

SPECIAL ISSUE

# brief



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The Impact  
of Landlord  
Tenant Laws  
*on* Community  
Fees

American  
Seniors  
Housing  
Association

# The Impact of Landlord Tenant Laws *on* Community Fees

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## **A. OVERVIEW OF THE ISSUE**

The potential impact of state landlord-tenant laws on assisted living and independent living communities remains an issue that can be problematic for seniors housing developers and operators. State laws often impose limits on security deposits and other up-front monies, such as “community fees,” collected by property owners from applicants for residential housing. This *Special Issue Brief* focuses on the impact of landlord-tenant laws on community fees and offers several strategies that may prove useful to operators.

To date, community fee-related litigation has been brought in California, Florida, and Michigan. In California, a lawsuit filed in 2004 by the California Public Interest Research Group [CalPIRG] and the California Congress of Seniors, alleged that “community fees,” charged by independent living and assisted living providers at the time of a resident’s admission, violate a California law limiting the amounts landlords can charge residential tenants as “security deposits.”

The CalPIRG Complaint, which originally named over 150 senior housing owners and operators (representing over 30,000 units in California), sought recovery of all community fees paid by independent and assisted living residents since the year 2000, as well as an injunction preventing the collection of all such fees in the future. The amount of damages sought was estimated to exceed \$200 million in community fees already collected by defendants, plus fines and punitive damages. In late 2006, the case settled on terms very favorable to the defendants, in the wake of the passage of California’s Proposition 64, which limits the rights of plaintiffs in unfair business practices lawsuits.

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Although the scope of this paper is limited to community fees, the characterization of service-enriched seniors properties as residential or service-oriented businesses may also have an impact upon such issues as **zoning, affordable housing, fair housing** compliance, and **land use** approvals. Strategies such as those discussed in this paper may also be used by seniors property developers and operators to prevent inappropriate application of the law in such circumstances.

## **B. COMMUNITY FEES AND SECURITY DEPOSITS**

### ***1. Community Fee Characteristics***

A “community fee” is a lump sum charge collected from residents of assisted living or independent living properties at the time of admission, in addition to the normal monthly fee. It may be called an entrance fee, admission fee, facilities fee, or some other name. Generally, it is not refundable, except that sometimes a portion will be refunded if the resident moves out within a short time after admission. The amount can vary from a relatively nominal sum [e.g., \$500], to as high as \$5,000 or more. Typically, it is the equivalent of the monthly fee.

The purpose of the community fee, when described at all, is often characterized as supporting the operation of the building’s common areas and amenities. It normally is not held as security for the performance of some resident obligation, such as payment of monthly fees or leaving the unit in an undamaged condition, and is not considered payment for the last month’s fee.

Community fees are distinguishable from entrance fees found in continuing care retirement communities. Most states that regulate continuing care define an entrance fee as a lump sum payment made in return for a promise of care in excess of one year, or for life, and such fees are usually tens or hundreds of thousands of dollars.

### ***2. Restrictions on Security Deposits and other Landlord Charges***

Security deposits typically are collected by landlords from tenants in residential housing properties for the purpose of securing the tenant’s performance of an obligation, such as refraining from damaging the premises or paying the last month’s rent. They usually are refundable at the end of the tenancy, after deduction of charges for cleaning, repairs, and unpaid rent or fees. State laws often place limitations on landlords’ ability to collect security deposits and other charges from tenants at the commencement of the tenancy. State landlord-tenant laws may limit the amount of upfront charges and deposits, require that deposits be refundable if there is no damage beyond normal wear and tear, and require that deposits be placed in escrow and interest paid. Because landlords, over the years, often have devised clever methods of characterizing charges in ways designed to avoid such statutory limitations, the landlord-tenant laws have evolved to include very broad language limiting the amounts landlords can charge other than rent. For example, in California, a security deposit is defined in statute as virtually any charge other than rent.

Other statutory limitations on fees charged by landlords can cover application or processing fees, credit check fees, and the like.

