring at chiropractic offices.

A voter initiative adopted in 1922 ("Chiropractic Act") authorizes the chiropractic profession in California.[2] The Chiropractic Act created the State Board of Chiropractic Examiners ("Board") and authorized the Board to adopt regulations governing the licensing and conduct of chiropractors.[3] The Board employs a 16 person staff[4] to administer regulatory programs applicable to the approximately 15,000 active chiropractic licensees.[5] Under an initiative approved by voters in March 2002, the Board's enforcement unit is required to investigate alleged insurance fraud by licensees.[6] As a result, the enforcement unit is unable to focus on the rising trend in prostitution at chiropractic offices. Fortunately, recent legislation and the peculiar status of the chiropractic profession under California law provide local law enforcement some options for addressing this problem.

II. GOVERNMENT CODE SECTION 51033(B)

The Legislature has allowed cities and counties to enact ordinances regulating the business of massage.[7] Massage permits may be denied if a criminal background check shows that massage personnel or the business owners or operators have been convicted of various crimes, including prostitution-related offenses.[8] Last year, however, the Legislature revised this statutory scheme to specifically exempt chiropractors.[9] Under the new legislation, a city or county ordinance adopted pursuant to this statutory scheme cannot require "the licensing for regulation of the business of massage" when carried on by a chiropractor or other specified healing art practitioner operating in the scope of his or her state license. The new legislation does permit cities and counties to regulate independent contractors of any professional who is otherwise exempt.[10] Thus, city attorneys and county counsel may want to revise their agency's massage ordinances to delete exemptions for independent contractors providing massage treatments under the direction of professionals specified in Government Code Section 51033.

III. VERIFICATION OF COMPLIANCE WITH BOARD REGULATIONS

Cities and counties can also indirectly regulate by confirming that chiropractors applying for local business licenses have complied with various Board regulations. For example, a chiropractor must file with the Board the address of the principal office and every sub-office where he or she practices.[11] A Satellite Office Certificate must be obtained for every sub-office.[12] Cities and counties should confirm that a chiropractic business license applicant and all chiropractors who will provide services have registered with the Board to practice at that location.[13]

Verifying chiropractor staffing at a proposed location can help determine compliance with another Board regulation. Although the Board permits unlicensed persons to provide massage treatments as an adjunct to chiropractic adjustment, such treatments must be given under the "adequate supervision" of a chiropractor.[14] Also, adjunct treatments may be given only pursuant to a written treatment program following an initial examination by the supervising chiropractor.[15] In addition, the chiropractor must be present at the facility at least 50% of the time the unlicensed individual is on duty.[16] When processing chiropractic business license applications, cities and counties should consult the Board's license database for indications that the supervision requirements can be met. If a large number of offices are listed, licensing staff might consider checking with other licensing agencies for reports of prostitution activity at existing satellite offices.[17]

IV. LOCAL REGULATORY AUTHORITY WITHIN THE CHIROPRACTIC ACT

Section 13 of the Chiropractic Act provides that "Chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health...." If prostitution is viewed as a public health matter,[18] then, under Section 13, chiropractors are subject to local permit requirements designed to address illegal prostitution. It might be argued that the Legislature's exemption of chiropractors from the grant of local massage regulatory authority[19] preempts local regulation of chiropractic employees. However, the Chiropractic Act could provide an independent basis for local regulation of chiropractors. Local authority granted by the Chiropractic Act cannot be limited by the Legislature without voter approval.[20] This unresolved issue may be of little consequence, however, since prostitutes arrested at chiropractic offices are typically not treated as employees by the chiropractor.[21] Thus, Government Code Section 51033(b) allows cities and counties to apply massage permit requirements to the workers more likely to engage in prostitution.

V. OPTIONS THE BOARD SHOULD CONSIDER

The Board has not reacted decisively to the growing problem of prostitution at chiropractic offices. A Board notice issued in December, 2001, states that "[r]ecent arrests by several different law enforcement agencies suggest individuals engaging in prostitution have been aided and abetted by chiropractic licensees using their license [sic] as a front to hire unlicensed individuals for illegal activities."[22] The notice warns chiropractors against allowing duplication of their licenses and reminds them of the scope of services unlicensed individuals may perform. It also restates the adequate supervision requirements for unlicensed individuals. The Board should do more.

