Or. Op. Atty. Gen. OP-6377 (Or.A.G.), 1991 WL 543948

Office of the Attorney General

State of Oregon
Opinion Request OP-6377
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***1** Richard C. Lippincott, M.D.
Administrator
Mental Health and Developmental Disability Services Division
Department of Human Resources
2575 Bittern Street, N.E.
Salem, OR 97310–0520

Dear Dr. Lippincott:
You have asked three questions concerning the effect of the federal Fair Housing Act on Oregon statutes governing the siting of residential homes and residential facilities for the disabled. We set forth your questions and our short answers, followed by a discussion.

1. Do ORS 197.667(1) and (2), regarding siting of residential facilities for the disabled, violate the Fair Housing Act as amended in 1988? In particular, do they violate: a) the Act's non-discrimination provisions, b) the Act's mandatory assistance provisions, or c) the HUD regulations limiting inquiries concerning handicaps[1] in housing negotiations?

When those statutes are read properly in conjunction with ORS 197.667(3), the answer is no.

2. Does ORS 197.667(3) allow local jurisdictions to avoid violating the Fair Housing Act?

Yes.

3. Under the Fair Housing Act, are all state and local zoning restrictions on residential facilities for the disabled, including conditions and special use permits, invalid unless applied to all other residential uses?

Yes. With one possible exception explained below, residential facilities for the disabled must not be subject to any zoning restrictions not applied to other residential uses.

Discussion

1. The Fair Housing Act

The Fair Housing Amendments Act of 1988, effective March 12, 1989, amended Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act or FHA) to include people with handicaps among the classes of people protected against discrimination in housing. The Act now prohibits discrimination on the basis of handicap in the "terms, conditions or privileges" of the sale or rental of any dwelling. The prohibition applies whether the handicapped person is the buyer or renter, the current or an intended resident of that dwelling, or a person associated with the buyer or renter. 42 USC § 3604(f)(1), (2) (1988).

The amendments impose certain mandatory assistance requirements upon "any person" involved in the sale or rental of housing to the handicapped. No person may refuse to permit a handicapped person to make reasonable modifications to the premises if necessary to allow the handicapped person full enjoyment of those premises. 42 USC § 3604(f)(3)(A) (1988). It also is unlawful to refuse to make reasonable accommodations in rules, policies, practices and services if necessary to afford the handicapped person "equal opportunity to use and enjoy a dwelling." 42 USC § 3604(f)(3)(B) (1988).

The Department of Housing and Urban Development (HUD) regulations implementing the FHA amendments include another key prohibition. These regulations prohibit inquiry into either the existence of or the nature or severity of any handicap of the buyer, renter, or intended resident or of an associate of the buyer, renter or intended resident. 24 CFR § 100.202(c) (1990). The regulations list five exceptions,[2] which govern so long as the "inquiries are made of all applicants, whether or not they have handicaps." 24 CFR § 100.202(c)(1)–(5) (1990).

***2** The legislative history of the amendments shows that Congress intended them to apply to state and local laws:
"These 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, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. * * *

"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."

H R Rep No. 100–711, 100th Cong, 2d Sess 24, reprinted in 1988 US Code Cong & Admin News 2185.

2. Application of ORS 197.667

You first ask whether ORS 197.667(1) and (2) violate the FHA and implementing regulations by discriminating or requiring discrimination against people with handicaps. Because these statutes must be read together with ORS 197.667(3), we address your second question at the same time.

ORS 197.667(1)–(3) are part of a statutory scheme, ORS 197.660 through 197.670, enacted to promote housing opportunities for the aged and disabled. The legislature stated the policies underlying these provisions as follows:
"(1) It is the policy of this state that disabled persons and elderly persons are entitled to live as normally as possible within communities and should not be excluded from communities because their disability or age requires them to live in groups;

"(2) There is a growing need for residential homes and residential facilities to provide quality care and protection for disabled persons and elderly persons and to prevent inappropriate placement of such persons in state institutions and nursing homes;

"(3) It is often difficult to site and establish residential homes and residential facilities in the communities of this state;

"(4) To meet the growing need for residential homes and residential facilities, it is the policy of this state

that residential homes and residential facilities shall be considered a residential use of property for zoning purposes * * *."

ORS 197.663(1)–(4).
We must construe ORS 197.667 in light of these expressed policies. ORS 174.020; Wimer v. Miller, 235 Or 25, 30, 383 P2d 1005 (1963) ("effect must be given to the overall policy which [the statute] is intended to promote").