## **C. ALLEGATIONS AND DEFENSES REGARDING COMMUNITY FEES**

### ***1. Allegations***

Community fees are usually charged by independent living and assisted living operators without awareness of the limitations imposed on security deposits and other up-front monies collected by landlords from tenants of residential housing. Plaintiffs’ attorneys representing tenants are very familiar with such limitations and with the opportunity to collect significant damages awards from landlords who own large numbers of residential units. Plaintiffs may allege that community fees exceed statutory limitations on the amounts landlords may charge a new tenant, beyond first and last months’ rent. Such fees also may be alleged to violate refundability, escrow, interest and other requirements for tenant deposits, or to exceed statutory limits on application fees, charges for credit checks, or similar pre-occupancy fees.

### ***2. Defenses***

The defenses available to managers of seniors properties are likely to vary according to: 1) whether the property is unlicensed, or licensed as assisted living or residential care; 2) the extent to which licensure laws and regulations address the kinds of fees that may be charged, or impose limitations on fees; 3) whether contracts, advertising and other materials characterize the relationship with the resident as a tenancy or residential activity, rather than a service relationship; 4) the extent of the services program, and the degree to which services are emphasized rather than shelter; and 5) how the community fee and its purposes are described.

## **D. STRATEGIES FOR LICENSED AND UNLICENSED PROPERTIES**

### ***1. Licensed Properties***

Assisted living properties are subject to some form of licensure in every state. Often, these laws and regulations will reference a provider's ability to charge monthly fees, admission processing fees, health assessment fees, security deposits, and the like. There also may be restrictions on the amounts charged and specification of circumstances under which fees or deposits must be refunded.

Even where such laws or regulations do not specifically deal with community fees, the absence of a prohibition against community fees can be useful in defending against allegations that landlord-tenant laws are being violated. It can be argued that the state legislature meant to comprehensively regulate assisted living, including restrictions on fees, in the applicable licensure law, and that landlord-tenant laws are inapplicable. This defense is also consistent with the widely-accepted rule of statutory construction that more specific provisions [such as those governing assisted living] control over general legislation [regarding residential occupancies generally].

### ***2. Unlicensed Properties***

For unlicensed properties with a significant services program, a case can be made that the nature of the relationship is such that laws governing ordinary residential occupancies should not apply. Landlord-tenant laws were designed to regulate the rental of dwellings, but not contracts for hospitality services. If an unlicensed independent living property has a significant program of services, such as dining, housekeeping, recreation and exercise programs, and transportation, and emphasizes services, rather than shelter, in its contracts and advertising, it is possible to maintain that landlord-tenant laws are inapplicable.

## **E. LANGUAGE IS KEY IN RESIDENT CONTRACTS AND MATERIALS**

Resident contracts should avoid words such as "lease," "rent," "landlord," and "tenant," and substitute language like "service agreement," "monthly fee," "manager," and "occupant." It may also be possible to establish that the relationship between the manager and occupant is that of proprietor and lodger, rather than landlord and tenant, by reciting language to that effect in the agreement, along with specification that the occupant does not have a leasehold interest but only a license to use the premises.

The way in which the community fee is described is also important. If the fee is described as being charged in order to support maintenance of the common areas in the building, it is likely to be considered real estate-related. On the other hand, if it is described as a prerequisite to participation in the service program, that characterization is consistent with the position that landlord-tenant laws should not be implicated. Therefore, use of a description such as "Service Initiation Fee" is generally preferable to "Community Fee" because it unambiguously rules out a real estate-related purpose for the fee. Simply stating that the fee will be used to reduce monthly fees is also acceptable because it is a neutral description that does not tie the fee directly to real estate.

## **F. LEGAL PRECEDENT SUPPORTS DIFFERENT TREATMENT FOR SERVICE-ORIENTED SENIOR PROPERTIES**

### ***1. When Services Eclipse Shelter, Residential Restrictions Should Not Apply***

Several court cases throughout the country have held that state laws governing residential property uses, landlord-tenant relationships, and other "shelter-only" activities, do not apply to assisted living and continuing care retirement communities, because the communities' primary purpose is the delivery of services to the residents. These cases can also be used to support the principle that independent living communities, where a full array of hospitality services is available, should also be exempt from such regulation.

