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REGULAR SESSION, 1997

ENROLLED

COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 349

(ORIGINATING IN THE COMMITTEE ON HEALTH
(By Senator AND HUMAN RESOURCES)

PASSED APRIL 10, 1997

In Effect NINETY DAYS FROM Passage

ENROLLED

COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 349

(Originating in the Committee on Health and
Human Resources.)

[Passed April 10, 1997; in effect ninety days from passage.]

AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-n, relating to establishing a new licensure category for residential care communities; stating public policy; defining terms; setting forth powers and duties of the director of the division of health with regard to residential care communities; providing for administrative and inspection staff; authorizing and directing proposal of legislative rules; establishing minimum standards for residential care communities; requiring a license for operation; providing for application procedures and fees;

providing for license expiration, renewal, revocation, suspension and limitation; requiring cost disclosure to potential residents; limiting liability for costs not disclosed; prohibiting management of residents' personal funds; requiring compliance with fire code; setting forth provisions for inspections; prohibiting retaliation; requiring reports and plans of correction; classifying types of violations; providing for notice of violation or noncompliance; authorizing assessment of civil penalties, interest, attorneys fees and costs; providing for hearings of contested cases; providing for administrative appeals; providing for judicial review; providing for collection of unpaid penalties; authorizing judicial appointment of temporary management and specifying scope of authority; providing for automatic stay of certain actions; authorizing certain emergency rules; providing for legal counsel to the director; specifying unlawful acts; authorizing injunctive relief and private causes of action; setting forth damages which may be recovered; requiring that certain reports and records be made available; and providing for confidentiality of residents' records.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-n, to read as follows:

ARTICLE 5N. RESIDENTIAL CARE COMMUNITIES.

§16-5N-1. Purpose.

1 It is the policy of this state to encourage and promote
2 the development and utilization of quality residential
3 communities for persons who desire to live independently
4 in an apartment, who are or may be dependent upon the
5 services of others by reason of physical or mental impair-
6 ment, and who may require limited and intermittent
7 nursing care and who are capable of self-preservation and
8 are not bedfast. Individuals may not be disqualified for
9 residency solely because they qualify for or receive
10 services coordinated by a licensed hospice. This care and
11 treatment requires a living environment for these persons

12 which, to the extent practicable, approximates a normal
13 home environment. To this end, it is the policy of this
14 state to encourage and promote the development and
15 maintenance of residential care communities.

16 The provisions of this article are remedial and shall be
17 liberally construed to effectuate its purposes and intents.
18 This article is intended to apply only to residential
19 communities in which apartments are rented on a month-
20 to-month basis. All residential care community rental
21 contracts shall specify in bold-faced type, under the
22 conspicuous caption "NOTICE TO RESIDENT", that
23 residents of the residential community must be capable of
24 self-preservation, or substantially similar words clearly
25 conveying the same meaning. This article may not be
26 construed to require that any person be required to vacate
27 any property in which that person has an ownership or a
28 leasehold interest, except for a month-to-month tenancy,
29 because that person is disabled and incapable of self-
30 preservation. Nothing in this article is intended to
31 supersede the provisions of article eleven-a, chapter five
32 of this code.

§16-5N-2. Definitions.

1 As used in this article, unless a different meaning
2 appears from the context:

3 (a) "Capable of self-preservation" means that a person
4 is, at a minimum, physically capable of removing himself
5 or herself from situations involving imminent danger such
6 as fire;

7 (b) "Deficiency" means a statement of the rule and the
8 fact that compliance has not been established and the
9 reasons therefor;

10 (c) "Department" means the state department of health
11 and human resources;

12 (d) "Director" means the director of the division of
13 health;

14 (e) "Division" means the division of health of the state
15 department of health and human resources;

16 (f) "Limited and intermittent nursing care" means direct
17 hands-on nursing care of a resident who needs no more
18 than two hours of nursing care per day for a period of time
19 no longer than ninety consecutive days per episode, which
20 care may be provided only when the need for it meets
21 these requirements: (1) The resident requests that he or
22 she remain in the residential care community; (2) the
23 resident is advised of the availability of other specialized
24 health care facilities to treat his or her condition; and (3)
25 the need for care results from a medical pathology or the
26 normal aging process. Limited and intermittent nursing
27 care may be provided only by or under the supervision of
28 a registered professional nurse and in accordance with
29 legislative rules proposed by the secretary;

30 (g) "Nursing care" means those procedures commonly
31 employed in providing for the physical, emotional and
32 rehabilitation needs of the ill or otherwise incapacitated
33 and which require technical skills and knowledge beyond
34 those that untrained persons possess, including, irriga-
35 tions, catheterizations, special procedures that contribute
36 to rehabilitation and administration of medication by any
37 method involving a level of complexity and skill not
38 possessed by untrained persons;

39 (h) "Person" means a natural person and every form of
40 organization, whether incorporated or unincorporated,
41 including partnerships, corporations, trusts, associations
42 and political subdivisions of the state;

43 (i) "Personal assistance" means services of a personal
44 nature, including help in walking, bathing, dressing,
45 toileting, getting in or out of bed and supervision that is
46 required because of the age or mental impairment of a
47 resident;

48 (j) "Resident" means an individual who lives in a
49 residential care community for the purpose of receiving
50 personal assistance or limited and intermittent nursing
51 services from the community;

52 (k) "Residential care community" means any group of
53 seventeen or more residential apartments, however named,
54 which are part of a larger independent living community

