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#9003

NO.
STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

DATED: February 16, 1990

SUBJECT: Effect of Federal Fair Housing Amendments Act of 1988 on Neb.Rev.Stat. §§ 18-1744 through 18-1747 (Reissue 1987 and 1989 Supp.).

REQUESTED BY: Senator Don Wesely, Chairperson, Health and Human Services Committee Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Royce N. Harper, Senior Assistant Attorney General

You have requested an opinion as to whether Neb.Rev.Stat. §§ 18-1744 through 18-1747 (Reissue 1987 and 1989 Supp.) defining and regulating the establishment and location of group homes for persons with mental or physical disabilities are valid under the federal Fair Housing Amendments Act of 1988 that became effective on March 21, 1989.

For the reasons explained below, Neb.Rev.Stat. §§ 18-1744 through 18-1747 contain provisions that appear to require or permit discriminatory housing practices as to persons with physical or mental impairment, and therefore, to that extent, the statutes would be invalid under the Fair Housing Amendment Act of 1988.

Detailed Analysis and Response to Senator Wesely's Questions

The federal Fair Housing Amendments Act of 1988, effective as law on March 12, 1989, amended Title VIII of the Civil Rights Act of 1968 to include persons with a handicap as a class protected from discriminatory housing practices under the Fair Housing Act. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988), to be codified at 42 U.S.C. §§ 3601 through 3631 [hereinafter Act].

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The act defines "handicap" with respect to a person as:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) a record of having such an impairment; or

(3) being regarded as having such an impairment, but such terms does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21.

42 U.S.C. § 3602(h)(1)(2)(3).

The 1988 amendments make it unlawful:

> [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of --
>
> (A) that buyer or renter;
>
> (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
>
> (C) any person associated with that person.

42 U.S.C. §3604(f)(1)(A)(B)(C).

Further, it is unlawful:

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection with such dwelling, because of a handicap of --
>
> (A) that person; or
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or
>
> (C) to any person associated with that buyer or renter.

42 U.S.C. § 3604(f)(2)(A)(B)(C).

Also the Act states that discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices or sources, where such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . .

42 U.S.C. § 3604(f)(3)(B).

Section 3615 provides for the effect of the Act on state laws.

> Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivisions of a State, or of any other jurisdictions in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; <u>but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall be to that extent be invalid</u>.

42 U.S.C. § 3615 (Emphasis added).

<u>Neb.Rev.Stat.</u> §§ 18-1744 through 18-1747 were originally enacted by the Nebraska State Legislature with the passage of Laws 1980, LB 525.

The purpose of LB 525 was to provide ". . . that a municipality cannot restrict the location of group homes from anywhere within the legal boundaries of a municipality." Comm. Report on LB 525, Public Health and Welfare Comm. 86th Leg. 2d Sess. (Apr. 17, 1979).

This purpose, standing alone, is consistent with the purpose of the federal Act.

In reference to 42 U.S.C. § 3604 (f)(2), the House Comm. on the Judiciary stated:

> This provision is intended to prohibit special restrictive covenants or other terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangements for persons with handicaps.

H.R.Rep. No. 711, 100th Cong., 2d Sess. 22 at 18 (1988).

The intent of the Nebraska Legislature was to maximize the effectiveness of group services for persons with certain physical or mental disabilities, i.e., cerebral palsy, autism, or mental

retardation, Neb.Rev.Stat. § 18-1744 (Reissue 1987), by allowing locations of group homes in all municipal zone districts, and to discourage "local zoning codes [that] have restricted group living homes to certain very limited areas resulting in a high density of group living homes, generally in highly populated zones." Introducer's Statement of Purpose, LB 525, 86th Leg. 2d Sess. (Feb. 22, 1979). In 1989, the legislature enacted LB 366, amending sections 18-744 by striking reference to specific disabilities and referring instead to "mental or physical disabilities." (Neb.Rev.Stat. § 18-1744 (1989 Supp.). The purpose of the amendment was to add group homes for the mentally ill to the statutes covering zoning and location of group homes for persons with cerebral palsy, autism and mental retardation. Comm. Statement on LB 366, Health and Human Services Comm. 91st Leg. 1st Sess. (Jan. 25, 1989).

The plain language of this amendment, "mental or physical disabilities" is substantially similar to the federal Act that uses "physical or mental impairment" in its definition of handicap. However, the legislative history of sections 18-1744 through 18-1747 indicate that the Nebraska legislature did not envision the broad remedial purpose for all persons with a handicap that Congress intended. Statutory interpretation of the Nebraska statutes, looking to the legislative history of the statutes, could conceivably exclude persons with physical or mental disabilities not specifically mentioned by the Legislature, and not specifically included in the statute's definition. Such interpretation would clearly be judged to violate the federal mandate. The only "impairment" explicitly excluded from the federal Act's definition of "handicap" is "current illegal use of or addiction to a controlled substance as defined in section 802 of Title 21." 42 U.S.C. § 3602(3) (Emphasis added).