Assisted living communities, CCRCs, and other properties subject to licensing regulations may also argue that a state licensure statute comprehensively regulates the business activity. In other words, the licensure law comprehensively and exclusively regulates the relationship between provider and resident, and demonstrates a legislative intent that the general residential property or landlord-tenant laws do not apply. However, in the absence of such a legal precedent in a given state, a broadly worded landlord-tenant law may pose significant challenges to a senior services community's practices.

## ***2. Licensed Care Settings should not be regulated as Residential or Rental Properties***

Licensed assisted living communities must provide their occupants with a wide range of care and services that are nonexistent in typical residential housing, and even go far beyond the services provided by a hotel. Provision of a detailed explanation [such as the one that follows] of how assisted living differs from residential housing can persuade government officials and courts that laws governing pure housing are inapplicable.

As a condition of licensure, assisted living properties often must provide residents with the following basic services: personal assistance and care; assistance with taking medications; regular observation of physical, mental, emotional and social functioning; supervision; planned activities; food service; transportation to medical and other appointments; and arrangements for obtaining incidental medical and dental care. Assisted living laws and regulations often require that operators provide residents with the following services:

- (a) Care and supervision.
- (b) Assistance with instrumental activities of daily living in the combinations which meet the needs of the residents.
- (c) Helping residents gain access to appropriate supportive services in the community.
- (d) Being aware of the residents' general whereabouts, although the resident may travel independently in the community.
- (e) Monitoring the activities of the residents while they are under the supervision of the facility to ensure their general health, safety, and well-being.
- (f) Encouraging the residents to maintain and develop their maximum functional ability through participation in planned activities.

The mandated care and supervision that an operator normally must provide to residents includes assistance as needed with activities of daily living ("ADLs") such as dressing, feeding, grooming, bathing and other personal hygiene, mobility, money management, and taking prescribed medications. Usually, assisted living properties must also make reasonable efforts to safeguard residents' personal property.

In addition to monitoring residents' health status and care needs, assisted living providers may care for residents' health conditions such as oxygen administration, catheter care, colostomy/ileostomy care, contractures, diabetes, enemas, suppositories and/or fecal impaction removal, bowel and bladder incontinence, injections, certain dermal ulcers, and wound care. Also, hospice care and dementia care are often available in assisted living communities.

Regulations routinely impose additional duties on assisted living operators to take action in the event residents' care needs change and they are no longer appropriately placed. For example, they might be required to regularly observe each resident for changes in physical, mental, emotional and social functioning and provide appropriate assistance when such observation reveals unmet needs which might require a change in the existing level of service, or possible discharge or transfer to another type of facility.

These activities and duties present a stark contrast to the circumstances that residential housing laws were designed to regulate.

### 3. Courts Often Refuse to Apply Residential Property Laws to Service-Intensive Senior Communities

Because service-oriented seniors housing communities are overwhelmingly characterized by the provision of services, rather than housing, numerous courts have determined that laws applicable to residential housing and landlords and tenants should not be applied to CCRCs or assisted living residences. The rationale behind the holdings of these cases also are useful in persuading government officials and courts that independent living communities offering an array of hospitality services are more like hotels and other commercial uses than typical shelter-only housing.

An Illinois appellate court found that the relationship between a senior care provider and a resident was fundamentally different from a landlord-tenant relationship. (*Antler v. Classic Residence Management Limited Partnership* (2000) 315 Ill.App.3d 259, 266; see also *APT Asset Management, Inc. v. Board of Appeals of Melrose* (2000) 50 Mass.App.Ct. 133, 137.) The Antler court found that, because the community's continuing care contract included meals, housekeeping, and linen service, transportation, and an emergency call system in residents' bedrooms, and assistance with ADLs for an extra charge, the facility had "special responsibilities towards their residents that differ in nature and in scope from those existent in the common landlord/tenant relationship." (*Id.*, at pp. 265-266.)

