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The State of South Carolina

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August 12, 1994

Senator W. Greg Ryberg
606 Gressette Building
Columbia, South Carolina 29202

Dear Senator Ryberg:

You have requested an Attorney General Opinion on the question of whether or not S.C. Code Ann. §6-7-830 (Supp. 1993) has been superseded or preempted by the Federal Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §3601, et seq. It is our conclusion that the FHAA does not summarily or automatically supersede or preempt the referenced South Carolina law; but to the extent that such State law may purport to require or permit any action that would be a discriminatory housing practice under the FHAA, a court would most likely determine the State law to be invalid.

Factual Background

By letter dated December 20, 1993, the Tri-Development Center of Aiken County, Inc., a United Way Agency, having received approval from the U.S. Department of Housing and Urban Development (HUD) for a grant to build a four (4) bedroom home to house three (3) individuals with mental retardation and a live-in care giver, by its Executive Director, Ralph Courtney, who was also the Agency's site selection representative, sought a zoning certification from Steve Thompson, the City Manager, City of Aiken. Mr. Courtney stated that the Center's proposed home was considered a single family dwelling. He stated in the letter that he had been told by the local zoning official, Major Brunson Cromer, that the proposed site for the building was zoned R-1, which permits a single family dwelling, but that if the proposed home were a group home it might be subject to S.C. Code Ann. §6-7-830; and further that the project would be subject to all applicable zoning regulations of the City of Aiken. (See comments on Zoning Certification dated 11/30/93 signed by Major Cromer).

Request Letter

The City Attorney for the City of Aiken, James Holly, informed Mr. Courtney of the Development Center, that "use of the home to house three (3) clients and a live-in care giver would not meet the definition of a single family residential dwelling in the Comprehensive Zoning Ordinance." The City Attorney then went on to advise:

> " . . . the City's interpretation . . . is that a single family residential use consists of a family plus not more than two (2) other persons. Therefore, the proposed use at this site would not be permitted under a city single family zoning classification, and some other procedure would need to be followed to allow it at this site." [Emphasis added].
>
> ". . . I will request . . . that the City Manager consider placing your request relating to this site on the City Council Agenda . . . . It would be considered a request for Council's approval of this site pursuant to Section 6-7-830." (letter from Mr. Holly to Mr. Courtney dated May 2, 1994).

Copies of the letter addressed to the Development Center were sent to Mr. Thompson, the City Manager, Ed Evans, the Director of Planning and Community Development, and to Major Cromer, the zoning official for the City of Aiken. The City Manager thereafter sent a memo to the City Council stating, inter alia:

> "Section 6-7-830 of the South Carolina Code of Laws does allow City Council an opportunity to object to the location of a home for mentally retarded adults . . . Mr. Holly's conclusion is that these individuals would not constitute a family, and that the City would have an opportunity to accept comments and possibly object to the location of the home . . . ."
>
> "We have sent a copy of this notice to several of the neighbors in the area, and have advertised this in the Aiken Standard." [Emphasis added].
>
> "For City Council consideration, this is a request to approve the site in the 1300 block of Hayne Avenue for a group home, under South Carolina Code of Laws Section 6-7-830."

A public meeting was held on the matter, and the site was approved, but the dust is not settled as to the efficacy of the procedure that was employed. The City Attorney in his letter of May 11, 1994, to the State Attorney General's Office stated that, "the foregoing state statute (S.C. Code Ann. §6-7-830) sets up a review and arbitration process for group homes for mentally disadvantaged citizens."

Applicable Law

The City of Aiken's Comprehensive Zoning Ordinance defines "single family dwelling" as follows:

> A building containing but one housekeeping unit, and designed or used to house not more than one family in a permanent manner, which may include not more than two (2) boarders or lodgers. [Emphasis added.]

A "family" is defined by the Aiken City zoning ordinance as:

> A group of one or two (2) persons or parents with their direct descendants and adopted children (and including the domestic employees thereof) together with not more than two (2) persons not so related, living together in a room or rooms comprising a single housekeeping unit. Every additional group of five (5) or less persons living in such housekeeping unit shall be considered a separate family for the purpose of this Ordinance. Family does not include a group occupying a club, dormitory, etc. for the purpose of this Ordinance. [Emphasis added.]

