



Community Health  
Commission (CHC)

Internal

## COMMUNITY HEALTH COMMISSION

Health Facilities Subcommittee

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### Agenda

Monday, May 8, 2023 at 1:00pm

- 1) Call to Order and Roll Call
- 2) Public Comment
- 3) Discussion regarding City Council Referral on Long Term Care Facilities
- 4) Adjourn

**Attachments:** City Council Referral on Long Term Care Facilities (Bartlett)

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**BEN BARTLETT**

CITY COUNCILMEMBER, DISTRICT 3

Attachment 01

CONSENT CALENDAR

December 14, 2021

To: Honorable Mayor and Members of the City Council  
 From: Councilmember Ben Bartlett  
 Subject: Health Care Facility Oversight

RECOMMENDATION

Refer to the City Manager and the Community Health Commission an assessment of the breadth of regulatory control the City of Berkeley can exert on skilled nursing facilities, and create a process of accountability if complaints are found to be substantiated that threaten, or could potentially escalate to the point of threatening, the wellbeing of patients and/or violate federal, state, or local law; the business license of the offending facility will be suspended until the skilled nursing facility submits a report demonstrating rectification of the situation.

BACKGROUND

The California Department of Public Health (CDPH) mandates that skilled nursing facilities provide 3.5 hours of patient care to each patient per day.<sup>1</sup> For instance, some care facilities in Berkeley are reported to have as few as 6 staffers serving 66 patients, meaning that even if the staff worked around the clock, at most they would be able to offer 2.1 staff hours per patient per day. In 2021 alone, the facility has received 12 complaints, but not a single one has been followed up by an enforcement action<sup>2</sup>. This is just a single example in an egregious pattern of lack of care met with lack of enforcement. In 2019, for example, skilled nursing facilities were found to violate an average of 23 federal and state laws per facility. Yet, in the 77 skilled nursing facilities across California, not a single regulation was enforced. As a result, there has been a history of negligence, mistreatment, and patient abuse within Californian care facilities.<sup>3</sup>

CURRENT SITUATION

The City has received numerous grievances from concerned community members over the quality of care in certain skilled nursing facilities in Berkeley. Community members complain of neglect, indifference, and harmful, negligent behavior with sometimes tragic consequences.

The City must address these hazards by creating internal procedures and policies designed to prevent further harmful acts. Precedence for license revocation policies can be found in other municipalities. For example, Chapter 6 Section 1.80 of Superior, Colorado Municipal Code states that business licenses can be suspended “when any activity conducted by the licensee, his or her employee or agent violates any federal, state or local rule, regulation or law.”<sup>4</sup> The City

<sup>1</sup><https://canhrnews.com/guidelines-for-3-5-direct-care-service-hours-per-patient-day-dhppd-staffing-audits/>

<sup>2</sup> <https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/SearchResult.aspx>

<sup>3</sup> <https://calmatters.org/health/2021/10/nursing-homes-oversight-california-hearing/>

<sup>4</sup> [https://library.municode.com/co/superior/codes/municipal\\_code?nodeId=CH6BULIRE](https://library.municode.com/co/superior/codes/municipal_code?nodeId=CH6BULIRE)

of Berkeley could adopt such an ordinance to shutter inept care facilities and deter improper conduct and mismanagement.

Furthermore, to ensure enforcement, the City could mandate that all complaints be forwarded to the Environmental Health Division to be reviewed in a timely manner. This would prevent a backlog of complaints and strengthen City follow-through.

The City of Berkeley needs to enforce strict regulations over the performance and conditions of skilled nursing care facilities to ensure that patients are not stripped of their right to quality care. As stated above, a particularly skilled nursing care facility received 12 complaints in 2021, but there was zero enforcement action taken against them. With this recommendation, there will be a strict standard that skilled nursing care facilities must meet to guarantee that issues are adequately addressed by the City of Berkeley. Furthermore, it provides safeguards to ensure that patients are not neglected by those assigned to look after them.