To aid understanding of ORS 197.667 and the source of your questions, it is useful first to examine ORS 197.665. That statute governs siting of residential homes. A "residential home" is a home, licensed by or under the authority of the Department of Human Resources (DHR) under ORS 443.400 to 443.825, which provides residential care for five or fewer individuals who need not be related. ORS 197.660(2).[3] Residential homes must be a permitted use in any residential zone, including residential zones allowing single-family dwellings, and in any commercial zone that allows a single-family dwelling. ORS 197.665(1)(a), (b). Thus, local jurisdictions must allow residential homes anywhere that they allow single-family dwellings. Further, ORS 197.665(2) prohibits cities and counties from imposing "any zoning requirement on the establishment and maintenance of a residential home in a zone described in [ORS 197.665(1) ] that is more restrictive than a zoning requirement imposed on a single-family dwelling in the same zone."

***3** At first glance, ORS 197.667, which governs siting of "residential facilities," may appear not to give equivalent protections to those facilities. A "residential facility" is a facility licensed by or under the authority of DHR under ORS 443.400 to 443.460 providing residential care to six to 15 individuals, who need not be related.[4] ORS 197.667(1) and (2) provide:
"(1) A residential facility shall be a permitted use in any zone where multifamily residential uses are a permitted use.

"(2) A residential facility shall be a conditional use in any zone where multifamily residential uses are a conditional use."

These provisions allow residential facilities, whether providing care to six persons or 15, to be sited as of right in multi-family residential use zones or conditionally in other zones where multi-family residential uses would be a conditional use.

Thus, under ORS 197.665 a "residential home" may be sited as of right in any zone permitting single-family dwellings. In contrast, ORS 197.667(1) and (2), viewed in isolation, require cities and counties to permit "residential facilities" as a matter of right only in zones permitting multi-family residential uses.

So construed, these statutes would allow a city or county to exclude a six-person residential facility from a zone that would permit a six-person family in a single-family dwelling. Consequently, six or more unrelated, handicapped individuals living together in a residential facility could be denied a housing option which would be available to related individuals: living in a single-family zone.

The FHA prohibits state and local laws and regulations that limit housing opportunities for the disabled or that treat them differently from non-disabled individuals. If ORS 197.667(1) and (2) were read in isolation, these statutes would violate or require violation of the FHA. When read together with ORS 197.667(3), however, the statutes are lawful.

ORS 197.667(3) provides:

"A city or county may allow a residential facility in a residential zone other than those zones described in subsections (1) and (2) of this section, including a zone where a single-family dwelling is allowed." (Emphasis added.)

On its face, ORS 197.667(3) merely permits cities and counties to allow residential facilities in any zone where a single-family dwelling is allowed. For three reasons, however, we conclude that this statute must be read to be mandatory rather than merely permissive.

First, this construction of ORS 197.667(3) is consistent with the statutory policy, as stated in ORS 197.663(1)–(4), quoted above. In order to permit disabled persons "to live as normally as possible within communities" and to avoid excluding them from communities "because their disability * * * requires them to live in groups," they must not be denied the option of living in single-family zones because of their disabilities. Construing ORS 197.667(3) as mandatory rather than permissive best effectuates the legislative policy.

***4** Second, we must construe state statutes, whenever possible, to comply with federal law and thus to avoid constitutional infirmity under the Supremacy Clause. See, e.g., State v. Smyth, 286 Or 293, 593 P2d 1166 (1979). To comply with the FHA, ORS 197.667(3) must be read as mandatory. That is, cities and counties must permit residential facilities in single-family zones to the same extent that six or more related family members would be permitted to live in a single-family dwelling in those zones.

Third, when the public or a third person has an interest in the exercise of a discretionary power, the word "may" should be construed to mean "must." Simpson v. Winegar, 122 Or 297, 301, 258 P 562 (1927); 17 Op Atty Gen 643 (1936). The public has an interest in providing housing opportunities for the handicapped equal to those of the non-handicapped. Therefore, local jurisdictions must permit a residential facility in a single-family dwelling zone on the same terms as a single-family dwelling.[5]

This reading of the statute does not prevent cities and counties from adopting and enforcing ordinances necessary to promote health and safety. For example, cities and counties may limit the number of persons who may live in a dwelling in a single-family zone. Such limits would be lawful so long as they are applied uniformly, and not as a mere pretext to discriminate against the handicapped.[6]

In applying ORS 197.667(3), cities and counties also must avoid violating the HUD regulations prohibiting inquiry into handicaps. A potential conflict could arise, for example, under ORS 197.667(4).[7] This statute permits a city or county to require an applicant proposing to site a residential facility within its jurisdiction to supply it with a copy of the facility's state licensing application, except for portions exempt from public disclosure under ORS 192.496 to 192.530. There are nondiscriminatory purposes for which a city or county could seek the licensing application: for instance, to determine if a facility has been licensed, or has a license pending. To avoid violating the regulations, however, cities and counties may not request information specifically concerning the existence, nature or severity of handicaps of those individuals whom the licensing process concerns. Further, to the extent that a licensing application contains information on the handicaps of current or prospective residents, a city or county may not use this information as a factor in any decision under ORS 197.667(3).