One step it might consider is revising its multiple office regulations to either cap the number of Satellite Office Certificates a chiropractor can obtain or at least account for required supervision of unlicensed individuals. It would not be unreasonable to require a chiropractor filing for a fifteenth Satellite Office Certificate to provide the number of unlicensed individuals the chiropractor must supervise and the hours those individuals are on duty.

Advertising regulations could also be strengthened. Currently, the Board generally restricts false advertising.[23] Offices where illegal prostitution occurs tend to advertise massage services offered without any mention of chiropractic services. The Board could impose name restrictions for chiropractic offices.[24] Currently, the Board only regulates names of chiropractic corporations.[25] Such corporate entities must operate under names that include the word "chiropractic" and a name of one or more of its shareholders.[26] Applying that requirement to all chiropractic entities and requiring the name to be displayed on advertisements would make chiropractors more accountable for their business operations without imposing undue burdens on legitimate chiropractors.

The Board must remember that it has a duty "to aid attorneys and law enforcement agencies in the enforcement of [the Chiropractic Act]."[27] The regulatory revisions described above would assist cities and counties in confronting problem chiropractors operating within their jurisdictions. If the chiropractic profession does what is needed to police itself, cities and counties will not be forced to treat chiropractic offices like massage parlors.

ENDNOTES

1. Karima A. Haynes, "Prostitution Stings Lead to 27 Arrests," L.A. Times, Feb. 27, 2003 at B3; Monte Morin, "Kinky Therapy for Your Back," L.A. Times, May 3, 2002 at A1.
2. See Cal. Bus. & Prof. C. § 1000. As an initiative measure, the Chiropractic Act is not codified, but is set forth in the Business and Professions Code for convenient reference. Cal. Bus. & Prof. C. Div. 2, Ch. 2, Art. 1, Refs & Annos.
3. Chiropractic Act §§ 1, 4.
4. Board web site (http://www.chiro.ca.gov/board/), April 5, 2003.
5. Morin, supra note 1 at A1.
6. Cal. Bus. & Prof. C. § 1004.
7. Cal. Gov.C. § 51030 et seq.
8. Cal. Gov.C. § 51032.
9. Cal. Gov.C. § 51033(a). Also exempt are cosmetologists, barbers, and healing arts professionals licensed pursuant to Division 2 of the Business and Professions Code.
10. Cal. Gov.C. § 51033(b).
11. 16 Cal.Code of Regs. § 303.
12. Id. § 308(b).
13. Chiropractor address information for both principal and satellite offices is available at the Board's web site (http://www.chiro.ca.gov/board/).
14. 16 Cal.Code of Regs. § 312(c).
15. Id. § 312(c)(2).
16. Id. § 312(c)(1). The Board may waive this requirement. In addition, the chiropractor must be "readily available at all other times for advice, assistance and instruction." Id.
17. The Board's license database includes records of a chiropractor who at one time held over 30 active Satellite Office Certificates for various offices in Southern California. The author compiled 15 police reports concerning prostitution arrests at several of the listed locations.
18. See Brix v. City of San Rafael, 92 Cal.App.3d 47, 54 (1979) ("discourag[ing] massage establishments from degenerating into houses of prostitution ... is a valid exercise of the city's power to regulate the health, morals and welfare of the community").
19. Cal. Gov.C. § 51030 et seq.
20. Cal. Const. Art. II, § 10(c).
21. E.g., chiropractic offices usually do not withhold taxes for such "workers."
22. Board of Chiropractic Examiners: Notice to Chiropractors, Dec. 6, 2001 (http://www.chiro.ca.gov/important/warningtochiros.pdf).
23. 16 Cal.Code of Regs. § 311.
24. Id. § 1350.3(a) (stating Medical Board of California requirements for fictitious business names of medical groups or individuals).
25. Id. § 367.7.
26. Id.
27. Chiropractic Act § 17.

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The Glue for Houses of Cards: The Role of Cities in Mobilehome Park Regulation

*By Alexander Abbe, Esq.**

Mobilehome parks are a part of American culture, having long provided a cheap alternative to conventional housing, particularly during the housing crisis following World War II. In California, the extreme housing shortage and skyrocketing property values make mobilehome living not just an attractive option, but often the only method of homeownership for some people. However, so-called "trailer parks" have historically carried a certain stigma. One commentator has described the place of mobilehome parks on the scale of social acceptability as "somewhere in the neighborhood of junkyards, but junkyards for people."[1] Recognizing this bias, in 1981 the Legislature enacted a statute mandating that mobilehome parks be deemed a permitted use in all residential areas of a city, although the law does permit the imposition of a use permit requirement.[2] And today some of that stigma has been eroded with the advent of manufactured homes that are indistinguishable from conventional housing.