Similarly, in resolving a zoning dispute, a Massachusetts appeals court determined that the "principal use" of an assisted living facility was the provision of *services* to residents. (*APT Asset Management, supra*, 50 Mass.App.Ct. at pp. 142-143.) This Massachusetts property was operated under regulations requiring it to assist residents with ADLs when needed, "including, at a minimum, assistance with bathing, dressing and ambulation [and] self-administered medication management." (*Id.*, at p. 140.) Furthermore, state law required the operator to provide at least one meal per day, housekeeping and laundry services, and staff on duty 24 hours a day to respond to emergencies. (*Ibid.*) The court found that because the community provided such extensive services, it was sufficiently distinguishable from multi-family dwellings and apartment houses. (*Id.*, at pp. 141-142.) Accordingly, the court concluded that the legal relationship between the operator and each resident was not that of a landlord and tenant: "Landlords do not customarily provide their tenants with most of these services nor are they required by law to do so." (*Id.*, at p. 143.)

Likewise, a New Jersey court concluded that a CCRC was not "residential property" subject to the state's anti-eviction laws because it "provides more for each resident than a place to live." (*Starns v. American Baptist Estates of Red Bank* (2002) 352 N.J.Super. 327, 337.) In addition to a room, the CCRC provided services such as weekly housekeeping and linens, meals, nursing services as needed, social, recreational and spiritual activities, an emergency call switch in each room, and the use of common areas, including a garden room, shuffleboard lounge and deck. The *Starns* court found that the seniors community was distinguishable from residential property because it provided these services and the staffing to provide them. (*Id.*, at pp. 336-337.) In contrast, residential tenants are not entitled to receive health-related services, personal care or supervision from their landlords. And unlike assisted living operators, residential landlords typically do not provide food, housekeeping, laundry and transportation services pursuant to a rental agreement. (See *Starns*, at pp. 334-337.)

In *Lindstrom v. Pennswood Village* (1992) 612 A.2d 1048, 1051-52), the court found that residents of a CCRC could not assert a claim for constructive eviction because theirs was not a residential lease. Similarly, in *Sunrise v. Ferguson* (1989) 55 Wn.App. 285, the court found that the state's landlord-tenant act did not apply to an independent living community that provided "supervision and assistance with activities of daily living and/or health-related services" to developmentally disabled persons. The court reasoned that residence at the community was "merely incidental to the provision of services" and that the facility had an "institutional purpose above and beyond the provision of fundamental room and board services." (*Id.*, at pp. 288-89.)



Similarly, a federal appeals court has ruled that an agreement that is primarily for services should not be considered a rental agreement. In *Aujero v. CDA Todco, Inc.* (9th Cir. 1985) 756 F.2d 1374, the Ninth Circuit Court of Appeals found that fees that a resident paid to a California senior housing community for meals did not constitute rent, even though they were required as a condition of occupancy

From these cases, a strong argument can be made that service-intensive senior communities, and especially those providing care, should not be subject to restrictions on development or operations set forth in laws and regulations designed for residential housing and landlords.

#### **4. Hospitality Services Providers As Proprietors, Not Landlords**

The relationship between a property's owner and its occupant can help define whether the use is commercial or residential in character. Even for unlicensed independent living properties, the relationship between owner and occupant reasonably can be classified as proprietor and lodger, rather than landlord and tenant. The classic proprietor-lodger relationship is that of a hotel and its customer. Unlike a residential landlord, who typically provides no services other than limited maintenance and repairs, staff is on the premises of an independent living property to provide dining, housekeeping, transportation and other services to the occupant. Unlike a tenancy, where the tenant is said to have "exclusive" possession of the residential unit, in a proprietor-lodger relationship, the proprietor retains the right of full access to the unit, as evidenced by housekeeping and other staff routinely going into the occupant's room to perform services as needed.