55 and which are advertised, offered, maintained or operated
56 by an owner or manager, regardless of consideration or
57 the absence thereof, for the express or implied purpose of
58 providing residential accommodations, personal assistance
59 and supervision on a monthly basis to seventeen or more
60 persons who are or may be dependent upon the services of
61 others by reason of physical or mental impairment or who
62 may require limited and intermittent nursing care but who
63 are capable of self-preservation and are not bedfast.
64 Individuals may not be disqualified for residency solely
65 because they qualify for or receive services coordinated by
66 a licensed hospice. Each apartment in a residential care
67 community shall be at least three hundred square feet in
68 size, have doors capable of being locked and contain at
69 least: (1) One bedroom; (2) one kitchenette that includes
70 a sink and a refrigerator; and (3) one full bathroom that
71 includes a bathing area, toilet and sink. Services utilizing
72 equipment which requires auxiliary electrical power in the
73 event of a power failure may not be used unless the
74 residential care community has a backup power generator.
75 Nothing contained in this article applies to hospitals, as
76 defined under section one, article five-b of this chapter,
77 state institutions, as defined under section three, article
78 one, chapter twenty-five of this code or section six, article
79 one, chapter twenty-seven of this code, residential care
80 communities operated as continuing care retirement
81 communities or housing programs operated under rules of
82 the federal department of housing and urban development
83 and/or the office of rural economic development, residen-
84 tial care communities operated by the federal government
85 or the state government, institutions operated for the
86 treatment and care of alcoholic patients, offices of physi-
87 cians, hotels, boarding homes or other similar places that
88 furnish only room and board, or to homes or asylums
89 operated by fraternal orders pursuant to article three,
90 chapter thirty-five of this code;

91 (l) "Secretary" means the secretary of the state depart-
92 ment of health and human resources or his or her designee;
93 and

94 (m) "Substantial compliance" means a level of compli-

95 ance with the rules promulgated hereunder that identified
96 deficiencies pose a risk to resident health or safety no
97 greater than a potential for causing minimal harm.

98 The secretary may by rule define terms pertinent to this
99 article which are not defined herein.

§16-5N-3. Powers, duties and rights of director.

1 In the administration of this article, the director has the
2 following powers, duties and rights:

3 (a) To enforce rules and standards for residential care
4 communities as adopted, proposed, amended or modified
5 by the secretary;

6 (b) To exercise all powers granted herein relating to the
7 issuance, suspension and revocation of licenses of residen-
8 tial care communities;

9 (c) To enforce rules governing the qualification of
10 applicants for residential care community licenses,
11 including, but not limited to, educational, financial,
12 personal and ethical requirements, as adopted, proposed,
13 amended or modified by the secretary;

14 (d) To receive and disburse federal funds and to take any
15 lawful action that is necessary or appropriate to comply
16 with the requirements and conditions for the receipt or
17 expenditure of federal funds;

18 (e) To receive and disburse funds appropriated by the
19 Legislature to the division for any authorized purpose;

20 (f) To receive and disburse funds obtained by the
21 division by way of gift, grant, donation, bequest or devise,
22 according to the terms thereof, funds derived from the
23 division's operation, and funds from any other source, no
24 matter how derived, for any authorized purpose;

25 (g) To negotiate and enter into contracts, and to execute
26 all instruments necessary or convenient in carrying out the
27 functions and duties of the position of director; and all of
28 these contracts, agreements and instruments shall be
29 executed by the director;

30 (h) To appoint officers, agents, employees and other

31 personnel and establish the duties and fix the compensa-
32 tion thereof;

33 (i) To offer and sponsor education and training programs
34 for residential care communities' administrative, manage-
35 rial and operations personnel;

36 (j) To undertake survey, research and planning projects
37 and programs relating to the administration and operation
38 of residential care communities and to the health, care,
39 treatment and service in general of residents of these
40 communities;

41 (k) To establish by legislative rule in accordance with
42 section ten of this article and to assess reasonable civil
43 penalties for violations of residential care community
44 standards;

45 (l) To inspect any residential care community and any of
46 the records maintained therein, subject to the provisions
47 of section ten of this article;

48 (m) To establish legislative rules in accordance with
49 article three, chapter twenty-nine-a of this code, setting
50 forth procedures for implementing the provisions of this
51 article, including informal conferences, investigations and
52 hearings, and for enforcing compliance with the provi-
53 sions of this article and the rules promulgated hereunder;

54 (n) To subpoena witnesses and documents, administer
55 oaths and affirmations and examine witnesses. Upon the
56 failure of any person without lawful excuse to obey a
57 subpoena to give testimony and upon reasonable notice to
58 all persons affected thereby, the director may apply to the
59 circuit court of the county in which the hearing is to be
60 held or to the circuit court of Kanawha County for an
61 order compelling compliance;

62 (o) To make a complaint or cause proceedings to be
63 instituted against any person or persons for the violation
64 of the provisions of this article or of the rules promulgated
65 hereunder. An action may be taken by the director in the
66 absence of concurrence or participation by the prosecuting
67 attorney of the county in which the proceedings are
68 instituted. The circuit court of Kanawha County or the

69 circuit court of the county in which the violation has
70 occurred has jurisdiction in any civil enforcement action
71 brought pursuant to this article and may order equitable
72 relief. In these cases, the court may not require that a
73 bond be posted, nor may the director or any person acting
74 under his or her authority be required to give security for
75 costs;

76 (p) To delegate authority to his or her employees and
77 agents in the performance of any power or duty granted in
78 this article, except the issuance of final decisions in any
79 adjudicatory matter; and

80 (q) To submit a report to the governor and the Legisla-
81 ture on or before the first day of December, one thousand
82 nine hundred ninety-seven, and annually thereafter, which
83 report shall review the residential care community
84 licensing and investigatory activities of the division
85 during the preceding year and the nature, scope and status
86 of any other activities of the division. This report may
87 include comment on the actions, policies, practices or
88 procedures of any public or private agency that may affect
89 the rights, health or welfare of residents of residential care
90 communities. These annual reports shall also include a
91 listing of all licensed residential care communities in the
92 state together with the following information: Whether a
93 community is proprietary or nonproprietary; how the
94 community is or should be classified; the name of the
95 owner or owners; the total number of apartments con-
96 tained therein; the monthly costs for residents; the number
97 and profession of full-time employees; the number and
98 types of recreational programs available to residents; and
99 other services and programs available to residents, and the
100 costs thereof; and whether the residential care community
101 listed accepted medicare or medicaid residents. These
102 reports shall also contain the division's recommendations
103 with regard to changes in law or policy which it considers
104 necessary or proper for the protection of the rights, health
105 or welfare of the residents of residential care communities
106 within the state.