The bleaker side of the picture is the fact that many mobilehome parks are more than thirty years old and are in a condition commensurate with their age. Some local officials have described their parks as being in "Third World conditions,"[3] pointing to exposed electrical lines, raw sewage, inoperative heating, missing smoke detectors and a complete lack of maintenance. Residents of a dilapidated mobilehome park generally lack the "exit option" because, as the Supreme Court has observed, "[m]obile homes are largely immobile as a practical matter"[4] due to market economics.

For a city containing mobilehome parks, the problem often comes to a head when scores of mobilehome residents appear at a council meeting to complain of unsafe and unsanitary conditions. This article discusses the legal options available when that situation arises.

I. STATE CONTROL

The most significant state law for remedying dilapidated mobilehome parks is the California Mobilehome Parks Act ("MPA"), which addresses maintenance, occupancy, use and design.[5] The California Department of Housing and Community Development ("HCD") is responsible for administering the statute.[6]

Unfortunately, for 5,657 mobilehome parks, there are only 25 HCD inspectors. Moreover, the agency is only obligated to inspect mobilehome parks once every seven years.[7]

II. CITY ASSUMPTION OF ENFORCEMENT RESPONSIBILITY

California cities have the authority to assume HCD's enforcement responsibilities under the MPA, but they cannot do so on a piecemeal basis. If a city exercises this authority, it must commit to enforce the statute for all of its mobilehome parks. Low permit fees make this a significant economic burden,[8] which may explain why less than twenty percent have undertaken the commitment.

In order to begin enforcing the MPA, a city must obtain HCD approval, as well as pass an ordinance that identifies specific local objectives and fulfills various other requirements.[9] Assumption of HCD's enforcement responsibility includes the following duties:

Permit Processing

The city will administer the state's construction permits, annual operating permits and installation permits.[10] Additionally, the city is obligated to ascertain the status of all existing operating permits.

Inspections

The city must inspect mobilehome parks within its jurisdiction at least once every seven years, and must investigate complaints "as the need arises."[11] At least 30 days prior to an inspection, the city must give mobilehome owners and occupants written notice and an HCD-prepared audio-visual orientation to educate them about the MPA.[12]

The city also must enforce pertinent state building standards and maintenance requirements. For example, HCD has extensive regulations for mobilehomes related to construction, electrical wiring, fuel gas equipment, plumbing and fire protection.[13] The city may apply its codes for permanent buildings within mobilehome parks if those laws are at least as strict as the state regulations.[14]

Abatement

Most significantly, upon determining that a mobilehome or mobilehome park is in violation of the MPA, the city must implement an abatement procedure specified by the state. The city is required to provide written notice to the owner and occupants of the mobilehome, or the owner of the mobilehome park, within 10 business days of an inspection.[15] The notice must be given immediately if there is an imminent hazard to health or safety.[16] The city is then obligated to allow a "reasonable time" for correction of imminent hazards, five days for removal of nuisances, and 90 days for correction of any other violation.[17] In the event the violation is not corrected in that time, the city may bring "any appropriate action or proceeding to prevent, restrain, correct, or abate the violation."[18] Where the violation constitutes a nuisance, the city attorney or city prosecutor may bring a nuisance abatement action.[19]

III. SCOPE OF CITY REGULATORY AUTHORITY

The MPA "supersedes any ordinance enacted by any city . . . applicable to this part."[20] There are, however, some limited exceptions to this preemption. The Legislature has authorized cities to enact land use regulations that do the following:

1. Establish zones for mobilehomes and recreational trailer parks; designate types of mobilehome parks; regulate park perimeter walls, signs, access, and vehicle parking; and prohibit certain uses.
2. Regulate gas, water and electricity facilities (except those structures owned by a public utility) located outside of a mobilehome or recreational vehicle; and regulate sewage disposal facilities located outside of a mobilehome park.

