



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 89- 99

Robert L. Earnest  
Russell City Attorney  
P.O. Box 72  
410 North Main Street  
Russell, Kansas 67665

Re: Cities and Municipalities--Planning and Zoning;  
Group Homes--Group Homes, Exclusion of, Prohibited;  
Conditions; Special or Conditional Use Group Home  
Permit; Validity Under the Fair Housing Amendments  
Act of 1988

Synopsis: Where a special use permit is not required for  
single family dwellings of similar size, a city  
ordinance which requires the issuance of a special  
use permit as a condition precedent to locating a  
"group home" (as that term is defined in K.S.A.  
1988 Supp. 12-736, as amended by L. 1989, ch. 58,  
§1) in a residential district violates subsection  
(f)(1) of 42 U.S.C. §3604, as amended by the Fair  
Housing Amendments Act of 1988, P.L. 100-430, 102  
Stat. 1619. Accordingly, such an ordinance, and  
the provisions of K.S.A. 1988 Supp. 12-736(e), as  
amended by L. 1989, ch. 58, §1, which authorize  
such municipal legislation, are invalid under 42  
U.S.C. §3615. Cited herein: K.S.A. 1988 Supp.  
12-736, as amended by L. 1989, ch. 58, §1; 42 U.S.C.  
§§3604, 3615; P.L. 100-430, 102 Stat. 1619.

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Dear Mr. Earnest:

You request our opinion as to whether the portion of subsection (e) of K.S.A. 1988 Supp. 12-736, as amended by L. 1988, ch. 58, §1 which states that "group homes" may be required by municipalities to procure a special use permit has been voided by virtue of the Fair Housing Amendments Act of 1988, P.L. 100-430, 102 Stat. 1619.

Subsection (b)(1) of K.S.A. 1988 Supp. 12-736, as amended defines the term "group home," with subsection (e) providing as follows:

"(e) Except as hereinafter provided, no municipality shall prohibit the location of a group home in any zone or area where single family dwellings are permitted. Any zoning ordinance, resolution or regulation which prohibits the location of a group home in such zone or area in violation of this act is invalid. Notwithstanding the provisions of this act, group homes may be required to procure a special or conditional use group home permit and shall be subject to all other regulations applicable to other property located in the zone or area that are imposed by any municipality through its building regulatory codes, subdivision regulations, special or conditional use group home permit regulations or other nondiscriminatory regulations. For the purpose of preserving the single family residential character of the area, the governing body of the municipality may require the physical structure of the group home to be generally compatible with other physical structures in the surrounding neighborhood. In order to avoid excessive concentration of group homes, from and after the effective date of this act, no such group home may be located within 1,000 feet of another such group home in areas zoned exclusively for single family dwellings, unless the governing body of the municipality approves a closer location by a majority vote thereof. A special or conditional

use group home permit shall be issued upon a determination by the governing body of the municipality that the establishment of the group home is in compliance with the provisions of this section." (Emphasis added.)

The Fair Housing Amendments Act of 1988, (F.H.A.A.), P.L. 100-430, 102 Stat. 1619, extends the provisions of the Fair Housing Act of 1968 to handicapped persons. The term "handicap" is defined as follows:

"'Handicap' means with respect to a person --

"(1) a physical or mental impairment which substantially limits one or more of such persons major life activities,

"(2) a record of having such an impairment, or

"(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

Section 6 of the 1989 law amends subsection (f)(1) of 42 U.S.C. §3604 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 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 buyer or renter." (Emphasis added.)

The legislative history of the above-quoted 1989 law makes it clear that Congress intended to prohibit local zoning laws which discriminate against persons with handicaps:

"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, 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 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.

"Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land use in a manner which discriminates against people with disabilities. Such discrimination often

results from false or over protective assumptions about the needs of handicapped people as well as unfounded fears of difficulties about the problems that their tendencies may pose. These and similar practices would be prohibited." House of Representatives Report 100-711, 100th Congress, 2d session, p. 24.

Additionally, section 8 of the F.H.A.A. provides for enforcement by the United States Attorney General where the legality of any state or local zoning or other land use law or ordinance is called into question, and the enforcing federal agency (the Department of Housing and Urban Development) has indicated that "the act is intended to prohibit the application of restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [handicapped] individuals to live in the residence of their choice in the community." (54 Federal Register 3246).

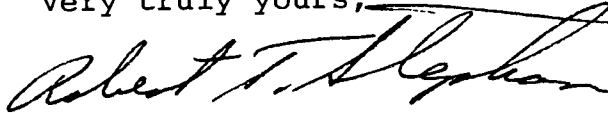
Finally, the Fair Housing Act provides that "any law of a state, political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. §3615.

In regard to the validity of K.S.A. 1988 Supp. 12-736, as amended, under the federal act, it is apparent that the requirement of a special use permit may "otherwise make unavailable or deny, a dwelling" to a handicapped person. Thus, where a special use permit is not required for single family dwellings of similar size, it is our opinion that a city ordinance which requires the issuance of a special use permit as a condition precedent to locating a "group home" (as that term is defined in K.S.A. 1988 Supp. 12-736, as amended by L. 1989, ch. 58, §1) in a residential district violates 42 U.S.C. §3604, as amended by the Fair Housing Amendments Act of 1988, P.L. 100-430, 102 Stat. 1619. Accordingly, such an ordinance, and the provisions of K.S.A. 1988 Supp. 12-736(e), as amended by L. 1989, ch. 58, §1 which authorize such municipal legislation, are invalid under 42 U.S.C. §3615.

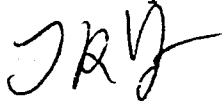
Although you have not requested an opinion regarding the same, we are impelled to note that the requirement that no group home be located within 1,000 feet of another group home in areas zoned exclusively for single family dwellings also appears to violate subsection (f)(1) of 42 U.S.C. §3604, as

amended. Accordingly, we would urge the Kansas Legislature to repeal that prohibition and other offending portions of subsection (e) of K.S.A. 1988 Supp. 12-736, as amended.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:JLM:TRH:jm