



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

TELEPHONE
(208) 334-2400

JIM JONES
ATTORNEY GENERAL

January 22, 1985

The Honorable Norma Dobler
State Senator, District 5
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND
IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Restrictive Covenants

Dear Senator Dobler:

You have asked whether a restrictive covenant among a group of landowners in a subdivision is enforceable in Idaho. According to your letter, the proposed restrictive covenant limits lot usage to:

. . . residential purposes and by a family of one (1) or more persons related by blood, marriage or adoption or a group of not more than six (6) persons not related by blood or marriage, living together as a single house-keeping unit.

In addition, it would exclude any:

. . . commercial establishment, hospital, sanitarium, place for institutional care or treatment of the sick or disabled, physically or mentally, or mobile home.

It is our opinion that a restrictive covenant of this nature may face insurmountable hurdles in the areas of property law, constitutional law and public policy and thus could prove unenforceable in Idaho.

ANALYSIS.

I. Property Law Considerations

As a general principle, restrictive covenants among property owners are enforceable in Idaho. Ada County Highway Dist. v. Magwire, 104 Idaho 656, 662 P.2d 237 (1983); Twin Lakes Improvement Ass'n v. East Greenacres Irrigation Dist., 90 Idaho 281, 409 P.2d 390 (1965); Payette Lakes Protection Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948).

On the other hand, restrictive covenants are not favored because they act as a burden on the free use and alienability of property. Consequently, courts will construe such covenants narrowly. Campbell v. Glacier Park Co., 381 F.Supp. 1243 (Id. 1974). Thus, if there are any defects in the creation of the covenant or any ambiguities in its wording it will not be enforced.

According to your letter, the proposed restrictive covenant will be an amendment to the existing subdivision covenants. Such amendments are enforceable if the original covenants provide a mechanism for amendment. However, the amendment mechanism must be meticulously carried out: the required number of property owners must agree; the amendment must cover all of the lots covered by the original covenants; and the revised covenants must be properly recorded. Annot: "Validity, Construction and Effect of Contractual Provisions Regarding Future Revocation or Modification of Covenant Restricting Use of Real Property," 4 ALR3d 570 (1965). The Idahonian of December 8, 1984, indicates that not all property owners have agreed to the amendments. If that is so, the proposed covenant may not be enforceable. We do not have a copy of the original covenants to determine whether the conditions for amendment have been met.

The earliest court cases dealing with this subject have construed covenant language narrowly and have generally allowed group homes in residential neighborhoods. In Costley v. Caromin House, Inc., 313 N.W.2d 21 (1981), the Minnesota Supreme Court summarized the reasons adopted by various courts for treating residents of a group home as a "family" when covenants permit only "single-family" dwellings:

From the outside, the home looks like all the other single-family homes in the neighborhood. The residents live in a family-type setting and call the dwelling their home. Courts in other jurisdictions have found similar group homes in compliance with single-family restrictive covenants. State ex rel. Region II Child & Family Services, Inc. v. District Court of the Eighth Judicial District, 609 P.2d 245 (Mont. 1980) (five retarded children; one unit single-family dwelling); Bellarmino Hills Ass'n v. Residential Systems Co., 84 Mich.App. 554, 269 N.W.2d 673 (1978) (six retarded children; one single private family dwelling); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976) (eight to twelve multihandicapped children under age nine; one dwelling house). Factors considered by the courts include the single housekeeping structure, the relatively permanent type of living situation, and public policy supporting such living arrangements--all factors applicable to Caromin House.

313 N.W.2d at 27.

The Minnesota Supreme Court likewise held that the group home for retarded adults did not violate a covenant banning "commercial" usage simply because the home was compensated for its services. The court found support for this holding in J.T. Hobby and Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981) (receipt of money by group home for four retarded adults does not violate covenant restricting use to residential purposes and one single-family dwelling); and Crowley v. Knapp, 94 Wis.2d 421, 288 N.W.2d 815 (1980) (for-profit group home for retarded adults complies with covenant restricting use to single-family dwelling used for residential purposes only). Only one case has been found where a covenant restricting use to "single family dwellings" has been enforced to ban group homes for mentally retarded adults. See Omega Corp. of Chesterfield v. Malloy, 319 S.E.2d 728 (Va. 1984).

In reading covenants to allow group homes within the definition of a "single family dwelling," courts frequently take their cues from state zoning statute language. As you note in your letter, the Idaho legislature has already decreed that a "single family dwelling" shall include "any home in

which eight (8) or fewer unrelated mentally and/or physically handicapped persons reside," and that such a home shall constitute a "residential use" for local zoning purposes. Idaho Code §§ 67-6530 through 67-6532. Thus, it seems likely that the proposed covenant restricting usage to "a single housekeeping unit" could not be interpreted to ban a group home. Furthermore, a court might conclude that a covenant restricting any "place or institution for care or treatment of the sick or disabled, physically or mentally" would be unenforceable in Idaho because such homes have been expressly designated by the legislature as "alternatives to institutionalization." Idaho Code § 39-4604(h).

We assume, however, that you are not simply interested in whether loopholes can be found in a proposed covenant but whether any restrictive covenant attempting to ban group homes from residential neighborhoods could prove enforceable in Idaho. The remainder of this opinion addresses the broader question.