§16-5N-4. Administrative and inspection staff.

1 The director may, at any time he or she considers
2 necessary, employ administrative employees, inspectors or
3 other persons to properly implement the provisions of this
4 article. Employees of the division shall be members of the
5 state civil service system and shall enforce the provisions
6 of this article and the rules promulgated hereunder. In
7 discharging their official duties, employees of the division
8 have the right of entry into any place maintained as a
9 residential care community.

§16-5N-5. Rules; minimum standards for residential care communities.

1 (a) The secretary shall, by the first day of July, one
2 thousand nine hundred ninety-eight, propose all rules that
3 may be necessary or proper to implement or effectuate the
4 purposes and intent of this article and to enable the
5 director to exercise the powers and perform the duties
6 conferred herein. All rules authorized or required pursu-
7 ant to this article shall be proposed by the secretary and
8 promulgated in accordance with the provisions governing
9 legislative rules, contained in article three, chapter
10 twenty-nine-a of this code.

11 (b) The secretary shall propose rules establishing
12 minimum standards for the operation of residential care
13 communities, including, but not limited to, the following:

14 (1) Administrative policies, including: (i) An affirmative
15 statement of the right of access to residential care commu-
16 nities by members of recognized community organizations
17 and community legal services programs whose purposes
18 include rendering assistance without charge to residents,
19 consistent with the right of residents to privacy; and (ii) a
20 statement of the rights and responsibilities of residents;

21 (2) Minimum numbers and qualifications of residential
22 care community personnel according to the size, classifi-
23 cation and health care needs of the residential care
24 community;

25 (3) Safety requirements, except for those fire and life
26 safety requirements under the jurisdiction of the state fire
27 marshal;

- 28 (4) Sanitation requirements;
 - 29 (5) Protective and personal services required to be
30 provided;
 - 31 (6) Dietary services required to be provided;
 - 32 (7) Maintenance of health records, including confidenci-
33 ality;
 - 34 (8) Social and recreational activities required to be made
35 available;
 - 36 (9) Physical facilities;
 - 37 (10) Requirements related to limited and intermittent
38 nursing care; and
 - 39 (11) Other items or considerations that the secretary
40 considers appropriate to ensure the health, safety and
41 welfare of residents of residential care communities.
- 42 (c) The secretary shall propose rules that include de-
43 tailed specifications for each category of standards
44 required under subsections (b) and (d) of this section, and
45 shall classify these standards as follows:
- 46 (1) Class I standards, the violation of which presents
47 either an imminent danger to the health, safety or welfare
48 of a resident or a substantial probability that death or
49 serious physical harm may result;
 - 50 (2) Class II standards, the violation of which directly
51 implicates the health, safety or welfare of a resident, but
52 which does not present imminent danger thereto; and
 - 53 (3) Class III standards, the violation of which has an
54 indirect or potential impact on the health, safety or
55 welfare of any resident.
- 56 (d) A residential care community shall attain substantial
57 compliance in every category of standard enumerated in
58 this section in order to be considered as being in substan-
59 tial compliance with the requirements of this article and
60 the rules promulgated hereunder.
- 61 (e) Until such time as the secretary proposes rules
62 governing residential care communities under this section,

63 existing rules governing residential board and care homes
64 shall apply to residential care communities and shall be
65 construed so as to conform with the provisions of this
66 article in their application to residential care communi-
67 ties: *Provided*, That to the extent any provisions of the
68 rule governing residential board and care homes conflict
69 with the provisions of this article, the provisions of this
70 article shall govern.

**§16-5N-6. License required; application; fees; duration; re-
newal.**

1 No person may establish, operate, maintain, offer or
2 advertise a residential care community within this state
3 unless he or she first obtains a license therefor as provided
4 in this article, which license remains unsuspended,
5 unrevoked and unexpired. No public official or employee
6 may place any person in, or recommend that any person be
7 placed in, or directly or indirectly cause any person to be
8 placed in, any residential care community which is being
9 operated without a valid license from the director. The
10 procedure for obtaining a license is as follows:

11 (a) The applicant shall submit an application to the
12 director on a form prescribed by the director, containing
13 information as may be necessary to show that the appli-
14 cant is in compliance with the standards for residential
15 care communities as established by this article and the
16 rules promulgated hereunder. The application and any
17 exhibits thereto shall provide the following information:

18 (1) The name and address of the applicant;

19 (2) The name, address and principal occupation: (i) Of
20 each person who, as a stockholder or otherwise, has a
21 proprietary interest of ten percent or more in the appli-
22 cant; (ii) of each officer and director of a corporate
23 applicant; (iii) of each trustee and beneficiary of an
24 applicant which is a trust; and (iv) where a corporation
25 has a proprietary interest of twenty-five percent or more
26 in an applicant, the name, address and principal occupa-
27 tion of each officer and director of the corporation;