For example, in *Roberts v. Casey*, 36 Cal.App.2d Supp. 767 (1939), the court concluded that parties had a proprietor-lodger relationship, not a landlord-tenant relationship, where one party, owners of an "apartment hotel:"

"...at all times retained keys to all the apartments and had regular access to them for caretaking purposes, furnished the linen and caused it to be laundered, furnished regular maid service and caused the beds to be changed,... kept not only the hallways but also the carpets and windows in the apartments themselves clean, and attended to the removal of garbage, as well as furnishing light, water, heat and telephone service [all of which] are matters tending as far as they go to show the relation of the parties to have been that of proprietors and lodgers rather than landlords and tenants." (*Id.*, at p. 772, emphasis added.)

According to the *Roberts* court, the mere presence of common kitchens and dining rooms is indicative of a proprietor-lodger relationship rather than a landlord-tenant relationship. (*Id.*) The California Supreme Court further clarified the distinction between lodgers and tenants by stating that tenants are responsible for the "care and condition" of the rented premises, while lodgers have "only a right to use the premises, subject to the landlord's retention of control and a right of access to them." (*Stowe v. Fritzie Hotels* (1955) 44 Cal.2d 416, 421; see also *Green v. Watson* (1964) 224 Cal.App.2d 184, 190.)

Legislatures also frequently distinguish between the relationships of innkeepers-lodgers and landlord-tenants by establishing separate rules to govern these relationships.<sup>1</sup> Furthermore, it may be useful to determine whether a state's real property law characterizes senior care providers as landlords or innkeepers.<sup>2</sup>

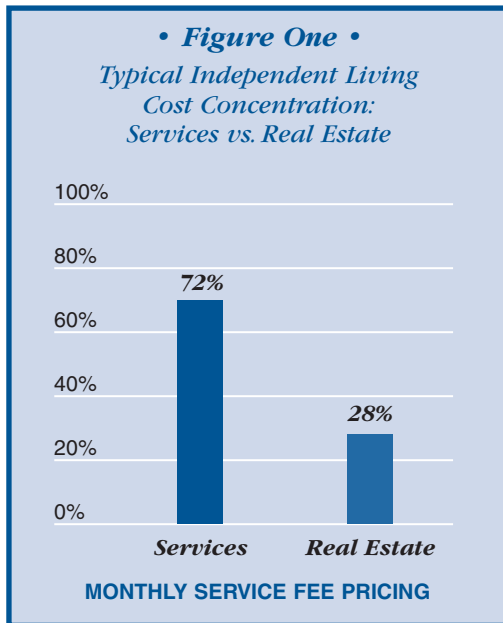
Both licensed and unlicensed properties can benefit from characterizing the relationship between owner and occupant as proprietor and lodger when trying to avoid the application of unfavorable residential and landlord-tenant laws.

<sup>1</sup> See, e.g., Civil Code §§1833, et seq. which covers proprietor-lodger relationships, while §§1940, et seq. governs landlord-tenant relationships.

<sup>2</sup> See, e.g., California Civil Code §§1859, 1860 which group "rest homes" with innkeepers rather than landlords.

**G. COST AND OTHER OPERATIONAL DATA CAN ALSO SUPPORT THE DISTINCTIVENESS OF SERVICE-ORIENTED SENIORS PROPERTIES**

The significant differences between residential real estate and service-oriented seniors communities is evident in their budgets, charge structures, staffing, and other business characteristics. Service-oriented seniors housing communities have significantly higher staff-to-occupant ratios, compared to shelter-only housing, where staff may be almost nonexistent. Accordingly, monthly costs of



**• Exhibit One •**  
*Typical Operating Cost Composition of an Independent Living Community Charging Market Rate Monthly Service Fees*

SERVICES COMPONENT	
• Administration	\$1,321 / unit / yr
• Activities	710
• Housekeeping / Laundry	774
• Dietary / Food Service	4,376
• Liability Insurance	<i>(Included in Properties)</i>
• Marketing / Advertising	1,240
• Transportation	360
• Property / Liability Insurance	654
• Property Taxes <sup>1</sup>	386
• Management Fees/Services	1,164
• Misc. Labor Costs <sup>2</sup>	1,978
• Other Operating Expenses <sup>2</sup>	1,268
	<b>\$14,231 / unit / yr</b>
<b>OPERATING COST CONCENTRATION:</b>	<b>72%</b>