#### FINANCIAL IMPLICATIONS

Determine as part of City Manager and Commission response.

Suppose the City can regulate skilled nursing facilities (generally not a City role). In that case, there could be significant financial implications because there is currently no staff assigned to this work in the City.

#### COMMUNITY CONSULTATIONS

This item was informed by consultations with and complaints raised by community members.

#### CONTACT PERSONS

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## Model Ordinance for Local Long Term Care Facility Licensure

California law states that no person or entity shall operate a health facility without first obtaining a license (Health and Safety Code Section 1253). Unfortunately, the California Department of Public Health's (CDPH) licensing process has become dysfunctional to the point of irrelevance. CDPH takes no action when nursing home operations are transferred to unlicensed and unvetted operators. As a result, operators no longer need a license to own or run nursing homes in California. Virtually anyone or any company can acquire nursing homes in California, no matter how incompetent, financially unqualified, or terrible their track record they may be. As a result, California nursing homes are dominated by for-profit chains that, at best, are known for putting profits over care and, at worst, for routinely exposing residents to neglect and abuse that is causing residents to suffer severe harm, misery and torturous deaths. As the State continues to fumble with its role of nursing home oversight, cities and counties are encouraged to become proactive in vetting what people or entities are operating nursing homes in their communities.

The following model local ordinance is meant to ensure that no new entity can operate a nursing home without prior approval from the local community by creating consequences severe enough to discourage even the most unscrupulous operators. The model ordinance is also designed to ensure the local community has the information it needs to make good licensing decisions.

### The ordinance

*No person or entity shall own or operate a skilled nursing facility without first obtaining a local license. A skilled nursing facility is defined in Health and Safety Code Section 1250(c).*

*“Operate” means to exercise operational control, including but not limited to, managing, budget setting, and contracting with residents for admission.*

### Operation

#### 1. Application

Any person(s) or entity(ies) seeking to own or operate a skilled nursing facility shall submit an application, signed under penalty of perjury that includes the following:

- A description of the services to be offered in the facility.
- The name of the proposed owner(s) / operator(s), type of facility to be owned or operated, address of facility to be owned or operated, name of the facility, and the name of the current owner and operator,
- Whether the owner or operator is for-profit or non-profit provider.
- If the proposed owner or operator is an entity, the application must include the name, address, and affiliation with any other long term care facilities of all directors, board

members, managers, and persons with an ownership interest of five percent or more. The application must also include the name, address, and affiliation with any other long term care facilities of any and all parent organizations of any entity. Every entity named must include the names, addresses, and affiliation with any other long term care facilities of all directors, board members, and managers of any and all parent organizations in a list format. All entities must be connected to individual people. A *“long term care facility”* is a skilled nursing facility under Health and Safety Code Section 1250(c) or Residential Care Facility for the Elderly under Health and Safety Code Section 1569.2.

- If the facility would be part of a chain after the proposed change in ownership or operation, a diagram indicating the relationship between the applicant and the persons or entities that are part of the chain, including those that are owned or controlled by the same parties, and in a separate list, the name, address, and license number, if applicable, for each person or entity in the diagram. A “chain” means a group of two or more long term care facilities that are owned or operated by the same persons or entities.
- A detailed projected budget for the first twelve months of operation, prepared in accordance with generally accepted accounting principles and certified by the principal officer of the prospective operator, accompanied by evidence of access to a sufficient amount of working capital required to operate the long term care facility in accordance with the budget, in the form of cash on deposit, a line of credit, applicant's equity, or any combination thereof.
- Proof of sufficient insurance
- Affirmative evidence that the prospective owner(s) or operator(s) has the character, ability, education, experience, performance history, financial resources, and other necessary qualifications to ensure that the facility will be operated in full compliance with all applicable statutes and regulations governing the operation of skilled nursing facilities. If the proposed owner/operator is an entity, like evidence shall be submitted as to the members or shareholders thereof.
- Any revocation, suspension, probation, exclusion order, or other similar administrative disciplinary action that was filed and sustained in California or any other state, or in the process of being adjudicated, against a facility associated with a person or entity identified in the application or by any authority responsible for the licensing of health, residential, or community care facilities within the past ten years.
- Copies of final findings, orders, or both, issued by any health, residential, or community care licensing agency or any court relevant to the actions described above.
- Any petition for bankruptcy relief filed within five years of the date of application involving operation or closure of any related health, residential, or community care facility licensed

