STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 18, 2014

Opinion No. 14-85

Validity of Restrictions on Licensure of Facilities Housing Persons with Disabilities

QUESTIONS

1. Does Tenn. Code Ann. § 33-2-418, which restricts the licensure of certain residential facilities that house persons with intellectual or developmental disabilities, facially violate any provision of the state or federal constitutions?

2. Does Tenn. Code Ann. § 33-2-418 violate any provision of the state or federal constitutions when used to prohibit licensure for any facility that houses more than four (4) individuals with intellectual or developmental disabilities?

3. Does Tenn. Code Ann. § 33-2-418 violate any provision of the state or federal constitutions when used to prohibit licensure of more than two facilities housing persons with intellectual or developmental disabilities within 500 yards from other such facilities?

OPINIONS

1. It is unlikely that Tenn. Code Ann. § 33-2-418 would be found to be facially unconstitutional.

2 and 3. Depending upon the specific circumstances in which it may be applied, Tenn. Code Ann. § 33-2-418 is defensible but could be susceptible to a challenge under the federal Fair Housing Amendments Act, 42 U.S.C. §§ 3601 to 3619, or to an as-applied constitutional challenge.

ANALYSIS

1. The State of Tennessee licenses residential facilities that provide services to persons with intellectual or developmental disabilities pursuant to Title 33, Chapter 2, of the Tennessee Code. Tenn. Code Ann. § 33-2-418 imposes specific limitations on the licensure of residential facilities for intellectually and developmentally disabled persons. Under this statute, and subject to certain exceptions, no license may be issued to a residential facility that houses more than

four disabled persons,[1] nor may a license be issued for more than two residential facilities within 500 yards in any direction from other such facilities. *Id.* § 33-2-418(a).

Acts of the General Assembly are presumed constitutional, and this presumption applies with greater force when a statute's facial validity is challenged. *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). A statute is facially constitutional unless no set of circumstances exists under which the statute as written would be valid. *Waters v. Farr*. 291 S.W.3d 873, 882 (Tenn. 2009). Tenn. Code Ann. § 33-2-418 places specific restrictions on licensure for residential homes providing services to disabled persons that do not apply to residential homes for non-disabled persons. The primary challenge to a law that imposes restrictions on one group of citizens that differ from restrictions on other groups would be one alleging a denial of equal protection, and both the Fourteenth Amendment to the United States Constitution and Article XI, § 8, of the Tennessee Constitution guarantee to citizens the equal protection of the laws. *See Brown v. Campbell Cnty Bd. of Educ.*, 915 S.W.2d 407, 412 (Tenn. 1995). These provisions "confer essentially the same protection upon the individuals subject to those provisions" by guaranteeing that "all persons similarly circumstanced shall be treated alike." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W. 2d 139, 152-53 (Tenn. 1993) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

Because of the similarities between the federal and state equal-protection provisions, Tennessee courts utilize the same framework developed by the United States Supreme Court for analyzing equal-protection claims. Under this framework, unless a legislative classification interferes with a fundamental right or adversely affects a suspect class, the classification is subject to rational-basis review. *Caudill v. Foley*, 21 S.W.3d 203, 211 (Tenn. Ct. App. 1999). "Under rational basis scrutiny, a legislative classification will be upheld if a reasonable basis can be found for the classification or if any set of facts may reasonably be conceived to justify it." *Id.* The United States Supreme Court has declined to recognize the intellectually or developmentally disabled as a suspect class or a quasi-suspect class, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985), so rational-basis review applies to such a classification, *id.*

In *Cleburne*, the Supreme Court struck a local zoning ordinance, as applied to the facts in the case, as a violation of the Equal Protection Clause. 473 U. S. at 450. The ordinance required all group homes for intellectually disabled persons to obtain a special-use permit to operate in an R-3 zone. The Court found that the city lacked a rational purpose for requiring a special-use permit for these group homes when it did not require such permits for apartment houses, boarding and lodging houses, fraternity or sorority houses, dormitories, hospitals, nursing homes for convalescents or the aged, private clubs, or other uses. *Id.* at 448. While the Court acknowledged that the intellectually disabled as a group are indeed different from others not

[1] This restriction does not apply if the facility was licensed as of June 23, 2000.

sharing their misfortune, it found this difference to be largely irrelevant for zoning purposes, unless the particular group home and its occupants would threaten legitimate interests of the city in a way that the other permitted uses would not. But the Court determined that "the record does not reveal any rational basis for believing that the [proposed] home would pose any special threat to the city's legitimate interests." *Id.* at 448.

Tenn. Code Ann. § 33-2-418 does not require local approval of special-use permits for residential facilities housing persons with intellectual or developmental disabilities; it instead restricts the licensure of such facilities on the basis of the number of persons served and on the basis of the facility's location relative to the location of other such facilities. One can conceive of a rational basis for such occupancy and spacing restrictions; the State has an interest in deinstitutionalizing those with intellectual or developmental disabilities and integrating them into the community by licensing residential facilities that approximate single-family living situations. *See, e.g.*, *Larkin v. Mich. Dep't of Social Servs.*, 89 F.3d 285, 291 (6th Cir. 1996) (recognizing that "deinstitutionalization is a legitimate goal for the state to pursue").[2] It is therefore unlikely that Tenn. Code Ann. § 33-2-418 would fall to a facial equal-protection challenge.

