

Office of the City Attorney

October 1, 2007

TO: GORDON WOZNIAK, Councilmember

FROM: MANUELA ALBUQUERQUE, City Attorney
By: LAURA N. McKINNEY, Deputy City Attorney *gml*

RE: Whether the City of Berkeley Can Require Posting of a Resident Manager/Owner's Name and Phone Number on Buildings With Five (5) or More Units

Issue:

Can the City amend Berkeley Municipal Code (BMC) Section 19.40.100 to require posting of a resident manager/owner's name and phone number on buildings containing five or more units?

Conclusion:

No. The City is preempted by state law from enacting such an amendment.

Background:

Councilmember Wozniak has proposed an amendment to BMC Section 19.40.100 to require: 1) posting of a resident manager's or owner's name and phone number for buildings which contain 16 or more units; and 2) the owner's phone number for a building containing between 5 and 15 units and has forwarded such request to our Office for analysis.

Discussion:

On November 3, 1992, the City Attorney's Office issued an opinion about whether the City was preempted from enacting an amendment to the same Housing Code provision¹ which currently requires: 1) a resident manager or owner to reside on the premises in buildings containing 16 or more units; and 2) posting of the owner's name and address on buildings containing 5 to 15 units where the owner does not reside on the premises. The 1992 opinion is attached here as Attachment A.

¹ Previously enacted as BMC Section 12.48.100.

It concludes that Berkeley could not amend its law relating to resident managers since it is part of the state Uniform Housing Code which has been found to preempt local regulation of the field unless the City is able to make findings that such an amendment is necessary due to local topographical, geographical or climatic reasons per Health and Safety Code Section 17958.5(a) and 17958.7(a).

Its conclusion is based primarily on a case that was decided the year the opinion was issued, *Briseno v. City of Santa Ana* 6 Cal.App.4th 1378 (1992). I have researched whether *Briseno* is still good law and found that 3 subsequent decisions have followed the reasoning of this case.²

The state requirement regarding resident managers is found at 25 Code of California Regulations 42 and is attached here as Attachment B. The City's Housing Code provision mirrors this requirement in large part. (See BMC 19.40.100).

Therefore, the proposed amendment to: 1) require resident managers/owners to post their names and phone numbers on buildings which contain 16 or more units and; 2) require owners to post their phone numbers on buildings containing 5 to 15 units whether or not they reside at the building would only be allowed if the City could make findings that these changes were necessary due to local topographical, geographical or climatic reasons.

Since the proposed amendment is the result of a neighborhood association request to attempt to alleviate the impact of loud parties and assist in the distribution of door hangers for the Move Out project, it does not appear to be the result of local topographical, geographical or climatic reasons. As a result, the City would be preempted from enacting such an amendment by state law.

² *Bldg. Indus. Ass'n v. City of Livermore* 45 Cal.App.4th 719 (1996); *ABS Institute v. City of Lancaster* 24 Cal.App.4th 285 (1994); and *Cedar Shake & Shingle Bur. v. City of Los Angeles* 997 F.2d 620 (9th Cir. 1993).

CITY OF BERKELEY

DATE: November 3, 1992

Memorandum

TO: Michael F. Brown, City Manager

FROM: Manuela Albuquerque, City Attorney
By: Marjorie Gelb, Assistant City Attorney

SUBJECT: CITY COUNCIL REFERRAL NO. 92-039: LEGALITY OF AMENDING B.M.C. SECTION 12.48.100 TO REQUIRE A RESIDENT CARETAKER IN APARTMENT BUILDINGS ON CONTIGUOUS PARCELS WHERE THERE ARE SIXTEEN OR MORE APARTMENTS AMONG THE BUILDINGS AND THE BUILDINGS ARE COMMONLY OWNED

ISSUE:

Can the City amend B.M.C. section 12.48.100 to require a resident caretaker in apartment buildings on contiguous parcels where there are sixteen or more apartments among the buildings and the buildings are commonly owned?

CONCLUSION:

No. The State Housing Law preempts cities from regulating in this area.

ANALYSIS:

In the early 1960's California enacted its State Housing Law in the form of California Health & Safety Code sections 17910-17995 (West 1992). Before 1970 municipalities were free to modify the requirements of the State Housing Law as long as the local ordinance prescribed standards equal to or greater than those prescribed by the Division of Housing. 40 Ops.Cal. Atty.Gen. 205, 206 (1962); Health & Safety Code sec. 17951(a) (West 1961). This rule gave municipalities a great deal of freedom to deviate from the minimal requirements of the State Housing Law.