in California or any other state, the court, date, and case number of the filing, and whether a discharge was granted. If a discharge was not granted, the applicant shall provide copies of any court findings supporting denial of discharge.

- Proof of the right to possess the facility at the time the application will be granted and the name and address of any persons or entities that own the real property on which the facility seeking licensure is located.
- Fire clearance
- Any other information as may be required by the City/County.
- The information required pursuant to this section, other than individuals' social security numbers, shall be made available to the public upon request, and shall be included in the department's public file regarding the facility.
- An application fee that covers the cost of reviewing the application.

The City/County may require the prospective owner or operator to furnish other information or documents at its discretion. Failure of the applicant to provide any needed information may result in the denial of the application. Failure of the proposed owner or operator to disclose affiliations with other facilities will result in the denial of the application or revocation of license.

## 2. Considering the Application

The application will be submitted and reviewed by the City/County. The City/County will hold a public hearing before approving or denying the application.

The application may be approved if the City/County believes the facility will be operated in full compliance with all applicable statutes and regulations governing the operation of skilled nursing facilities while under the ownership or operational control of the applicant.

The City/County retains sole discretion over approval or denial of an application for a license but the following will result in automatic denial or revocation of a license:

The prospective owner or operator or any affiliate of the prospective owner or operator:

- Has owned, operated or managed any facility that has received more than one class "AA" citation from the Department of Public Health within any 24-month period.
- Has owned, operated or managed any facility that has received three or more of any combination of a class "AA" citation, a class "A" citation, or a deficiency constituting an immediate jeopardy violation in the preceding five years.

- Is on the List of Excluded Individuals/Entities of the United States Department of Health and Human Services Office of Inspector General.
- Has owned, operated, or managed a facility that was terminated from the federal Medicare Program or the Medi-Cal program due to noncompliance, had its license suspended or revoked, or was subjected to receivership.
- Has been convicted of a crime as defined in Health and Safety Code Section 1265.2.

Knowingly making a false statement or withholding material information on the application. The City may assess a civil penalty of ten thousand dollars (\$10,000) for making a false statement or withholding material information on an application for licensure or renewal.

The City/County shall consider the performance of associated facilities such as the number of regulatory complaints and civil lawsuits filed against them and publicly available data regarding facility staffing and other performance measures. The City/County shall consult with the local long term care Ombudsman program regarding the performance of associated facilities.

### 3. Approval or Denial of the Application

Approved owners and operators will be granted a license and may assume ownership or operational control of the facility. Denied operators or operators awaiting approval may not assume operational control.

The approval or denial shall be communicated in writing. If the license is denied, the written denial shall state the reason for the denial

Applicants who are denied licensure may seek an appeal. The applicant may not own or operate the facility at issue while the appeal is pending.

### 4. Enforcement

Any violation of this section is a misdemeanor. If a facility is being operated, in whole or in part, by an unlicensed person or entity, the licensed owner, licensed operator, unlicensed owner, and unlicensed operator are all subject to the following measures:

- A ban on admitting new residents to the facility;
- A daily fine of up to \$10,000 / day. The fines may be assessed on the individual operators in their personal capacity, in addition to the entities;;
- Up to one year in jail;criminal liability,
- A civil suit for injunctive relief.

Internal

The penalties available in this section are cumulative to any other penalty or punishment available under any other law.