Regarding zoning ordinance exceptions for certain homes for mentally handicapped, South Carolina law states:

> All agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State shall be subject to the zoning ordinances thereof. . . . The provisions of this act do not apply to a home serving nine or fewer mentally or physically handicapped persons provided the home provides care on a twenty-four hour basis and is approved or licensed by a state agency or department under contract with the agency or department for such pur-

> pose. Any such home is construed to be a natural family or such similar term as may be utilized by any county or municipal zoning ordinance to refer to persons related by blood or marriage. Prior to locating the home for such handicapped persons the appropriate state agency or department or the private entity operating the home under contract must first give prior notice to the local governing body administering the pertinent zoning laws, advising of the exact site of any proposed home. The notice must also identify the individual representing the agency, department, or private entity for site selection purposes. If the local governing body objects to the selected site, the governing body must notify the site selection representative of the entity seeking to establish the home within fifteen days of receiving notice and must appoint a representative to assist the entity in selection of a comparable alternate site and/or structure. The site selection representative of the entity seeking to establish the home and the representative of the local governing body, shall select a third mutually agreeable person. The three persons shall have forty-five days to make a final selection of the site by majority vote. Such final selection shall be binding on the entity and the governing body. In the event no selection has been made by the end of the forty-five day period, the entity establishing the home shall select the site without further proceedings. An application for variance or special exception is not required. No person may intervene to prevent the establishment of such a community residence without reasonable justification. . . . [Emphasis added.]

S.C. Code Ann. §6-7-830 (Supp. 1993).

Discussion

The declared policy of the United States is to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. §3601. This chapter was enacted to ensure the removal of artificial, arbitrary and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of

impermissible characteristics. U.S. v. City of Parma, Ohio, D.C. Ohio 1980, 494 F. Supp. 1049.

Discriminatory treatment of handicapped persons, in their pursuit of housing, is prohibited under both federal and state law and such discrimination is not limited to the selling or rental of dwellings, but includes other "prohibited practices" enunciated in §3604 of the Act.

> For purposes of this subsection, discrimination includes - a refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. [Emphasis added].

42 U.S.C.A. §3604 (f)(3)(B).

The Fair Housing Act has been held to apply to governmental bodies. Smith v. Town of Clarkton, N.C., C.A.N.C. 1982, 682 F.2d 1055; to municipalities, Keith v. Volpe, C.A. 9 (Cal) 1988, 858 F. 2d 467, certiorari denied, 110 S.Ct. 61, 493 U.S. 813, 107 L.Ed. 28; and a City has been held to be a person for purposes of the Act, making restrictions therein applicable to municipalities, U.S. v. City of Parma, Ohio, C.A. Ohio 1981, 661 F.2d 562.

The purpose of the section of the Fair Housing Act regarding rights of the handicapped has been held to protect housing choices of handicapped individuals who seek to buy or lease housing and of those who seek to buy or lease property on their behalf. Growth Horizons, Inc. v. Delaware County, Pa., C.A. 3 (Pa.) 1993, 983 F.2d 1277.

Local governments, cities, and municipalities cannot, therefore, enforce vague or unrestricted zoning ordinances which impact adversely on handicapped persons, U.S. v. City of Taylor, Mich., USDCED Mich, S.D. 1992, 798 F. Supp. 442; nor can they uphold restrictive covenants that have the effect of discriminating against handicapped persons, Rhodes v. Palmetto Pathway Homes, 400 S.E. 2d 484 (1991); nor may they engage in procedures such as holding public hearings, which even if not intended, result in limiting or prohibiting the protected use of property by handicapped persons. Potomac Group Home Corporation v. Montgomery County, Maryland, 823 F. Supp. 1285 (D. Md. 1993).

