

00-074

HOUSING: VIRGINIA FAIR HOUSING LAW.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

House Bill 908, which allows locality to require special exception or special use permit for three or more persons unrelated by blood, marriage, or adoption residing in single-family dwelling in area zoned for single-family use, would not violate federal or state fair housing law unless applied in discriminatory manner. Whether bill applies to or affects specific piece of property must be decided on case-by-case basis. Incorporation of term "nonprofit" in definition of "residential facility" in Senate Bill 449 creates discriminatory distinction that violates Virginia Fair Housing Law.

The Honorable Frederick M. Quayle
Member, Senate of Virginia
December 8, 2000

You ask whether federal or state fair housing laws affect certain legislation considered by the 2000 Session of the General Assembly. Specifically, you inquire whether federal or state fair housing laws affect House Bill 908¹ or Senate Bill 449,² and whether such bills constitute a regulatory taking of property.

House Bill 908 sought to amend § 15.2-2286(A)(3) of the *Code of Virginia*, relating to zoning and the granting of special exceptions by local governing bodies, by adding the following language:

Nothing in th[e planning and zoning] chapter [of Title 15.2] shall be construed to prevent a locality from requiring a special exception or special use permit^[3] for a use which includes three or more persons unrelated by blood, marriage or adoption residing in a single-family dwelling in an area zoned for single-family use.^[4]

Senate Bill 449 sought to amend § 15.2-2291, relating to zoning of group homes for mentally ill, mentally retarded, developmentally disabled, elderly, or otherwise disabled persons, to distinguish between for-profit and nonprofit group homes for purposes of defining a "residential facility."

The Federal Fair Housing Act was enacted as part of the Civil Rights Act of 1968.⁵ It was amended by the Fair Housing Amendments Act of 1988 ("Federal Act") to extend protection of the Fair Housing Act to handicapped persons.⁶ Likewise, the 1991 Session of the General Assembly recodified the Virginia Fair Housing Law, originally enacted in 1972,⁷ to complement the federal fair housing law to correct practices which denied to certain groups—among them the elderly and the handicapped—equal access to, and benefits from, housing opportunities.⁸ Both the federal and state fair housing laws are remedial in the sense that they seek to suppress the denial of housing opportunities to persons falling within the classifications designated in these laws.⁹ Neither the federal nor the state fair housing laws are intended to be land use or zoning statutes.

While zoning statutes that are facially neutral and otherwise constitutional enjoy a presumption of validity,¹⁰ the application of a particular zoning law may be challenged when it is applied in a manner that violates the federal or state fair housing law. With respect to House Bill 908, which allows a locality to require a special exception or special use permit for three or more persons unrelated by blood, marriage, or adoption residing in a single-family dwelling in an area zoned for single-family use, such bill appears facially neutral since it applies to all unrelated persons as described in the bill. If, however, in practice, it is applied only to housing for unrelated persons with disabilities, such application would appear to be discriminatory. Thus, the amendment proffered in House Bill 908 is not affected by the fair housing laws unless it is applied, in fact, in a discriminatory manner.

With respect to whether the proposed legislation could be considered a regulatory taking of property, the Taking Clause of the Fifth Amendment to the Constitution of the United States applies not only to a physical deprivation of property but also to regulations of property.¹¹ The Taking Clause is violated when land use regulations do not substantially advance legitimate state interests, or they deny an owner the economically viable use of his land.¹² A zoning regulation which does not in its terms arbitrarily discriminate, however, will not be declared unconstitutional, except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation.¹³ The zoning amendment in House Bill 908 does not in its terms arbitrarily discriminate among those properties which are subject to it nor does it deprive an owner the economically viable use of his land. Accordingly, it is my opinion that there is no clear conflict between the amendment and any federal or state law. Again, whether it applies to or affects a specific piece of property must be decided on a case-by-case basis.

Regarding Senate Bill 449 and its proposed amendment to § 15.2-2291 to change the current definition of a "residential facility" from "any group home or residential facility in which aged, infirm or disabled persons reside" to "any *nonprofit* group home or *other nonprofit* residential facility,"¹⁴ it is my opinion that such an amendment violates the Virginia Fair Housing Law.

Clearly, it is the policy of the Commonwealth, as expressed in the Virginia Fair Housing Law, "to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of ... handicap, and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons."¹⁵ Nothing in the Virginia Fair Housing Law distinguishes between a nonprofit and a for-profit group home or residential facility.¹⁶ To incorporate such a distinction in § 15.2-2291, which seeks to implement the Virginia Fair Housing Law, would result in a direct conflict with the legislative intent of the law.¹⁷

¹House Bill 908 was introduced and referred to the Committee on Counties, Cities and Towns on January 24, 2000, but was defeated in committee on February 12, 2000.

²Senate Bill 449 was introduced and referred to the Committee on Local Government on January 21, 2000. The bill was continued to the 2001 Session of the General Assembly.

³"*Special exception*' means a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." Section 15.2-2201.

⁴2000 H.B. 908, *supra* note 1.

⁵See Pub. L. No. 90-284, Tit. VIII, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. ch. 45, §§ 3601-3619, 3631 (1994 & Supp. III 1997)).

⁶See Pub. L. No. 1

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00-430, Tit. VIII, § 9, 102 Stat. 1619, 1635 (1988) (current version at 42 U.S.C. § 3631 (1994 & Supp. III 1997)).

⁷See 1991 Va. Acts ch. 557, at 979 (repealing Chapter 5 of Title 36, §§ 36-86 to 36-96, and adding in Title 36 Chapter 5.1, §§ 36-96.1 to 36-96.23).

⁸1992 Op. Va. Att'y Gen. 123, 124.

⁹*Id.* at 124-25.

¹⁰See, e.g., 1983-1984 Op. Va. Att'y Gen. 475 (determining validity of city council's adoption of floodplain regulations with some restrictive effect on property development).

¹¹The Taking Clause provides that "private property [shall not] be taken for public use, without just compensation."

¹²See *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); see also *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 295-96 (1981).

¹³1983-1984 Op. Va. Att'y Gen., *supra* note 10, at 477.

¹⁴2000 S.B. 449, *supra* note 2 (quoting § 5.2-2291(C)).

¹⁵Section 36-96.1(B).

¹⁶*Compare* 1982-1983 Op. Va. Att'y Gen. 265, 268 (concluding that definition of "facility," as used in Interstate Compact on the Placement of Children, does not distinguish between private and public residential facilities, and thus, "facility," as used in Compact, refers to all facilities otherwise includable).

¹⁷*Compare* § 36-96.6(D) (noting that "group home in which physically handicapped, mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family when construing any restrictive covenant which purports to restrict occupancy") *with* § 15.2-2291(A) (providing that "[z]oning ordinances for all purposes shall consider a residential facility in which no more than eight mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, as residential occupancy by a single family").