If section 18-1745 went no further than to say "[a] group home . . . may be established and operated in any residential zone within the exercised zoning jurisdiction of any municipality...," Neb.Rev.Stat. § 18-1745 (Reissue 1987), this statute would not only not offend the federal Act, but would in fact promote the federal Act's purpose to make it unlawful [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap. . . ." 42 U.S.C. § 3604(f)(1).

However, other provisions of sections 18-1744 through 18-1747 appear to clearly offend the federal Act.

Although the new provisions of 42 U.S.C. § 3604(f)(1)(2) do not specifically include exclusionary zoning practices, case law interpreting the Fair Housing Act of 1968 and the legislative history of the Fair Housing Amendments Act are clear that Congress

intended the statute to apply to zoning and land-use decisions. The House Report reads:

> The new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, the authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land use requirements on congregate living arrangements among nonrelated persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.
>
> The committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The act is intended to prohibit the application of special requirements through land use regulations, restrictive covenants and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. Under H.R. 1158, land use and zoning cases are to be litigated in court by the Department of Justice. They would not go through the administrative process.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 22 at 24.

Regulations promulgated by the Department of Housing and Urban Development (hereinafter HUD) to implement the Act state:

> It shall be unlawful, because of . . . handicap . . . to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.

24 C.F.R. § 100.70(a).

Section 18-1744 defines group homes for purposes of the statute as a ". . . facility licensed by the State of Nebraska in which at least four but not more than eight persons, not including

resident managers or house parents, who are unrelated by blood, marriage, or adoption reside . . . ." Neb.Rev.Stat. § 18-1744 (Reissue 1987). Such limitations on the number of unrelated persons who can reside in a group home, permitted in all municipal zones, appear to be a clear violation of the federal Act. Local governments may adopt legitimate restrictions for health and safety reasons on the number of persons within dwelling units. 24 C.F.R. § 100.10(3). However, such restrictions are permitted only if the restriction is applied equally to all persons similarly situated. If the restiction applies only to persons with disabilities, the statutory provision would violate the federal requirement to afford persons with handicaps ". . . equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3).

Furthermore, this restrictive language applied only to group homes for disabled persons would appear to violate 42 U.S.C. § 3604(f)(2) by defining ". . . terms, conditions, or privileges of sale or rental of a dwelling . . . in connection with such dwelling, because of a handicap. . . ." 42 U.S.C. § 3604(f)(2). This position is reinforced by reference to the House Report, where the House Committee on the Judiciary stated:

> This provision is intended to prohibit covenants or other terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangements for persons with handicaps.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 22 at 23.

Furthermore the provisions of sections 18-1746 and 18-1747 appear to clearly violate 42 U.S.C. § 3604(f)(1) & (2), and 24 C.F.R. 100.70(a).

Section 18-1746 prohibits state licensing of a new group home unless its location exceeds minimal distance requirements from other group homes. Section 18-1747 has limits based on population and the number of group homes within municipalities. Both provisions appear to clearly violate 42 U.S.C. § 3604(f)(1) & (2).

Such restrictions make unavailable to a person with a handicap housing that person might choose. These restrictions, absent applicability to dwellings of unrelated persons without disabilities, appear facially invalid. Absent a legitimate governmental interest and a rational relationship between these statutes and that governmental interest, the Nebraska statutes would likely be found to be unconstitutional. City of Clebourne v. Clebourne Living Center, 473 U.S. 432, 448 (1985). Furthermore, permitting conditional or special use permits or variances to waive the resolution of the statutes does not cure the violation. In

fact, such requirement is discriminatory itself unless the same distance and density requirements apply to all dwellings of unrelated persons, and unless permits are required for these dwellings to deviate from the requirements.

Discriminatory rules restricting housing choices rules applied to persons with handicap solely because of their handicap clearly violate the federal Act and the federal regulations. 24 C.F.R. 100.70(a) & (d)(2).

The legislature's intent for Neb.Rev.Stat. §§ 18-1744 through 18-1747 to maximize the rehabilitative effect of group homes and to provide living experiences that approximate family and community environments so that residents can move on to more independent living situations, and to discourage the concentration of density in a few neighborhoods is a legitimate and important government goal. The intent was to provide greater rather than more limited opportunities for normal living arrangements. However, the restrictive provisions of the statute permit or require discriminatory effect as to persons with handicaps and, therefore, violate the federal Fair Housing Amendments Act of 1988.

We have reviewed materials provided by your office, including Attorney General Opinions from Kansas, Maryland and Virginia, and the Mental Health Law Project Report. We are in general agreement with the conclusions therein as to the invalidity of state statutes with provisions substantially similar to Neb.Rev.Stat. § 1744 through 1747 (Reissue 1987 and 1989 Supp.).

Very truly yours,

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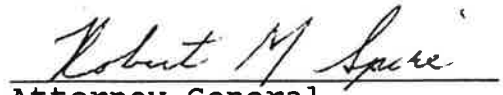
Royce N. Harper
Senior Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:



Attorney General

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