28 (3) The name and address of the owner of the premises

29 of the residential care community or proposed residential
30 care community, if different from the applicant, and if so,
31 the name and address: (i) Of each person who, as a
32 stockholder or otherwise, has a proprietary interest of ten
33 percent or more in the owner of the premises; (ii) of each
34 officer and director of a corporate applicant; (iii) of each
35 trustee and beneficiary of the owner if it is a trust; and (iv)
36 where a corporation has a proprietary interest of twenty-
37 five percent or more in the owner, the name and address
38 of each officer and director of the corporation;

39 (4) Where the applicant is the lessee or the assignee of
40 the residential care community or the premises of the
41 proposed residential care community, a signed copy of the
42 lease and any assignment thereof;

43 (5) The name and address of the residential care commu-
44 nity or the premises of the proposed residential care
45 community;

46 (6) The proposed number of apartments in the residen-
47 tial care community;

48 (7) (A) An organizational plan for the residential care
49 community indicating the number of persons employed or
50 to be employed, and the positions and duties of all em-
51 ployees; (B) the name and address of the individual who is
52 to serve as administrator; and (C) evidence of compliance
53 with applicable laws and rules governing zoning, building,
54 safety, fire prevention and sanitation, as the director may
55 require; and

56 (8) Additional information as the director may require.

57 (b) Upon receipt and review of an application for license
58 made pursuant to subdivision (a) of this section and
59 inspection of the applicant pursuant to section ten of this
60 article, the director shall issue a license if he or she finds:

61 (1) That an applicant which is an individual and every
62 partner, trustee, officer, director and person with a
63 controlling interest of an applicant which is not an
64 individual, is a person responsible and suitable to operate
65 or to direct or participate in the operation of a residential
66 care community by virtue of financial capacity, appropri-

67 ate business or professional experience, a record of
68 compliance with lawful orders of the department (if any)
69 and a history of nonrevocation of a license during the five
70 years immediately preceding the application;

71 (2) That the residential care community is under the
72 supervision of an administrator qualified for that position
73 by training and experience;

74 (3) That the residential care community is in substantial
75 compliance with standards established pursuant to section
76 five of this article, and other requirements as the secretary
77 may establish by rule under this article.

78 Any license granted by the director shall state the
79 maximum number of apartments for which it is granted,
80 the date of issuance and the date of expiration. Residen-
81 tial care community licenses shall be issued for a period
82 not to exceed one year: *Provided*, That any license which
83 is unexpired, for which timely application for renewal has
84 been made, together with payment of the proper fee, as
85 required by the provisions of this article and the rules
86 promulgated hereunder, continues in effect until: (i) One
87 year after the original expiration date of the license; (ii)
88 the date that the license is revoked or suspended pursuant
89 to the provisions of this article; or (iii) the date of issuance
90 of a new license, whichever date first occurs. Each license
91 issued is only for the premises and applicant named in the
92 application and may not be transferred or assigned:
93 *Provided, however*, That if the ownership of a residential
94 care community with an unexpired license is transferred,
95 the filing of an application for a license with the director
96 by the new owner shall have the effect of licensing the
97 operation of the residential care community under the new
98 owner for a period not to exceed three months. Every
99 residential care community license shall be displayed in a
100 conspicuous place at the facility for which it is issued so
101 as to be accessible to and in plain view of residents and
102 visitors.

103 (c) An original license may be renewed upon the timely
104 filing of an application therefor, accompanied by the
105 required fee and contingent upon the licensee's submission

106 of evidence satisfactorily demonstrating compliance with
107 the provisions of this article and the rules promulgated
108 hereunder together with the following:

109 (1) A balance sheet as of the end of the residential care
110 community's fiscal year, setting forth its assets and
111 liabilities as of that date, including all capital, surplus,
112 reserve, depreciation and similar accounts;

113 (2) A statement of operations of the residential care
114 community as of the end of its fiscal year, setting forth all
115 revenues, expenses, taxes, extraordinary items and other
116 credits or charges; and

117 (3) A statement of any changes in the name, address,
118 management or ownership information on file with the
119 director.

120 (d) In the case of an application for license renewal, if all
121 the requirements of section five of this article are not met,
122 the director may issue a provisional license, provided that
123 care given in the residential care community is adequate
124 for resident needs and the residential care community has
125 demonstrated improvement and evidences potential for
126 substantial compliance during the term of the provisional
127 license: *Provided*, That a provisional license is effective
128 for a period not to exceed one year, may not be renewed,
129 and may not be issued to any residential care community
130 with uncorrected violations of any Class I standard, as
131 defined in subsection (c), section five of this article.

132 (e) A nonrefundable application fee in the amount of
133 sixty-five dollars for an original residential care commu-
134 nity license shall be paid at the time an application for
135 license is made. The average cost of all direct costs for
136 initial licensure inspections of all residential care commu-
137 nities for the preceding year shall be assessed against and
138 paid by the applicant to the director before an initial or
139 amended license may be issued. The fee for license
140 renewal shall be computed at the rate of four dollars per
141 apartment in the community per year: *Provided*, That the
142 rate per apartment may be assessed against applicants for
143 whom a license is issued for a period of less than one year.
144 The director may annually adjust licensure fees for

145 inflation, based upon the consumer price index. All
 146 license fees are due and payable to the director, annually,
 147 in the manner set forth in the rules promulgated hereun-
 148 der. The director shall retain each application and
 149 licensure fee pending final action on the application. All
 150 fees received by the director under the provisions of this
 151 article shall be deposited in accordance with section
 152 thirteen, article one of this chapter.

§16-5N-7. Cost disclosure; residents' funds; nursing care; fire code.