REAL ESTATE COSTS	
• Property Taxes <sup>2</sup>	\$901 / unit / yr
• Utilities	1,639
• Repairs & Maintenance	1,275
• Reserve for Replacement	617
• Management Fees / Real Estate <sup>2</sup>	291
• Misc. Labor Costs <sup>2</sup>	494
• Other Operating Expenses <sup>2</sup>	317
<b>TOTAL COSTS</b>	<b>\$5,534 / unit / yr</b>
<b>OPERATING COST CONCENTRATION:</b>	<b>28%</b>

*The services cost component of independent living represents approximately 72% of total operating expenses for an independent living community charging market rate monthly service fees.*

Source: Moore Diversified Services, Inc.

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<sup>1</sup> 35% of property taxes are applied to services; 65% to real estate.

<sup>2</sup> 80% of these expenses are applied to services; 20% to real estate.



operation, and charges for occupancy, are significantly higher for service and care properties. This difference can be demonstrated by industry studies or statistical sampling in a given locale. Such a study was conducted by Jim Moore of Moore Diversified Services, Inc. (MDS), a nationally recognized senior living consulting firm. As reflected in the following exhibits, the services component of operating costs (and therefore necessary cost recovery through market rate pricing) far exceeds the real estate costs.

**• Exhibit Two •**

*Typical Operating Cost Composition  
of an Assisted Living Community  
Charging Market Rate Monthly Service Fees*

**SERVICES COMPONENT**

• Administration	\$1,671/ unit /yr
• Activities	815
• Housekeeping / Laundry	750
• Dietary / Food Service	3,471
• Assisted Living Labor	5,713
• Nursing Labor	3,623
• Liability Insurance	(Included in Properties)
• Marketing / Advertising	741
• Transportation	401
• Property / Liability Insurance	843
• Property Taxes <sup>1</sup>	425
• Management Fees/Services <sup>2</sup>	1,384
• Misc. Labor Costs <sup>2</sup>	1,808
• Other Operating Expenses <sup>2</sup>	4,839
	<b>\$26,484 / unit /yr</b>

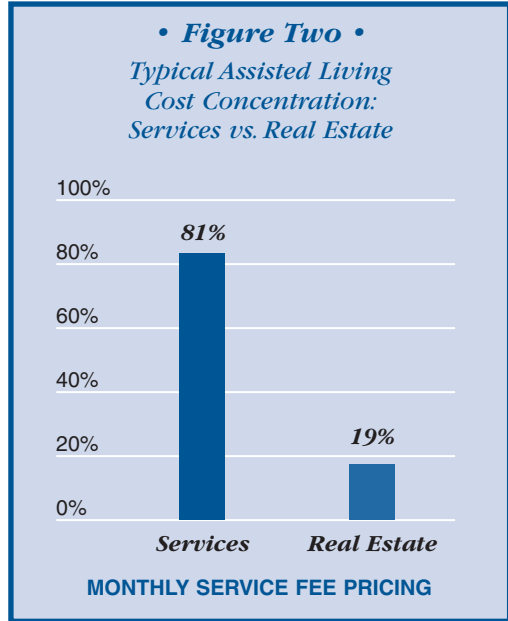
**OPERATING COST CONCENTRATION:** 81%

**REAL ESTATE COSTS**

• Property Taxes <sup>2</sup>	\$785/ unit /yr
• Utilities	1,553
• Repairs & Maintenance	1,087
• Reserve for Replacement	951
• Management Fees /Real Estate <sup>2</sup>	346
• Misc. Labor Costs <sup>2</sup>	452
• Other Operating Expenses <sup>2</sup>	1,210
<b>TOTAL COSTS</b>	<b>\$6,384/ unit /yr</b>

**OPERATING COST CONCENTRATION:** 19%

*The baseline services cost component of assisted living represents approximately 81% of total operating expenses for an assisted living community charging market rate monthly service fees. Higher acuity residents would require more direct care, further increasing the operating expense concentration above the baseline figure of 81%.*



Source: Moore Diversified Services, Inc.  
The State of Seniors Housing • American Seniors Housing Association and the National Investment Center

<sup>1</sup> 35% of property taxes are applied to services; 65% to real estate.  
<sup>2</sup> 80% of these expenses are applied to services; 20% to real estate.