3. Authorize creation, movement, shifting or alteration of lot lines within mobilehome parks.
4. Require permits for the use of mobilehomes and recreational vehicles that are not located in parks.
5. Require local building permits for accessory structures when a mobilehome is located outside of a mobilehome park.
6. Prescribe setback and separation requirements for mobilehomes that are not located in a mobilehome park.[21]

Additionally, as previously mentioned, the Legislature has preserved a city's right to require a conditional use permit ("CUP") for the construction of a mobilehome park.[22] This will not help a city regulate a preexisting park, but it does allow imposition of conditions on new parks. A large percentage of jurisdictions require mobilehome parks to obtain a CUP.[23]

Although the Legislature does not specify the conditions that are permissible for a mobilehome park CUP, it is likely that a city retains a large degree of discretion. Another statutory provision states that a city may not require improvements in mobilehome parks that are more extensive than those required for single-family residences.[24] This prevents a city from imposing such strict conditions in connection with a mobilehome park CUP that it is impossible for a mobilehome park to situate anywhere in its jurisdiction. Although the statute limits a city's authority to a degree, the existence of this statute is significant because it implies that a city does have discretion to go beyond the base standards established by HCD.

On the other hand, one of the HCD regulations provides that "mobile home locations are subject to the requirements of local zoning ordinances and conditional use permits established by local authorities."[25] If cities already had the authority to impose conditions related to location of mobilehomes through CUPs, this regulation would be unnecessary. However, the provision may be referring to the location of mobilehome parks, rather than the location of mobilehomes within parks, because another regulation specifies minimum setback and separation requirements for mobilehomes within parks. [26]

The better argument, then, is that a city may require a CUP for mobilehome park construction if the city does not impose any conditions that are more lenient than those required by HCD[27] or stricter than the applicable city residential standards. The mere fact that the Legislature has allowed cities to require a CUP indicates that the imposition of conditions is permissible. [28]

Although the CUP process should assist cities in regulating prospective mobilehome parks, it does little to address the problem of dilapidated preexisting parks. Local enforcement, though it is beyond the means of some cities, remains the best means of remedying the problems with mobilehome

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park conditions. An enforcing city should be able to address the needs of its mobilehome residents significantly quicker than would be done by the state.

IV. IMPROVING THE STATUTORY STATUS QUO

In the current term, two assembly bills provide for harsher penalties against delinquent mobilehome park owners, including punitive damages and civil and criminal penalties.[29] Senator Dunn also recently introduced a bill that would require more communication between enforcement agency inspectors and complaining residents, and also would compel inspections in the event of a dispute between a park owner and a resident.[30]

However, innumerable mobilehome parks remain in the "Third World" and, without additional local authority to regulate, they may never leave it. The obvious reason for prohibiting cities from regulating more strictly than HCD is that some would impose such stringent requirements that no mobilehome park could meet them. However, this is a sledgehammer of a remedy where a scalpel is required. If a local government is willing to sustain the expense of enforcing the MPA, it should also be permitted to tailor the regulations to its jurisdiction.

For example, the City of Pomona recently proposed legislation to allow it to assume enforcement authority for just some of its mobilehome parks. Pomona believed it could do a better job of enforcement than HCD in "slum lord" mobilehome parks if it was not burdened with enforcement in every park in its territory.[31] The bill passed in the Legislature but was vetoed by the Governor.

The unavailability of the variance power is another constraint on local authority. With conventional housing, a local government can allow improvements to be made contrary to a setback or lot width ordinance in circumstances where a lot is of an unusual size, shape, or topography.[32] For mobilehome parks, however, the city cannot depart from HCD's standards. Given that variances are only permitted when there are "special circumstances applicable to the property,"[33] allowing them in mobilehome parks would not create a significant risk of worsening park conditions.

Finally, cities could be granted additional flexibility regarding the process for remedying violations of the MPA. Currently, for many violations, an enforcement agency must provide a mobilehome park or mobilehome owner 90 days to remedy a defect, unless the defect is so serious as to constitute a nuisance.[34]

CONCLUSION

The problem of mobilehome park regulation is victim to the recurring question of whether control should lie with local government or with the state. However, the current setup either is virtually ineffectual, in the case of HCD enforcement, or gives a city all of the responsibility with none of the control, in the case of local enforcement.