1 (a) Each residential care community shall disclose in
 2 writing to all prospective residents a complete and
 3 accurate list of all costs which may be incurred by them as
 4 residents of the community. Residents may not be held
 5 liable for any cost that was not disclosed.

6 (b) Residential care communities may not manage the
 7 personal finances or funds of its residents.

8 (c) A residential care community may be required to
 9 have registered nurses on its staff to the extent that it
 10 provides limited and intermittent nursing care.

11 (d) Residential care communities shall comply with the
 12 applicable provisions of the current edition of the life
 13 safety code as promulgated by the national fire protection
 14 association and adopted by the state fire commission.

§16-5N-8. Investigation of complaints.

1 The secretary shall by rule establish procedures for the
 2 prompt investigation of all complaints of alleged viola-
 3 tions of applicable requirements of state law or rules by
 4 residential care communities, except those complaints that
 5 the director determines are without any reasonable basis
 6 or are made with the sole intention to willfully harass a
 7 licensee. These procedures shall include provisions for
 8 ensuring the confidentiality of the complainant and of any
 9 other person named in the complaint, and for promptly
 10 informing the complainant and the residential care
 11 community involved of the results of the investigation.

12 If, after its investigation, the director determines that

13 the complaint has merit, the director shall take appropri-
14 ate disciplinary action and shall advise any injured party
15 of the possibility of a civil remedy under this article.

16 No residential care community may discharge or in any
17 manner discriminate or retaliate against any employee or
18 resident for filing a complaint or participating in any
19 proceeding provided for in this article. Violation of this
20 prohibition by any residential care community constitutes
21 grounds for the suspension or revocation of its license as
22 provided in section eleven of this article. Any type of
23 adverse action taken by a residential care community
24 against a resident who has submitted a complaint to the
25 director or upon whose behalf a complaint has been
26 submitted or who has instituted any proceeding under this
27 article, if taken within one hundred twenty days of the
28 filing of the complaint or the institution of the proceeding,
29 shall raise a rebuttable presumption that the adverse
30 action was taken in retaliation for filing the complaint or
31 instituting the proceeding.

§16-5N-9. Inspections.

1 The director and any duly designated employee or agent
2 thereof is authorized to enter upon and into the premises
3 of any residential care community for which a license has
4 been issued, for which an application for license has been
5 filed, or which the director has reason to believe is being
6 operated or maintained as a residential care community
7 without a license. If entry is refused by the owner or
8 person in charge of the residential care community, the
9 director shall apply to the circuit court of the county in
10 which the residential care community is located or the
11 circuit court of Kanawha County for an order authorizing
12 inspection, and the court shall issue an appropriate order
13 if it finds good cause for inspection.

14 The director, by and through his or her agents or em-
15 ployees, shall conduct at least one inspection of a residen-
16 tial care community before issuing a license to it and shall
17 conduct periodic unannounced inspections thereafter to
18 determine if it is in compliance with all applicable statu-
19 tory requirements and rules. All residential care commu-

20 nities shall comply with applicable rules of the state fire
 21 commission. The state fire marshal, by and through his or
 22 her agents or employees, shall make all fire, safety and
 23 similar inspections of residential care communities. The
 24 director may provide for other inspections he or she
 25 considers necessary to effectuate the intent and purpose of
 26 this article. If the director determines upon investigation
 27 that a complaint is substantiated and that an immediate
 28 and serious threat to health or safety exists at a residential
 29 care community, he or she may invoke any remedy avail-
 30 able pursuant to section eleven of this article. Any
 31 residential care community aggrieved by a determination
 32 or assessment made pursuant to this section shall have the
 33 right to an administrative appeal as set forth in section
 34 twelve of this article.

**§16-5N-10. Reports of inspections; plans of correction; assess-
 ment of penalties, fees and costs; use of funds
 derived therefrom; hearings.**

1 (a) Reports of all inspections made pursuant to section
 2 nine of this article shall be in writing and filed with the
 3 director, and shall list all deficiencies in the residential
 4 care community's compliance with the provisions of this
 5 article and the rules promulgated hereunder. The director
 6 shall send a copy of the report to the residential care
 7 community and shall specify a time within which the
 8 residential care community shall submit a plan for
 9 correction of any listed deficiencies, which plan shall be
 10 approved, rejected or modified by the director. Inspectors
 11 shall allow audio taping of the exit conference that
 12 follows a licensure or certification inspection, with all
 13 costs incurred as a result of the taping to be paid by the
 14 residential care community. A copy of the audio tape
 15 shall be provided to the inspector.

16 (b) Upon the failure of a residential care community to
 17 submit a plan of correction as required or to correct any
 18 deficiency within the time specified, the director may
 19 assess a civil penalty or initiate other appropriate legal or
 20 disciplinary action, as provided by this article.

21 (c) Nothing in this section may be construed to require

22 the director to afford a formal opportunity for a residen-
23 tial care community to correct a deficiency before initiat-
24 ing an enforcement action in either an administrative or
25 judicial forum, where, in the opinion of the director, the
26 deficiency jeopardizes the health or safety of the commu-
27 nity's residents or where the deficiency is the second or
28 subsequent violation to occur within a twelve-month
29 period.

30 (d) Civil penalties assessed against residential care
31 communities shall be classified according to the nature of
32 the violation, as provided in subsection (c), section five of
33 this article and rules promulgated thereunder, consistent
34 with the following: For each violation of a Class I stan-
35 dard, the civil penalty imposed shall be not less than fifty
36 nor more than five hundred dollars; for each violation of
37 a Class II standard, the civil penalty imposed shall be not
38 less than twenty-five nor more than fifty dollars; for each
39 violation of a Class III standard, the civil penalty imposed
40 shall be not less than ten nor more than twenty-five
41 dollars. Each day that a violation continues after the date
42 of citation constitutes a separate violation. The date of
43 the citation is the date the facility receives the written
44 statement of deficiencies.