The Act requires that governing bodies make reasonable accommodations to assist the handicapped in land uses. It was held that a village violated the Fair Housing Act by failing to

reasonably accommodate a potential purchaser's request to place a group home for mentally ill persons within the village where, even though the village had distance restrictions on placement of such facilities, granting an exception to the restriction was feasible, practical, and would not entail undue burdens to the village. Tellurian U.C.A.N. Inc. v. Goodrich, Wis. App. 1993, 504 N.W2d 342, 178 Wis. 2d 205.

The standard for determining whether or not a state law has been preempted or superseded by federal law was enunciated in the landmark case of Silkwood v. Kerr - McGee Corporation. The U.S. Supreme Court said there:

> . . . state law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, ...

Silkwood v. Kerr - McGee Corporation, 464 U.S. 238, 78 L.Ed. 443, 104 S.Ct. 615 (1984).

Quoting from the Congressional Report, the Court in Potomac Group Home supra, included this paragraph which sheds light on congressional intent with regard to remedying governmental practices which have a discriminatory impact upon the housing choices of handicapped persons.

> These new subsections [§3604(f)] would also apply to state or local land use and health and safety laws, regulations, practices and 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, that 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 non-related 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. [Emphasis added].
>
> H.R.Rep. No. 100-711, 100th Cong., 2d Sess. 24, reprinted in 1988 U.S. Code Cong. & Admin.News at 2173, 2185.

The Court there further noted that courts have consistently invalidated a wide range of municipal licensing, zoning and other regulatory practices affecting persons with disabilities, citing: Marbrunake, Inc. v. City of Stow, 974 F.2d 43 47 (6th Cir. 1992)(striking down discriminatory fire and safety codes); Horizon House Development Services, Inc. v. Township of Upper Southhampton, 804 F. Supp. 683, 693 (E.D. Pa. 19192)(striking down 1,000 foot spacing requirement); A.F.A.P.S., 740 F.Supp. at 103 (enjoining refusal to issue special use permit to AIDS hospice); Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Com'n, 790 F. Supp. 1197, 1219 (D. Conn. 1992)(invalidating special exception process).

In Potomac Group Home, the U.S. District Court for the District of Maryland concluded that the public, program-review board hearings had a discriminatory effect on the handicapped plaintiffs there, in violation of the FHAA, stating:

> Under the Supremacy Clause, the Maryland Open Meetings Act, . . . is preempted by the FHAA, inasmuch as a state law would then stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. Silkwood, 464 U.S. at 248, 104 S.Ct. at 621.

Potomac, supra, at 1299.

Finally, our own state Supreme Court rather than announcing a preemption of state law by the FHAA, stated very clearly that both the FHAA and S.C. Code Ann. §6-7-830 embody federal and state "public policy" to protect the rights of the handicapped from housing discrimination on account of their handicap. The Court found that:

> . . . enforcement of this restrictive covenant would have the effect of depriving the mentally impaired of rights guaranteed under the Fair Housing Amendments Act.

Rhodes, supra, p. 486.

In fact, the S.C. Supreme Court seemed to recognize a compatibility of state and federal law to ensure protection of such rights when, after pointing out that the State Bill of Rights for Handicapped Persons demonstrates a commitment to the handicapped, went on to say that:

> S.C. Code Ann. §6-7-830 . . . which exempts homes for the mentally handicapped from local zoning ordinances, expresses in broad terms the State's public policy that handicapped persons shall not suffer housing discrimination on account of their handicap. [Emphasis added].

Rhodes, p. 486.

Conclusion

Thus, while not automatically superseding or preempting S.C. Code Ann. §6-7-830, the FHAA may be used by a Court to invalidate state or local government practices (under the Silkwood analysis) which stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. The practices employed by the City of Aiken in this situation, import a novel interpretation of S.C. Code Ann. §6-7-830: one, which to date has not been declared nor adjudicated in this state.

With kind regards, I am

Sincerely yours,

Alice C. Broadwater

Alice C. Broadwater
Assistant Attorney General

ACB/fg

REVIEWED AND APPROVED BY:

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