2 and 3. Tenn. Code Ann. § 33-2-418 could, however, be susceptible to challenge under the federal Fair Housing Amendments Act ("FHAA"), 42 U.S.C. §§ 3601 to 3619, or to an as-applied equal-protection challenge, depending upon the specific circumstances in which the state statute may be applied. The FHAA prohibits both intentional discrimination against and the failure to make reasonable accommodation for the handicapped. 42 U.S.C. § 3604(f)(1)(B), (3)(B).

In *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781 (6th Cir. 1996), the United States Court of Appeals for the Sixth Circuit considered a challenge under the FHAA to the application of a Michigan statute that permitted operation of Adult Foster Care ("AFC") residential facilities ("AFC") for six or fewer residents in all residential zones statewide.[3] The statute further provided that an AFC home may house more than six residents only with the approval of the local municipality. The plaintiff, a for-profit AFC, sought and was denied approval by the city to house 12 disabled adults in a residential zoning area; the plaintiff challenged the refusal on

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[2] *But see infra* note 5. *Larkin* was decided seven years after this Office issued Tenn. Att'y Gen. Op. 89-040 (Mar. 29, 1989), which addressed the legislation that would become Tenn. Code Ann. § 33-5-105 (now § 33-2-418). *See* 1989 Tenn. Pub. Acts, ch. 504. In that 1989 opinion, the Office likewise concluded that the legislation's occupancy restriction, which at that time was eight persons, must satisfy the rational-basis test, but it could not identify a legitimate interest furthered by the restriction.

[3] AFC homes provide 24-hour care to dependent adults, and the AFC home at issue in this case specialized in care for elderly disabled persons who were suffering from dementia and other ailments. *Id.* at 785.

the grounds that the city had intentionally discriminated and had failed to make a reasonable accommodation. *Id.* at 786.

The Sixth Circuit determined that the city's refusal to approve an override of the six-resident limitation in this instance amounted to a failure to make a reasonable accommodation. *Id.* at 795. While the court considered it reasonable to place a limitation on the number of residents, it found that enforcing the six-person limit in this case would render the facility unviable and reduce the opportunity for the elderly disabled to reside in a residential neighborhood. *Id.* at 796. Relying on the expert proof that it was not economically feasible for AFC homes to operate with fewer than nine residents, the court held that the city must accommodate the disabled by permitting AFC homes to operate with nine or fewer elderly residents. *Id.* at 797.[4]

In *Larkin v. Michigan Dep't of Soc. Servs.*, 89 F.3d 285 (6th Cir. 1996), the Sixth Circuit considered a challenge to another part of the same Michigan statute, which prohibited licensure of an AFC residential facility if another state licensed residential facility exists within the 1,500-foot radius of the proposed location, unless permitted by local zoning ordinance, or if the issuance of the license would contribute to an excessive concentration of state-licensed residential facilities within the city or village. *Id.* at 287. The plaintiff sought to operate an AFC facility but was denied a license because the city refused to waive the spacing requirement.

The Sixth Court found the spacing restriction to be facially discriminatory because it applied only to AFC facilities that house the disabled and not to other living arrangements. *Id.* at 290. The restriction could thus survive the FHAA challenge only if the state could demonstrate that the restriction was "warranted by the unique and specific needs and abilities of those handicapped persons" to whom the regulations apply. *Id.* Michigan argued that the 1,500-foot spacing requirement was intended to integrate the disabled into the community, prevent clustering, and promote deinstitutionalization of the disabled, *id.*, but the court determined that the state had not met its burden—it had not shown how the special needs of the disabled warranted intervention to ensure that they were integrated, and it had not explained how the 1500-foot spacing restriction fostered deinstitutionalization. *Id.* at 291-92.[5] Consequently, the court held that the spacing restriction violated the FHAA and was thus pre-empted by it. *Id.* at 292. Because of this holding, the court did not reach the plaintiffs' equal-protection claims.

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[4] The court expressly rejected the proposition, though, that it was necessary to require the permitting of AFC homes to operate with 12 residents in order to provide the elderly disabled an equal housing opportunity. *Id.*

[5] The court observed that the interest in integration cannot justify quotas and that the State must demonstrate how deinstitutionalization is fostered without unduly limiting housing for the disabled. *Id.*

The court stressed in *Larkin* that it "in no way mean[t] to intimate that the FHA, as amended by the FHAA, prohibits reasonable regulation and licensing procedures for AFC facilities." *Id.* The restrictions at issue in *Smith & Lee* and *Larkin* differ from those in Tenn. Code Ann. § 33-2-418; indeed, Tennessee's distance requirements are less restrictive than those in *Larkin* and are likely more defensible. But those case do suggest that certain applications of the Tennessee restrictions could be susceptible to challenge under the FHAA.

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