In 1970, however, the Legislature dramatically limited this freedom in order to achieve statewide uniformity of housing and building codes. Stats. 1970, ch. 1436, sec. 7. First, it deleted the "equal to or greater than" exception from section 17951(a). Second, it required the state and its cities and counties to adopt codes and ordinances imposing the same requirements as those contained in the various uniform

ATTACHMENT A

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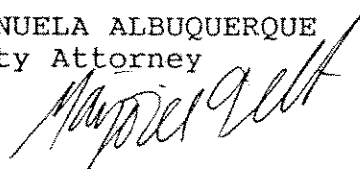
codes.^{1/} Health & Safety Code sections 17922(a)(1), 17950(a), 17958(a); Briseno v. City of Santa Ana, 6 Cal.App.4th 1378, 1382 (1992); 65 Ops.Cal.Atty.Gen 397, 400 (1982). Third, it clearly stated that cities and counties can deviate from these codes only if necessitated by local topography, geography or climate. Health & Safety Code sections 17958.5(a), 17958.7(a); Briseno at 1383.

Briseno, 6 Cal.App.4th 1378, the most recent appellate court decision involving the State Housing Law, holds that the effect of the 1970 amendments is to "generally preempt local regulation in the field." Id. at 1382. Briseno expressly holds that the limited grant of power to amend regulations and ordinances mandated by the State Housing Law, pursuant to Health & Safety Code sections 17958.5(a) and 17958.7(a), is by implication a denial of any greater jurisdiction. Id. at 1383.

Hence, Berkeley must have a topographical, geographical, or climatic reason for changing B.M.C. section 12.48.100. As the Berkeley City Council memorandum of May 12, 1992 indicates, however, the amendment to the resident caretaker ordinance is designed to relieve renters from "such problems as drug dealing and failure to provide proper security." Since these justifications clearly are not related to topographical, geographical or climatic necessities the amendment would be held invalid.^{2/}

Respectfully submitted,

MANUELA ALBUQUERQUE
City Attorney

By 
MARJORIE GELB
Assistant City Attorney

MG:dej

cc: City Clerk

^{1/} The resident caretaker requirement of B.M.C. section 12.48.100 enacts 25 Cal.Admin.Code section 42 (Barclays 1992), which enacts the Uniform Housing Code.

^{2/} A prior City Attorney's opinion dated June 1, 1988 concluding otherwise was based on an Attorney General's opinion which has been superseded by subsequent legislation.

LEXSTAT 25 CCR 42

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* THIS DOCUMENT IS CURRENT THROUGH REGISTER 2007, NO. 36, SEPTEMBER 7, 2007 *

TITLE 25. HOUSING AND COMMUNITY DEVELOPMENT
DIVISION 1. HOUSING AND COMMUNITY DEVELOPMENT
CHAPTER 1. STATE HOUSING LAW REGULATIONS AND EARTHQUAKE PROTECTION LAW
REGULATIONS
SUBCHAPTER 1. STATE HOUSING LAW REGULATIONS
ARTICLE 5. EXISTING BUILDINGS

25 CCR 42 (2007)

§ 42. Caretaker

A manager, janitor, housekeeper, or other responsible person shall reside upon the premises and shall have charge of every apartment house in which there are 16 or more apartments, and of every hotel in which there are 12 or more guest rooms, in the event that the owner of an apartment house or hotel does not reside upon said premises. Only one caretaker would be required for all structures under one ownership and on one contiguous parcel of land. If the owner does not reside upon the premises of any apartment house in which there are more than four but less than 16 apartments, a notice stating the owner's name and address, or the name and address of the owner's agent in charge of the apartment house, shall be posted in a conspicuous place on the premises.

AUTHORITY:

Note: Authority cited: *Sections 17003.5, 17921, 50061.5 and 50559, Health and Safety Code*. Reference: *Sections 17910-17995, Health and Safety Code*.

HISTORY:

1. Change without regulatory effect amending section filed 6-23-2004 pursuant to *section 100, title 1, California Code of Regulations* (Register 2004, No. 26).

ATTACHMENT B