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In reply, please refer to:
File:

Senate Committee on Human Services and Public Housing

SB 2930, RELATING TO ADULT RESIDENTIAL CARE HOMES
SB 2793, RELATING TO ADULT RESIDENTIAL CARE HOMES

Testimony of Chiyome Leinaala Fukino, M.D.
Director of Health

February 7, 2008
1:15 p.m.

Department's Position: The Department of Health would like to share some comments and concerns with the proposed legislation.

Fiscal Implications: Current licensing process expenditures would remain unchanged.

Purpose and Justification: The Department of Health continues to hear concerns from a number of communities regarding the location of group living facilities, including Adult Residential Care Homes (ARCHs), within their neighborhoods. We appreciate the intelligent and honest discussion on these issues that are so difficult to adjudicate. We have not found absolute answers to many of the community concerns, but we must make certain the State does not run afoul of the Federal Fair Housing Act, which is part of Title VIII of the Civil Rights Act of 1968. The fears and concerns of communities often stem from lack of information and/or misinformation. Many group living facility owners/operators do speak with members of the community and do want to be good neighbors. Others, unfortunately, feel they have no obligation to do so.

Many look to the Department of Health to oversee the entire process of group living facility placement because we license and/or certify health care settings. However, we have no jurisdiction over zoning, land use ordinances, or general placement of any of these settings. Our licensure and oversight

is provided for in Hawaii Administrative Rules Title 11 Chapter 100.1 which addresses the health, welfare and safety of the clients or patients in these settings.

Location and proximity issues are dictated by the Hawaii Revised Statutes section 46-4 and the Federal Fair Housing Act. The main concern expressed by some government officials and neighborhood residents that this measure attempts to address is that certain jurisdictions or particular neighborhoods within a jurisdiction may come to have more than their "fair share" of group homes. Some state and local governments have tried to address this concern by enacting laws requiring that group homes be at a certain minimum distance from one another. The Department of Justice and the Department of Housing and Urban Development take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act.

Thank you for the opportunity to testify.

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:
S.B. No. 2930, RELATING TO ADULT RESIDENTIAL CARE HOMES.

BEFORE THE:
SENATE COMMITTEE ON HUMAN SERVICES AND PUBLIC HOUSING
DATE: Thursday, February 7, 2008 **TIME:** 1:15 PM
LOCATION: State Capitol, Room 016
Deliver to: Committee Clerk, Room 226, 1 copy

TESTIFIER(S): Mark J. Bennett, Attorney General
or Andrea J. Armitage, Deputy Attorney General

Chair Chun Oakland and Members of the Committee:

The Attorney General opposes this bill because it violates federal law.

The bill amends section 321-15.6, Hawaii Revised Statutes (HRS), to require the Department of Health (DOH) to adopt rules to prohibit the licensing of both type I and type II adult residential care homes (ARCHs) that are within 1,000 feet of another ARCH or group living facility. Up to six residents are allowed in a type I ARCH and up to eight residents are allowed in a type II ARCH. ARCH residents are typically persons with mental illnesses, elders, and persons with disabilities. The homes are usually single family residences in residential neighborhoods.

This bill would violate the federal Fair Housing Amendments Act of 1988 (FHAA), codified in 42 U.S.C. sections 3601 to 3631. The FHAA prohibits discrimination against persons with any "handicap" (now referred to as a "disability"). This is defined very broadly to mean any person who has "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment . . . ." 42 U.S.C. §3602(h). The FHAA's purposes include ending segregation of the housing available

to people with disabilities and giving people with disabilities the right to choose where they wish to live.

