

SB 3052

Measure Title: RELATING TO ADULT RESIDENTIAL CARE HOMES.

Report Title: Type II Adult Residential Care Homes; License; Notice to Public; Informational Hearing; Notice to County

Description: Requires facilities that are applying for a license to be a type II adult residential care home in a residential area to: publish notice of their application in a newspaper that circulates in the county in which the facility is proposed to be located; hold an informational hearing in the relevant district; and if also applying for a county permit, notify the department of health of the county application so that the department will invite the county to attend the department's informational hearing.

Companion:

Package: None

Current Referral: HTH/HMS, PGM

Introducer(s): RYAN

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



LORETTA J. FUDDY, A.C.S.W., M.P.H.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
File:

Senate Committees on Human Services and Health

SB 3052, Relating to Adult Residential Care Homes

**Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Director of Health**

Monday, February 6, 2012

1 **Department's Position:** The department appreciates the intent of this bill but respectfully OPPOSES it
2 as unnecessary and possibly illegal.

3 **Fiscal Implications:** Additional staff time would be required to undertake the requirements of this bill
4 although the additional costs would likely be minimal.

5 **Purpose and Justification:** This bill will require applicants for a license of a Type II adult residential
6 care home (ARCH) to publish a public notice in a local newspaper and for the department of health to
7 hold public informational hearings on the prospective operator's license application and to invite the
8 county to participate in the public hearing.

9 It would appear that the purpose of the public hearing would be to invite comments and concerns
10 from neighboring residents or businesses who might oppose the placement of the Type II ARCH in their
11 community and for the prospective operator or the department of health to consider such opposition as
12 part of the license application process. Potentially, this could violate the U.S. Fair Housing Act. The
13 Federal Fair Housing Act prohibits discrimination on the basis of disability, which includes persons with
14 mental or physical impairments. The law also makes it illegal for local governments to deny a permit
15 for a home because of the disability of individuals who live or would live there. However, in effect, this

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1 bill would require the DOH to consider the testimony at a public informational meeting in determining
2 whether to grant a license. To deny a license because of the kind of individuals who live or would live
3 there is against federal law.

4 Currently, all ARCH license applicants, whether Type I or Type II or Expanded, are verbally
5 encouraged to be good neighbors and to reach out to their prospective neighbors to inform them of their
6 intention to open an ARCH in the neighborhood. OHCA could include this encouragement as part of its
7 written instructions to ARCHs instead of the more statutory and regulatory mandate proposed under this
8 bill. This would be a more prudent step-wise approach for prospective ARCH operators to work with
9 their prospective neighbors to alleviate specific concerns.

10 Thank you for the opportunity to testify.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

S.B. NO. 3052, RELATING TO ADULT RESIDENTIAL CARE HOMES.

BEFORE THE:

SENATE COMMITTEES ON HUMAN SERVICES AND ON HEALTH

DATE: Monday, February 6, 2012 TIME: 3:00 p.m.

LOCATION: State Capitol, Room 229

**TESTIFIER(S): David M. Louie, Attorney General, or
Andrea J. Armitage, Deputy Attorney General**

Chairs Chun Oakland and Green and Members of the Committees:

The Department of the Attorney General appreciates the intent of this bill to keep communities informed about new residential care homes, but is concerned that, as drafted, it is vague and may violate federal law. Specifically, we note that for a home where eight or fewer residents live, the State cannot impose requirements different than those imposed on a single-family residence.

This bill amends chapter 321, Hawaii Revised Statutes (HRS), to add requirements for applicants for licenses for Type II adult residential care homes (ARCHs) and for the Department of Health (DOH). Those requirements are:

1. An applicant for a Type II ARCH license must publish notice of its application for a license in a newspaper in the county where the Type II ARCH is to be located;
2. DOH must hold an "informational hearing" regarding the license application for the Type II ARCH in the district where the facility is to be located; and
3. If the applicant for a license for the proposed Type II ARCH is concurrently applying for a county permit for the facility, the applicant must notify DOH of its permit application and then DOH must invite the relevant county to the informational hearing.

Type II ARCHs are defined in section 321-15.6(b)(2)(B), HRS, as ARCHs that allow "six or more residents, including but not limited to the mentally ill, elders, persons with disabilities, the developmentally disabled, or totally disabled persons who are not related to the home operator or facility staff." They are licensed by DOH pursuant to section 321-15.6 and chapter 11-100.1, Hawaii Administrative Rules (HAR).

The bill as drafted is vague because it requires the applicant to publish the fact that the applicant is applying for the Type II ARCH license in the newspaper, but it does not provide a time frame for this publication nor minimum informational requirements. It then states that DOH shall hold an informational hearing regarding the application, but does not state the purpose of the hearing, how DOH is to provide notice to the public of that hearing (the notice the applicant publishes appears to be separate from what DOH is required to do), the time frame for the hearing, nor in what manner the hearing should be held. We recommend that to cure our vagueness concerns, subsections (a) and (b) be amended to provide this additional information regarding the applicant's publication notice and DOH's public hearing.

The bill requires that, if an applicant is concurrently applying for a license and a county permit, the applicant shall notify DOH of its county permit application and in turn DOH shall notify the county about the public hearing. But section 11-100.1-3(b)(1)(A), HAR, provides that any application for an ARCH license shall contain "documented compliance with current county building and zoning codes." In other words, all the required county permitting must be completed prior to applying for an ARCH license. Therefore, the contingency in subsection (c) would never happen. As a result we suggest that subsection (c) of the bill be removed.

The bill may violate the federal Fair Housing Amendments Act of 1988 (FHAA), codified in 42 U.S.C. sections 3601 to 3631. The FHAA prohibits discriminating against persons with any "handicap" (now referred to as a disability). The term 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 significant 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

The Statement addresses the issue of treating living situations differently for those with disabilities than those for the general population.