ENDNOTES

1. John Fraser Hart et al., The Unknown World of the Mobile Home 2 (2002).
2. Cal. Gov.C. § 65852.7.
3. Tina Dirmann, "Mobile Homes: One Local Official Cites 'Third World Conditions,'" L.A. Times, Feb. 18, 2001, at B-1; see also Tina Dirmann, "County Takes Aim At Mobile Home Parks," L.A. Times, Feb. 14, 2001, at B-1 (noting the poor condition of ten parks in Ventura County); Jeff Gottlieb, "Conditions In Anaheim Mobile Homes Appalling, Legislative Aide Says," L.A. Times, Dec. 31, 2000, at B-10.
4. Yee v. City of Escondido, 503 U.S. 519, 523 (1992). Congress also has acknowledged the immobility of mobilehomes. In the early 1980s, the term "manufactured home" replaced "mobile home" in federal statutes.
5. Cal. Health & S.C. § 18200 et seq. Numerous other laws pertain to mobilehome parks. See, e.g., the National Manufactured Housing Construction and Safety Act of 1974, 42 U.S.C. § 5401 et seq.; 24 C.F.R. § 3280.1 et seq.; and the California Mobilehome Residency Law, Cal. Civ.C. § 798 et seq.
6. The HCD regulations implementing the MPA are codified at 25 Cal.Code of Regs. § 1000 et seq.
7. Cal. Health & S.C. § 18400.1(a).
8. As the enforcement agency, a city will be entitled to receive annual fees for permits to operate, but this fee is only $25 for each mobilehome park and $6 for each lot in the park. Cal. Health & S.C. § 18502; 25 Cal.Code of Regs. § 1004(a)(4).
9. 25 Cal.Code of Regs. § 1004.
10. Cal. Health & S.C. §§ 18500-18, 18610-14; 25 Cal.Code of Regs. §§ 1006-54.
11. Cal. Health & S.C. § 18400.1(a).
12. Id. § 18400.1(d), (f).
13. 25 Cal. Code of Regs. §§ 1100-1368.
14. Cal. Health & S.C. §§ 18620-91; 25 Cal.Code of Regs. § 1384.
15. Cal. Health & S.C. § 18420 (a), (b).
16. Id.
17. Id. §§ 18402, 18420 (c)(3), (c)(6).
18. Id. § 18404; 25 Cal.Code of Regs. § 1642.
19. Id. § 18402.
20. Id. § 18300(a).
21. Id. § 18300(g).
22. Cal. Gov.C. § 65852.7.
23. California Department of Housing and Community Development, Local Government Mobilehome & Mobilehome Park Policies in California 2 (1986).
24. Cal. Health & S.C. § 18300(h)(2) ("[I]mprovements may be required only to the extent that the facilities or improvements are required in other types of residential developments containing a like number of residential dwelling units.").
25. 25 Cal.Code of Regs. § 1332.
26. Id. § 1330.
27. From a planning perspective, some of the more pertinent HCD regulations in Title 25 are Sections 1106 (width of roadways), 1110 (maximum occupiable lot area), 1328 (utility facilities), 1330 (setbacks and separation requirements), 1420-1520 (accessory structures), and 1614 (lot occupancy).
28. Cf. Upton v. Gray, 269 Cal.App.2d 352, 357 (1969) (recognizing a city's authority to impose conditions with a CUP).
29. A.B. 693 (Corbett) (2003); A.B. 1059 (Lieber) (2003).
30. S.B. 54 (Dunn) (2003).
31. S.B. 1663 (Soto) (2002).
32. Cal. Gov.C. § 65906.
33. Id.
34. Cal. Health & S.C. § 18420(c)(3).

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A Message from the Chair

*By Stephen Millich, Esq.**

One of the most important services the Public Law Section of the State Bar of California provides to California attorneys is the series of MCLE credit classes it makes available at the State Bar Annual Meeting. This year the meeting is in Anaheim in September, and we will offer the following programs for MCLE credit:

1. *Celebrating Strength in Diversity: Elimination of Bias in the Profession,* by Tina Rasnow. Not only is this an interesting and popular program, it also offers one unit of MCLE credit in the category of Elimination of Bias.
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5. *Government Code Tort Claims Act – Substance and Procedure.*
6. *Understanding and Drafting Legislative and Regulatory Language,* by Jeremy March.
7. *USA Patriot Act – A Clash of National Security and Civil Liberties?,* by Carlos Holquin and Fazle Rab Quadri.
8. *Conflict of Interest 101 for Public Lawyers and Lawyers Working with Public Agencies,* by California Political Attorneys' Association representative.

All the members of our Executive Committee sincerely hope that you take advantage of these classes. If you would also like to join the Public Law Section or present an MCLE program sponsored by the Section that would be "icing on the cake."

You can reach me at the City Attorney's Office in Simi Valley at (805) 583-6714 or by e-mail at smillich@simivalley.org.

* Stephen Millich is Chair of the Public Law Section's Executive Committee. He is Assistant City Attorney to the City of Simi Valley.

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