45 (e) The director shall assess a civil penalty not to exceed
46 two thousand dollars against any individual who notifies
47 a residential care community, or causes it to be notified,
48 in advance, of the time or date on which an inspection is
49 scheduled to be conducted under this article.

50 (f) If the director assesses a penalty under this section,
51 he or she shall cause a notice of penalty to be delivered to
52 the residential care community by personal service or by
53 certified mail. This notice shall state the amount of the
54 penalty, the action, deficiency or other circumstance for
55 which the penalty is assessed, the statutory requirement or
56 rule which has been violated and the basis upon which the
57 director determined the amount of the penalty.

58 (g) The director shall recover in a judicial proceeding
59 any civil penalty which: (i) Remains uncontested and
60 unpaid for thirty days after its receipt; or (ii) if contested,

61 has been affirmed by the director and remains unappealed
 62 for thirty days after receipt of the director's final order; or
 63 (iii) if appealed, has been affirmed upon judicial review of
 64 the director's final order. All funds received in the form
 65 of civil penalties or interest thereon pursuant to this
 66 article shall be deposited in a special resident benefit
 67 account which is hereby established and applied by the
 68 director exclusively for the protection of the health or
 69 property of residents of residential care communities
 70 operated within this state that the director determines to
 71 be deficient, which may include payment of costs to
 72 relocate residents of a deficient residential care commu-
 73 nity to other facilities, operation costs of a residential care
 74 community pending correction of deficiencies or closure
 75 and reimbursement of residents for personal funds lost.

76 (h) The opportunity for a hearing on any action taken
 77 under this section is as provided in section twelve of this
 78 article. In addition to any other rights of appeal conferred
 79 upon a residential care community under this section, it
 80 may also request a hearing and seek judicial review
 81 pursuant to sections twelve and thirteen of this article to
 82 contest the director's citing of a deficiency in an inspec-
 83 tion report, irrespective of whether the deficiency results
 84 in the imposition of a civil penalty.

**§16-5N-11. License limitation, suspension and revocation; ban
 on admissions; continuation of disciplinary
 proceedings; closure, transfer of residents,
 appointment of temporary management; assess-
 ment of interest; collection of assessments;
 hearing.**

1 (a) The director shall by order impose a ban on the
 2 admission of additional residents or reduce the number of
 3 apartments permitted in a residential care community, or
 4 any combination thereof, where it is determined upon
 5 inspection that a licensee is not providing adequate care
 6 to its residents under its existing quota and, further, that
 7 a reduction in the quota or the imposition of a ban on
 8 additional admissions, or a combination thereof, would
 9 enable the licensee to render adequate care to its residents.
 10 A notice to a licensee of a reduction in its quota or a ban

11 on additional admissions shall include the terms of the
12 order, the reasons therefor, and the date by which it must
13 comply.

14 (b) The director may suspend or revoke a license issued
15 under this article if it is determined upon inspection that
16 there has been a substantial failure to comply with the
17 provisions of this article or the standards or rules promul-
18 gated hereunder.

19 (c) Whenever a license is limited, suspended or revoked
20 pursuant to this section, the director shall file an adminis-
21 trative complaint stating facts constituting the grounds
22 therefor. Upon the filing of this administrative complaint,
23 the director shall notify the licensee in writing, enclose a
24 copy of the administrative complaint, and advise the
25 licensee of its opportunity for a hearing pursuant to
26 section twelve of this article. The notice and copy of the
27 administrative complaint shall be served on the licensee
28 by certified mail, return receipt requested.

29 (d) The suspension, revocation or expiration of a license,
30 or the withdrawal of an application for a license after it
31 has been filed with the director, may not deprive the
32 director of his or her authority to institute or continue a
33 disciplinary proceeding or to deny an application for a
34 license.

35 (e) In addition to other remedies provided in this article,
36 upon petition from the director, a circuit court may
37 determine that a residential care community's deficiencies
38 under this article constitute an emergency immediately
39 jeopardizing the health, safety, welfare or rights of its
40 residents, and issue an order to:

41 (1) Close the residential care community;

42 (2) Transfer residents of the residential care community
43 to other facilities; or

44 (3) Appoint a temporary manager to oversee the opera-
45 tion of the residential care community and to assure the
46 health, safety, welfare and rights of the residential care
47 community's residents, where there is a need for tempo-
48 rary management while:

49 (A) There is an orderly closure of the residential care
50 community; or

51 (B) Corrections are made in order to bring the residen-
52 tial care community into compliance with all applicable
53 requirements of this article and the rules promulgated
54 hereunder.

55 If the director petitions a circuit court for the closure of
56 a residential care community, for the transfer of residents,
57 or for the appointment of a temporary manager, the
58 circuit court shall hold a hearing no later than seven days
59 thereafter, at which time the director and the licensee or
60 operator of the residential care community may partici-
61 pate and present evidence.

62 A circuit court may divest the licensee or operator of
63 possession and control of a residential care community in
64 favor of temporary management. The temporary manage-
65 ment is accountable to the court and has those powers and
66 duties that the court may grant to direct all acts necessary
67 or appropriate to conserve the property and promote the
68 health, safety, welfare and rights of the residents, includ-
69 ing, but not limited to, replacing managerial and other
70 staff, hiring consultants, making necessary expenditures
71 to close the residential care community or to repair or
72 improve the residential care community so as to return it
73 to compliance with applicable requirements, and receiv-
74 ing, conserving and expending funds, including making
75 payments on behalf of the licensee or operator. Priority in
76 making payments shall be given to expenditures for
77 current direct resident care and the transfer of residents,
78 if necessary.

79 The person charged with temporary management shall
80 be an officer of the court and paid by the residential care
81 community if resources are available; he or she may not be
82 held liable in any capacity for conditions at the residential
83 care community that originated or existed before his or
84 her appointment nor may he or she be held personally
85 liable for any act or omission, except those constituting
86 gross negligence or intentional acts that result in injuries
87 to persons or damage to property during his or her tenure

88 as temporary manager.

89 It is unlawful for any person to impede the operation of
90 temporary management as appointed by the court. For
91 ninety days after the appointment of temporary manage-
92 ment at a residential care community, any legal action
93 that would interfere with its functioning or operation
94 shall be automatically stayed. These actions include, but
95 are not limited to, cancellation of insurance policies,
96 termination of utility services, attachments to working
97 capital accounts, foreclosures, evictions and repossessions
98 of equipment used in the residential care community.

99 Temporary management appointed by the court for
100 purposes of making improvements to bring a residential
101 care community into compliance with applicable require-
102 ments may not be terminated until the court has deter-
103 mined that the residential care community has the man-
104 agement capability to ensure continued compliance with
105 all applicable requirements: *Provided*, That if the court
106 does not make such a determination within six months of
107 the appointment of the temporary management, the
108 temporary management terminates by operation of law at
109 that time, and the residential care community shall be
110 closed. After the termination of the temporary manage-
111 ment, the person who was appointed as the temporary
112 management shall make an accounting to the court, and
113 after deducting the costs of the temporary management,
114 expenditures and civil penalties and interest no longer
115 subject to appeal, in that order, from receipts, the remain-
116 der, if any, shall be paid to the licensee or operator of the
117 residential care community.

118 (f) Assessments for civil penalties and costs of actions
119 taken under this article, including attorney fees, shall
120 accrue interest at the rate of five percent per annum,
121 beginning on the thirtieth day after receipt of notice of the
122 assessment or the thirtieth day after receipt of the direc-
123 tor's final order following a hearing, whichever later
124 occurs. All assessments against a residential care commu-
125 nity that remain unpaid shall be added to its licensure fee
126 next due and may be filed as a lien against the property of
127 the licensee or operator of the residential care community.

128 Funds received from these assessments shall be deposited
129 in the same manner as are funds received pursuant to
130 section ten of this article.

131 (g) The secretary is authorized to propose emergency
132 rules, if necessary, to expand the powers of the director
133 beyond those provided in this article, to the extent re-
134 quired to comply with federal requirements: *Provided,*
135 That the director's powers may be expanded only to the
136 extent required by federal requirements. Emergency rules
137 proposed pursuant to this subsection are subject to the
138 provisions governing legislative rules contained in article
139 three, chapter twenty-nine-a of this code.

140 (h) The opportunity for a hearing on any action taken by
141 the director under this section is as provided in section
142 twelve of this article.

**§16-5N-12. Administrative appeals from civil penalty assess-
ment, license limitation, suspension or revoca-
tion.**

1 (a) Any licensee or applicant aggrieved by an order
2 issued pursuant to section five, six, ten or eleven of this
3 article shall, upon timely written request, be afforded an
4 opportunity for a hearing by the director at which the
5 order may be contested as contrary to law, unwarranted
6 by the facts, or both. The provisions of article five,
7 chapter twenty-nine-a of this code governing contested
8 cases apply to and govern hearings conducted pursuant to
9 this section and the administrative procedures in connec-
10 tion therewith. A licensee or applicant may also request
11 an informal meeting with the director before requesting a
12 hearing.

13 After a hearing conducted pursuant to this section, the
14 director shall make and enter a written order either
15 dismissing the complaint or taking whatever action is
16 authorized and appropriate pursuant to this article. This
17 written order shall be served upon the licensee and his or
18 her attorney of record, if any, by certified mail, return
19 receipt requested, accompanied by the director's findings
20 of fact and conclusions of law as specified in section three,
21 article five, chapter twenty-nine-a of this code. If the

22 director suspends a residential care community's license,
23 the order directing the suspension shall specify the
24 grounds for the suspension and the time by which the
25 conditions or circumstances giving rise to the suspension
26 must be corrected in order for the licensee to be entitled to
27 reinstatement of its license. If the director revokes a
28 license, he or she may stay the effective date of the
29 revocation upon a showing that a delay is necessary to
30 assure appropriate placement of the licensee's residents:
31 *Provided*, That the effective date of revocation may not be
32 stayed for more than ninety days. The director's order is
33 final unless it is vacated, reversed or modified by the court
34 upon judicial review in accordance with the provisions of
35 section thirteen of this article.

36 (b) In addition to all other powers granted by this
37 chapter, the director may take a case under advisement
38 and make a recommendation as to requirements to be met
39 by a licensee in order to avoid suspension or revocation of
40 its license. In these cases, the director shall enter an
41 appropriate order and notify the licensee and its attorney
42 of record, if any, by certified mail, return receipt re-
43 quested. If the licensee meets the requirements of this
44 order, the director shall enter a subsequent order taking
45 notice of the licensee's satisfactory compliance and
46 dismissing the complaint. This order shall also be deliv-
47 ered to the licensee and its attorney of record, if any, by
48 certified mail, return receipt requested.

§16-5N-13. Judicial review.

1 Any licensee adversely affected by an order of the
2 director rendered after a hearing held in accordance with
3 the provisions of section twelve of this article is entitled to
4 judicial review thereof. All of the pertinent provisions of
5 section four, article five, chapter twenty-nine-a of this
6 code apply to and govern these proceedings with like
7 effect as if those provisions were set forth in extenso
8 herein.

