

September 9, 2019

## **LEGAL LETTER OF OPINION**

### **To Whom It May Concern:**

#### ***Question Presented:***

Does a private owner's maximum occupancy limit of one person per unit violate Federal and California law's prohibition of discrimination against "familial status"? (See *42 USCA 3604, subd. (a)*; see also *Cal. Gov. Code §12955*.)

#### ***Opinion:***

**I, Justin Wilmers, Esq., am an attorney duly licensed to practice law in the State of California. After reviewing the relevant law, subject to the qualifications and analysis below, I am of the opinion that a private owner's maximum occupancy limit of one person per unit does not per se violate the anti-discrimination provisions under the applicable Federal and California law.**

#### ***Analysis:***

##### **I. The Federal Fair Housing Act and California FEHA**

The Federal Fair Housing Act states that it shall be unlawful to refuse to sell or rent after the making of a bonafide offer, or to refuse to negotiate the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of...familial status..." (42 USCA §3604, subd. (a).) Similarly, California FEHA forbids such discrimination based on familial status. (Cal. Gov. Code §12900 et. seq.)

The Fair Housing Act/FEHA mandates that courts examine the totality of the circumstances to determine whether the facially neutral occupancy restriction results in discrimination against a protected class. Specifically, if the plaintiff proves a prima facie case of discrimination, the defendant has the burden to articulate some legitimate nondiscriminatory reason for its action. As a matter of guidance, HUD has set forth a general rule that an occupancy policy of two persons per bedroom is presumptively reasonable. However, as exemplified below, the courts have never applied this rule as a basis of liability. Rather, each case is determined by the totality of the circumstances.

More restrictive, California's Department of Fair of Employment and Housing (DFEH) suggests "two plus one" formula, meaning two people per bedroom plus one additional occupant in the living space.

While the FHA authorizes federal, state or local governmental restrictions regarding the maximum number of occupants permitted to occupy rental units, the FHA does not expressly address the legitimacy of private owner occupancy restrictions that are more restrictive than state and local law. However, according HUD regulations, when a complaint alleges familial status housing discrimination, nongovernmental occupancy restrictions will be carefully examined to determine whether they operate *unreasonably* to limit or exclude families with children. (24 CFR, Ch.1, Subch. A, Appendix 1 at 693 (1991).)

In interpreting the laws above, the Eighth Circuit Court of Appeals in *U.S. v. Badgett* held that HUD's general rule of thumb "does not mean that a single occupancy requirement is always invalid, but it does render such a requirement suspect..." (*Badgett*, (1992) 976 F.2d 1176, at 1179.) However, in *Badgett*, the appellees only justification for a single person occupancy standard was limited availability of parking. The Court found this insufficient to justify the policy and was merely a pretext for other impermissible justifications. Most significantly, the dwellings at issue were one bedroom units with 636 square feet of living space.

In contrast to *Badgett*, the Ninth Circuit Court of Appeals has affirmed that 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. (See *Pfaff v. U.S. Dept. of Housing and Urban Development* (1996) 88 F.3d 739.) In its ruling, the *Pfaff* court departed from the suggested rule that a landlord must produce a "compelling business necessity" to impose numerical occupancy standards. (*Id.* at 748.)

Thus, the applicable federal law allows private housing providers to develop and implement occupancy standards reasonably related to the factors noted above, provided the standard has a demonstrable relationship to a legitimate business purpose.

## II. City of Merced Local Law

The City of Merced has no governmentally implemented occupancy limits. Below is a brief overview of municipal codes that may be relevant for analysis.

The City of Merced Municipal Code adopted the Uniform Housing Code, 1997 Edition as the housing code of the city. (Merced Municipal Code §17.08.010.) The Uniform Housing Act defines "Efficiency Dwelling Units" as a dwelling unit containing only one habitable room and meeting the requirements of Section 503.2, exception. The 503.2 exception states,

**"The unit shall have a living room of not less than 220 square feet of superficial floor area. An additional 100 square-feet of superficial floor area shall be provided for each occupant of such unit in excess of two."**

Presumably, based on the language above, the **maximum** allowable numerical occupancy for an efficiency unit of 220 square feet is two occupants.

Additionally, City of Merced Municipal Code §20.44.120 allows for Single Room Occupancy (SRO) use, which states each unit shall accommodate “a maximum of two (2) persons.”

**Provided the requirements for SRO are met, a privately implemented occupancy limit of 1 person per unit would seem reasonable and non-violative of the discrimination laws discussed above.**

***Qualifications:***

- Privately implemented occupancy limit must be uniformly applied, not selectively.
- Privately implemented occupancy limit must have a demonstrable relationship to a legitimate business purpose. Such factors include, but are not limited to,
  - Size of bedrooms and unit;
  - Age of occupants;
  - Configuration of unit;
  - Capacity of septic, sewer, or other building systems;
  - Compliance with state and local law.
- If municipal occupancy limits that are stricter than federal/state law do in fact exist, the privately implemented occupancy limits must comply with such. However, upon my research this does not seem to be the case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Justin Wilmers', with a stylized flourish at the end.

Justin Wilmers, Esq.  
Attorney at Law