• **Exhibit Three** •  
*Typical Operating Cost Composition  
of a Continuing Care Retirement Community (CCRC)*

**SERVICES COMPONENT**

• Administration	\$1,326 / unit / yr
• Activities	750
• Housekeeping / Laundry	1,377
• Dietary / Food Service	5,260
• Assisted Living Labor	1,509
• Nursing Labor	6,204
• Liability Insurance	<i>(Included in Properties)</i>
• Marketing / Advertising	957
• Transportation	450
• Property / Liability Insurance	827
• Property Taxes <sup>1</sup>	505
• Management Fees/Services <sup>2</sup>	1,641
• Misc. Labor Costs <sup>2</sup>	4,075
• Other Operating Expenses <sup>2</sup>	4,271
	<b>\$29,152 / unit / yr</b>

**OPERATING COST CONCENTRATION:** 77%

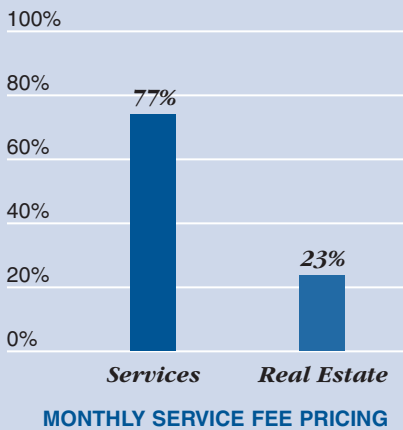
**REAL ESTATE COSTS**

• Property Taxes <sup>2</sup>	\$938 / unit / yr
• Utilities	2,192
• Repairs & Maintenance	1,714
• Reserve for Replacement	1,762
• Management Fees / Real Estate <sup>2</sup>	41
• Misc. Labor Costs <sup>2</sup>	1,019
• Other Operating Expenses <sup>2</sup>	1,067
	<b>\$8,733 / unit / yr</b>

**OPERATING COST CONCENTRATION:** 23%

*The services cost component of CCRC represents approximately 77% of total operating expenses for CCRC.*

• **Figure Three** •  
*Typical CCRC  
Cost Concentration:  
Services vs. Real Estate*



Source: Moore Diversified Services, Inc.

The State of Seniors Housing • American Seniors Housing Association and the National Investment Center

<sup>1</sup> 35% of property taxes are applied to services; 65% to real estate.

<sup>2</sup> 80% of these expenses are applied to services; 20% to real estate.

## H. CONCLUSION

Senior living communities straddle the middle ground between pure housing and non-residential service facilities. Laws designed to restrict real estate developers and landlords often do not fit a program designed primarily to deliver services to seniors in a home-like setting. As such, it is incumbent upon senior housing providers to emphasize the service characteristics of their product in order to prevent the misapplication of laws that were not intended to apply to seniors housing. Through consistent and effective advocacy efforts, and litigation where necessary, reasonable application of state and local real estate laws and ordinances to senior living communities is a realistic and achievable goal.

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## STATEMENT OF PURPOSE

*The American Seniors Housing Association provides  
leadership for the seniors housing industry  
on legislative and regulatory matters,  
advances research, education and the exchange  
of strategic business information, and promotes  
the merits of seniors housing.*

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Paul Gordon is a partner in the 130-attorney San Francisco law firm of Hanson, Bridgett, Marcus, Vlahos & Rudy.

He is the author of the book *Seniors Housing and Care Facilities: Development, Business and Operations* (Urban Land Institute 1998).

He is a member of the Executive Board and General Counsel to the American Seniors Housing Association and is former Chair of the Legal Committee of the American Association of Homes and Services for the Aging. Mr Gordon's entire law practice is devoted to representation of seniors housing and long-term care operators, developers, investors and related organizations. For more information, visit the [SeniorCareLaw.com](http://SeniorCareLaw.com) website.