3. Discriminatory Application of Zoning Requirements

Our prior discussion also indirectly answers your third question. We already have concluded that a city or county may not apply ORS 197.667 to treat residential facilities differently from single-family dwellings

on the basis of residents' handicaps. For the same reasons, conditions or special use permits applied only to residential facilities would be impermissible.

It is difficult to conceive of an application for a conditional use or special use permit for a residential facility that would not inquire into at least the existence of a disability. This inquiry would violate the HUD regulations. Each subsequent step in a permit process would involve similar potential for a violation. For example, a hearing on a conditional or special use permit application could involve inquiry into the existence of handicaps of intended occupants. The HUD regulations prohibit such inquiry.

***5** In one situation, however, zoning provisions lawfully might be applied to residential facilities only. The FHA arguably would permit a provision that operated solely to benefit the handicapped by making housing opportunities preferentially available to them. Federal law does not bar inquiries into handicaps to ascertain if an applicant qualifies for housing available only to persons with handicaps or particular types of handicaps, or qualifies for a priority available only to the handicapped. These inquiries are allowed if the same questions are asked of all applicants. 24 CFR § 100.202(c)(2)–(3) (1990). One also could argue that a zoning provision increasing housing opportunities for the handicapped would be lawful under the FHA. If, as seems reasonable to conclude, the prohibited inquiry regulations apply only to inquiries aimed at discriminating against the handicapped, implementation of such a zoning provision would not require violating the HUD regulations.

We take this opportunity to address an issue you have not specifically raised. ORS 197.665(2) arguably could be construed to permit limitations to be imposed on residential homes that are not similarly imposed on single-family dwellings in the same zone. That statute provides:
"A city or county shall not impose any zoning requirement on the establishment and maintenance of a residential home in a zone described in subsection (1) of this section that is more restrictive than a zoning requirement imposed on a single-family dwelling in the same zone." (Emphasis added.)

For purposes of these sections, ORS 197.660(3) defines "zoning requirement" as:
"[A]ny standard, criteria, condition, review procedure, permit requirement or other requirement adopted by a city or county * * * which applies to the approval or siting of a residential facility or residential home. A zoning requirement does not include a state or local health, safety, building, occupancy or fire code requirement."

ORS 197.665(2) thus prohibits the imposition of more restrictive zoning requirements on siting of residential homes than are imposed on single-family dwellings in the same zone. One could argue by inference that the statute permits the imposition of more restrictive requirements other than zoning requirements, such as health, safety, building, occupancy or fire code requirements. Under this reading, however, the statute would violate the FHA and this would run contrary to the legislature's intent in enacting ORS 197.660 through 197.670. One of the legislature's primary goals in enacting these provisions was to clarify zoning requirements by consolidating them in ORS chapter 197. The zoning provisions concerning residential homes and facilities had been in ORS chapter 443, which deals with licensing, not siting, of homes and facilities.[8] The split in the definition of "zoning requirement" between zoning requirements and those requirements more normally addressed in licensing provisions was consistent with this goal. In addition, when enacting ORS 197.660 through 197.670, the legislature was aware of and attempting to conform with the FHA.[9] Consequently, we conclude that the legislature did not intend that ORS 197.665(2) permit more restrictive requirements on residential homes than on single-family dwellings.

Conclusion

***6** ORS 197.667, read as a whole, requires cities and counties to permit residential facilities in single-family dwelling zones on the same terms under which they permit single-family dwellings. Under ORS 197.667(3), the only basis upon which a city or county lawfully could refuse to site a residential facility in a single-family zone would be an occupancy limit or other similar restriction applied as well to related family members living together. Any other restriction or limitation that either intentionally or unintentionally has the effect of denying handicapped individuals housing of their choice would violate the FHA. If a city or county discriminates against the handicapped in violation of the FHA, it does so at the risk of fines of up to $50,000 for a first offense. 42 USC § 3610(g)(2)(C) (1988); 42 USC § 3614(d)(1)(C)(i) (1988).

Sincerely,

Donald C. Arnold
Chief Counsel

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