II. Constitutional Considerations

Two federal circuit courts have recently overturned local zoning ordinances that exclude from residential neighborhoods group homes for retarded adults or for former mental patients. In Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191 (1984), the Fifth Circuit held that mentally retarded persons are a "quasi-suspect" class because they have been "subjected to a history of unfair and often grotesque mistreatment; . . . subjected to ridicule. . . and derision; . . . relegated to a position of political powerlessness; . . . [whose] condition is immutable." 726 F.2d at 196-198. As such, zoning ordinances that discriminate against this class must be subjected to "heightened scrutiny" because they "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 2394-95 n. 14, 72 L.Ed.2d 786 (1982). The Fifth Circuit concluded that a zoning ordinance excluding group homes for mentally retarded adults in an "apartment house district" was unconstitutional on its face as violating the Equal Protection Clause of the fourteenth amendment to the United States Constitution.

The Ninth Circuit reached a similar conclusion, under similarly heightened scrutiny, with regard to a zoning ordinance that discriminated against a group home for mentally retarded adults in a "residential" area. J.W. v. City of Tacoma, Wash., 720 F.2d 1126 (1983).

Little purpose would be served by additional discussion of this question. The Cleburne case is now before the U.S. Supreme Court. If the Court holds that the mentally retarded form a "quasi-suspect" class and that zoning ordinances that discriminate against them violate the fourteenth amendment, then discriminatory restrictive covenants would likewise prove unenforceable. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

It should be noted, however, that the converse need not be true. Even if the Supreme Court holds that the mentally retarded do not form a "quasi-suspect" class, lower courts could still find that discriminatory zoning ordinances are unconstitutional because they do not serve any "rational" purpose at all. The State of Pennsylvania has urged the U.S. Supreme Court to adopt precisely such an approach--which is significant because Pennsylvania was the prevailing party in a recent Supreme Court case that deferred to the "reasonable" judgment of qualified professionals in dealing with care of mentally retarded patients involuntarily committed to a state institution. See Youngberg v. Romeo, 457 U.S. 307 (1982).

III. Public Policy Considerations

The final obstacle to enforcement of a restrictive covenant such as the one outlined in your letter is the fact that state courts, completely apart from constitutional considerations, have found such covenants unenforceable on public policy grounds. In doing so, some courts have relied upon declarations of legislative intent found in zoning statutes similar to the Idaho statutes you quote in your letter. Idaho Code §§ 67-6530 et seq.

It could be argued that these statutes, by their own terms, apply solely to zoning and other local ordinances and restrictions and have no persuasive value in determining public policy regarding private restrictive covenants. The Michigan Court of Appeals rejected this argument:

The fact that a zoning statute limits its declaration of policy to zoning does not lessen to any degree the policy of this state to protect and foster facilities for the mentally handicapped.

McMillan v. Iserman, 327 N.W.2d 559, 563 (Mich.App. 1983).

The New York Court of Appeals has recently held that a statute preventing discrimination against group homes by "local laws and ordinances" was a sufficiently clear indication of public policy to prevent discrimination by private restrictive covenants as well. In so doing, the court held that:

even if use of the property violates the restrictive covenant, that covenant cannot be equitably enforced because to do so would contravene a longstanding public policy favoring the establishment of such residences for the mentally disabled.

Crane Neck Ass'n v. N.Y. City/Long Island County Services Group et al., 472 N.Y.S.2d 901, 904 (1984).

The legislative policy in Idaho favoring deinstitutionalization and community living for retarded citizens is also clear. See Idaho Developmental Disabilities Services and Facilities Act, Idaho Code §§ 39-4601 et seq.; Respite Care Services Act, Idaho Code §§ 39-4701 et seq.; and Personal Care Services Act, Idaho Code §§ 39-A4701 et seq.

Finally, as the author of the leading article on this matter observes, the legislature "could relieve the courts from having to determine whether these restrictive covenants violate public policy by enacting specific statutes." Guernsey, "The Mentally Retarded and Private Restrictive Covenants," 25 William and Mary Law Review, 421, 455 (1984). Four states (California, Indiana, North Carolina and Wisconsin) have adopted such statutes. The statutes routinely provide that the licensing process address such legitimate concerns as the size and outward appearance of the structure, the number of residents allowed in the group home and care to avoid a concentration of such units in a single neighborhood.

Conclusion

Restrictive covenants limiting property use to a "single housekeeping unit" have been narrowly construed by the courts to permit group homes for the mentally retarded in residential neighborhoods. Similarly, a covenant banning any "place for institutional care" of the mentally retarded might not be construed to ban group homes--because the Idaho legislature has found that such homes are "alternatives to institutionalization." Covenants that expressly aim to exclude such homes face severe constitutional problems even under the lowest level of court scrutiny. Finally, state courts that have addressed the

The Honorable Norma Dobler
January 22, 1985
Page 7

question have found such covenants to be unenforceable on public policy grounds. Against this background, it is our opinion that a restrictive covenant banning group homes from residential neighborhoods would probably be unenforceable in Idaho.

Cordially,



JOHN J. McMAHON
Chief Deputy

JJM/cjm