Both the United States Department of Justice (DOJ) and the United States Department of Housing and Urban Development (HUD) have determined that the FHAA applies to state and local zoning and licensing laws, and both departments take an active role in enforcing the FHAA. Because of the great amount of litigation in this area over the years and across the country, the federal government issued a "Joint Statement of the Department of Justice and the Department of Housing and Urban Development: Group Homes, Local Land Use, and the Fair Housing Act." It is very informative and can be found in its entirety at:

http://www.usdoj.gov/crt/housing/final8_1.htm

It directly addresses the issue of state and local governments enacting laws requiring a minimum distance between group homes. It states:

> **Q. When, if ever, can a local government limit the number of group homes that can locate in a certain area?**
>
> A concern expressed by some local government officials and neighborhood residents is that certain jurisdictions, governments, or particular neighborhoods within a jurisdiction, may come to have more than their "fair share" of group homes. There are legal ways to address this concern. The Fair Housing Act does not prohibit most governmental programs designed to encourage people of a particular race to move to neighborhoods occupied predominantly by people of another race. A local government that believes a particular area within its boundaries has its "fair share" of group homes, could offer incentives to providers to locate future homes in other neighborhoods.
>
> However, some state and local governments have tried to address this concern by enacting laws requiring that group homes be at a certain minimum distance from one another. The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the Fair Housing Act. We also believe, however, that if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities

and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.

The federal government, and the federal and state courts have nearly unanimously found that distance requirements between housing for persons with disabilities, persons suffering from mental illness, and elderly persons violate the FHAA. Some of these cases are:

1. Larkin v. State of Michigan Department of Social Services, 80 F.3d 285 (6th Cir. 1996), wherein the U.S. Circuit Court of Appeals for the Sixth Circuit held that the FHAA preempts spacing and notice requirements and struck down a statute that prohibited an adult foster care home with four handicapped adults from locating within 1,500 feet of another group living facility.
2. Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002), wherein the U.S. Circuit Court of Appeals for the Seventh Circuit held that denying a zoning variance to operate a community living facility for brain injured and developmentally disabled persons that was within 2,500 feet of another community living facility violated the FHAA. It cited Larkin above.
3. U.S. v. Village of Marshall, Wisconsin, 787 F. Supp. 872 (W.D. Wis. 1991), wherein the U.S. District Court held that prohibiting a group residential facility for up to six persons suffering from mental illness from locating within 1,619 feet of an existing group facility as being in violation of a statute that required 2,500 feet between group living facilities, violated the FHAA.

4. Horizon House Developmental Services v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992), wherein the U.S. District Court held an ordinance to be invalid as violating the Equal Protection Clause of the U.S. Constitution and the FHAA. The facts in this case involved the request for two group homes of three mentally retarded residents each to be located 800 feet apart, in violation of a law that required 1,000 feet between group living facilities. The Court in this case cited a number of Attorney General Opinions across the country in support of its decision. Those opinions were from Maryland, Delaware, Kansas, and North Carolina. Id. at page 694, fn. 4.

5. U.S. v. City of Chicago Heights, 161 F. Supp. 2d 819 (N.D. Ill. 2001), wherein the U.S. District Court held that denying a request for a special use permit for a group home for persons with mental illness due to a zoning law requiring 1000 feet between "community family residences," violated the FHAA. This case is very thorough in its analysis. The court stated: "This court agrees that community opposition is not relevant to the issue of reasonable accommodation, and therefore, cannot and will not consider that evidence in ruling on the Government's motion for summary judgment." Id. at 831.

6. Tellurian U.C.A.N., Inc. v. Village of Marshall, Wisconsin, 178 Wis.2d 205, 504 N.W.2d 342 (1993), wherein the Wisconsin Court of Appeals held that the FHAA required that the government make an exception to the law prohibiting community living arrangements from locating within 2,500 feet of another community living arrangement, and allow a home for ten elderly people to locate within that distance of another facility. To not give the exception would be to fail to make a reasonable accommodation for persons with disabilities in violation of the FHAA.

Given the opinion of the DOJ and HUD, and the plethora of cases filed against states or local governments by the federal government that find similar distance requirements as proposed in S.B. No. 2930 as violative of the FHAA, we respectfully oppose this bill. We request that this bill be held.