9 The judgment of the circuit court is final unless re-
10 versed, vacated or modified on appeal to the supreme
11 court of appeals in accordance with the provisions of

12 section one, article six, chapter twenty-nine-a of this code.

§16-5N-14. Legal counsel and services for the director.

1 (a) Legal counsel and legal services for the director in all
2 administrative hearings and all proceedings in any circuit
3 court and the supreme court of appeals shall be provided
4 by the attorney general or his or her assistants, an attor-
5 ney employed by the director or, in proceedings in any
6 circuit court, by the prosecuting attorney of the county
7 wherein the action is instituted, all without additional
8 compensation.

9 (b) The governor may appoint counsel for the director,
10 who shall perform legal services in representing the
11 interests of residents in residential care communities in
12 matters under the jurisdiction of the director, as the
13 governor shall direct. It is the duty of counsel so ap-
14 pointed to appear for the residents in all cases where they
15 are not represented by counsel. The compensation of
16 counsel so appointed shall be fixed by the governor.

**§16-5N-15. Unlawful acts; penalties; injunctions; private right
of action.**

1 (a) Whoever advertises, announces, establishes or
2 maintains, or is engaged in establishing or maintaining a
3 residential care community without a license granted
4 under section six of this article, or who prevents, inter-
5 feres with or impedes in any way the lawful enforcement
6 of this article is guilty of a misdemeanor and, upon
7 conviction thereof, shall be punished for the first offense
8 by a fine of not more than one hundred dollars, or by
9 confinement in the regional or county jail for a period of
10 not more than ninety days, or both, in the discretion of the
11 court. For a second or subsequent offense, the fine may be
12 increased to not more than two hundred fifty dollars, with
13 confinement in the regional or county jail for a period of
14 not more than ninety days, or both, in the discretion of the
15 court. Each day that a violation continues after convic-
16 tion therefor constitutes a separate offense.

17 (b) The director may bring an action to enforce compli-
18 ance with this article, any rule promulgated hereunder, or

19 order issued hereunder, whenever it appears to the
20 director that a person has engaged in or is engaging in an
21 act or practice in violation of this article or any rule or
22 order hereunder, or whenever it appears to the director
23 that a person has aided, abetted or caused, or is aiding,
24 abetting or causing such an act or practice. Upon applica-
25 tion by the director, the circuit court of the county in
26 which the conduct has occurred or is occurring has
27 jurisdiction to grant without bond a permanent or tempo-
28 rary injunction, decree or restraining order.

29 Whenever the director has refused to grant or renew a
30 license, revoked a license that is required to operate a
31 residential care community, or ordered a person to refrain
32 from actions that violate the rules promulgated pursuant
33 to this article, and the person has appealed the action of
34 the director, the court may, during the pendency of the
35 appeal, issue a restraining order or injunction upon proof
36 that the operation of the residential care community or its
37 failure to comply with the order of the director adversely
38 affects the well-being or safety of the residents of the
39 residential care community. Should a person who appeals
40 an order of the director fail to appear or should the appeal
41 be decided in favor of the director, the court shall issue a
42 permanent injunction upon proof that the person is
43 operating or conducting a residential care community
44 without a license as required by law, or has continued to
45 violate the rules promulgated pursuant to this article.

46 (c) Any residential care community that deprives a
47 resident of any right or benefit created or established for
48 the well-being of the resident by the terms of any contract,
49 any state statute or rule, or by any applicable federal
50 statute or regulation, is liable to that resident in a civil
51 action for any injuries suffered as a result of the depriva-
52 tion. Upon a finding that a resident has been deprived of
53 a right or benefit and suffered an injury thereby, compen-
54 satory damages shall be assessed in an amount sufficient
55 to compensate the resident for the injury, unless there is a
56 finding that the residential care community exercised due
57 care reasonably necessary to prevent and limit the depri-
58 vation and injury to the resident. In addition, if the

59 deprivation by a residential care community of a right or
60 benefit is found to have been willful or in reckless disre-
61 gard, punitive damages may be assessed. A resident may
62 also maintain an action pursuant to this section for any
63 other type of relief, including injunctive and declaratory
64 relief, permitted by law. Exhaustion of available adminis-
65 trative remedies may not be required prior to commencing
66 an action hereunder.

67 The amount of damages recovered by a resident in an
68 action brought pursuant to this section is exempt for
69 purposes of determining initial or continuing eligibility
70 for medical assistance under article four, chapter nine of
71 this code, and may not be taken into consideration or
72 required to be applied toward the payment or part pay-
73 ment of the cost of medical care or services available
74 under that article.

75 Any waiver by a resident or his or her legal representa-
76 tive of the right to commence an action under this section,
77 whether oral or in writing, is null and void as contrary to
78 public policy.

79 (d) The penalties and remedies provided in this section
80 are cumulative and are in addition to all other penalties
81 and remedies provided by law.

§16-5N-16. Availability of reports and records.

1 The director shall make available for public inspection
2 and provide copies at a nominal cost of all inspection
3 reports and other reports of residential care communities
4 filed with or issued by the director. Nothing contained in
5 this section may be construed to allow the public disclo-
6 sure of confidential medical, social, personal or financial
7 records of any resident. The secretary shall adopt rules
8 that are reasonably necessary to effectuate the provisions
9 of this section and preserve the confidentiality of medical,
10 social, personal or financial records of residents.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Karey Schoonover
.....
Chairman Senate Committee

Nick Jentasi
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Harold H. Wallace
.....
Clerk of the Senate

Gregory M. Bush
.....
Clerk of the House of Delegates

Earl Ray Tomblin
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *Approved* this the *22nd*
April
day of, 1997.

[Signature]
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/17/97

Time 3:38 pm