Q. What kinds of local zoning and land use laws relating to group homes violate the Fair Housing Act?

Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the Fair Housing Act. For example, suppose a city's zoning ordinance defines a "family" to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires this home to seek a use permit, such requirements would conflict with the Fair Housing Act. The ordinance treats persons with disabilities worse than persons without disabilities.

A local government may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the Act if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waiver. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.

The Honolulu Land Use Ordinance (LUO) defines “family” as:

one or more persons, all related by blood, adoption or marriage, occupying a dwelling unit or lodging unit. A family may also be defined as no more than five unrelated persons. In addition, **eight or fewer persons who reside in an adult residential care home . . . monitored and/or licensed by the State of Hawaii shall be considered a family.**

(Emphasis added.) Honolulu Land Use Ordinance § 21-10.1 Definitions (2006).

A Type II ARCH is defined as having six or more residents. To the extent that this bill would require a public hearing for a Type II ARCH that had six to eight residents, because it

would not require one for any other “family” dwelling, it would violate the FHAA. We would recommend that if this bill is amended to only apply to a Type II ARCH with more than eight residents, it would be more likely to survive a court challenge. Please note that if it is a Type II ARCH with more than eight residents, the applicant would have had to have a public hearing during the permitting process (at least on Oahu). The Honolulu Land Use Ordinance requires a public hearing for a major conditional use permit, and a group home licensed by the state with more than eight residents requires a major conditional use permit.

Further, the bill does not specify what DOH may or may not do with respect to licensing an ARCH based upon the testimony given at the hearing. However, it appears that if DOH were to deny the license following testimony in opposition to the type of residents the home would serve, the State may be violating the FHAA.

The Statement also addresses whether local governments may consider the concerns of community members in making a decision whether to grant a permit. This analysis can be interpreted similarly with respect to state licensing of group homes. It states:

Q. Can a local government consider the feelings of neighbors in making a decision about granting a permit to a group home to locate in a residential neighborhood?

In the same way a local government would break the law if it rejected low-income housing in a community because of neighbors' fears that such housing would be occupied by racial minorities, a local government can violate the Fair Housing Act if it blocks a group home or denies a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities. This is so even if the individual government decision-makers are not themselves personally prejudiced against persons with disabilities. If the evidence shows that the decision-makers were responding to the wishes of their constituents, and that the constituents were motivated in substantial part by discriminatory concerns, that could be enough to prove a violation.

As a result of this clear federal guidance, we recommend either that subsection (b) be removed from the bill or in the alternative, that it be amended to specifically note that the only types of concerns that DOH may consider from the community would have nothing to do with the *type* of residents the facility would serve. In other words, for example, DOH could consider community concerns such as how the establishment of the facility would legitimately affect parking availability in the area.

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Testimony of the Department of the Attorney General
Twenty-Sixth Legislature, 2012
Page 5 of 5

For the foregoing reasons, we respectfully ask the Committees to make the recommended amendments or to hold the bill.

From: Mailing List
Sent: Saturday, February 04, 2012 10:16 AM
To: HTHTestimony
Cc: robertscottwall@yahoo.com
Subject: Testimony for SB3052 on 2/6/2012 3:00:00 PM

Testimony for HTH/HMS 2/6/2012 3:00:00 PM SB3052

Conference room: 229
Testifier position: Support
Testifier will be present: Yes
Submitted by: Scott Wall
Organization: Individual
E-mail: robertscottwall@yahoo.com
Submitted on: 2/4/2012

Comments:

I support this bill. Right now it seems that any Tom, Dick, or Harry can open a home with virtually no oversight. You would not believe the quality of some of the living situations that the government is paying for. It would do this committee good to get out and wander around some of the places in Kalihi one day.

From: Mailing List
Sent: Saturday, February 04, 2012 4:17 PM
To: HTHTestimony
Cc: lorikyamada@hotmail.com
Subject: Testimony for SB3052 on 2/6/2012 3:00:00 PM

Testimony for HTH/HMS 2/6/2012 3:00:00 PM SB3052

Conference room: 229
Testifier position: Support
Testifier will be present: No
Submitted by: Lori Yamada
Organization: Individual
E-mail: lorikyamada@hotmail.com
Submitted on: 2/4/2012

Comments:

I support this senate bill SB3052 regarding the public notification of the licensing of adult residential care homes. Neighbors and neighborhoods should be made aware because of the potential negative effects of the basic nature of these home businesses - added noise, traffic, trash, bio hazards, etc., will impact the quality of life of the surrounding areas.

From: Mailing List
Sent: Saturday, February 04, 2012 5:00 PM
To: HTHTestimony
Cc: Brenda.Kosky@gmail.com
Subject: Testimony for SB3052 on 2/6/2012 3:00:00 PM

Testimony for HTH/HMS 2/6/2012 3:00:00 PM SB3052

Conference room: 229
Testifier position: Support
Testifier will be present: No
Submitted by: Brenda Kosky
Organization: Individual
E-mail: Brenda.Kosky@gmail.com
Submitted on: 2/4/2012

Comments:

From: Mailing List
Sent: Sunday, February 05, 2012 8:49 AM
To: HTHTestimony
Cc: crystalkpaul@yahoo.com
Subject: Testimony for SB3052 on 2/6/2012 3:00:00 PM

Testimony for HTH/HMS 2/6/2012 3:00:00 PM SB3052

Conference room: 229
Testifier position: Support
Testifier will be present: No
Submitted by: Crystal Kia Paul
Organization: Individual
E-mail: crystalkpaul@yahoo.com
Submitted on: 2/5/2012

Comments: