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Testimony on Administrative Code ch. 46-05-01  
Housing For Older Persons  
Prepared for the  
Administrative Rules Committee

December 10, 2009

Good morning, Chairman Klein and members of the Administrative Rules Committee. I am Lisa Fair McEvers, Commissioner of Labor.

In 1999, the legislative assembly enacted the North Dakota Housing Discrimination Act under N.D.C.C. ch. 14-02.5. The North Dakota Housing Act was enacted to be the "substantial equivalent" to the federal Fair Housing Act, so that the Department of Labor would qualify as a Fair Housing Assistance Program (FHAP) to investigate on behalf of the Department of Housing and Urban Development, and in so doing, qualify to receive federal funds for completed investigations.

Section 14-02.5-11 provides in part:

In determining whether housing qualifies as housing for elderly because it is intended and operated for occupancy by at least one individual fifty-five years of age or older for each unit, the department shall adopt rules that require at least the following factors:

- a. That at least eighty percent of the units are occupied by at least one individual fifty-five year of age or older per unit; and
- b. The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for individuals fifty-five years of age or older.

These rules were drafted to fulfill the legislative mandate and are intended to be the substantial equivalent of the federal rules on Housing For Older Persons age fifty-five and over. The rules are related to the above noted state statute and also relate to federal regulations on Housing for Older Persons (age fifty-five and over) put in place to implement the exemption in the Fair Housing Amendments of 1988 for older persons. The proposed rules were not mandated per se by federal law, but must be the substantial equivalent of the federal rules under the Fair Housing Act in order for the Department of Labor to continue to qualify as a FHAP.

Notice for the proposed rules was provided by filing a copy of the full notice with the Legislative Council along with a copy of the proposed rules. In addition, an abbreviated notice was published in each official county newspaper in North Dakota.

A hearing was conducted by a hearing officer from the Office of Administrative Hearings. No one from outside the Department of Labor attended the hearing. No oral or written testimony submitted to the hearing officer.

The cost to publish the notice the hearing using the North Dakota Newspaper Association was \$1,526.90. The cost for the administrative hearing officer to conduct the hearing was \$195.91.

The subject matter of the rules is housing designated for person age fifty-five or older. The rules define what a housing facility or community is, and how such a facility or community may qualify for the exemption for provisions relating to familial status or age under the North Dakota Housing Discrimination Act. The rules contain an eighty percent occupancy standard and factors to be considered to show intent to qualify for the exemption as required by N.D.C.C. § 14-02.5-11. The rules also provide requirements for verification of occupancy necessary to qualify for the exemption and provisions on a good faith defense to a discrimination claim based on familial status. These rules were modeled after federal rules found in 24 CFR 100.304 through 100.308.

A regulatory analysis was not required under N.D.C.C. § 28-32-08, therefore an analysis was not completed. The department did conduct a Small Entity Regulatory Analysis and a Small Entity Economic Impact Statement. Copies of each are attached. A Takings Assessment was also completed, a copy of which is attached. The Office of the Attorney General has examined the proposed rules, publication notices and other requirements for adopting administrative rules and found them to be in compliance with N.D.C.C. ch. 28-32.

The rules were not adopted as emergency rules.

Thank you for your consideration of the department's new rules.

## SMALL ENTITY REGULATORY ANALYSIS

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?

Yes. However, because the rules only require the same type of reporting requirements as would be required to qualify for the same exemption under federal fair housing laws for housing for older persons, less stringent requirements would not be practical. The rules would apply equally to all entities or individuals who wish to claim the exemption found in N.D.C.C. § 14-02.5-11, regardless of size. In addition, certain sales and rentals are already exempted based the number of sales made or the number of units involved under N.D.C.C. § 14-02.5-09, which may be used by certain small entities.

2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what result?

Yes. However, as noted above, the rules for this exemption apply equally to all entities regardless of size.

3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result.

Yes. However, because the rules are based on rules promulgated for federal fair housing laws for housing for older persons all persons or entities are already subject to the reporting requirements to qualify for the federal exemption. This was done intentionally as to make the requirements uniform and also to ensure the rules are the substantial equivalent of the federal requirements.

4. Were performance standards established for small entities for replacement design or operational standards required for the proposed rule? To what result?

No. The rules require a housing facility or community that intends to qualify for an exemption as housing for elderly because it is intended and operated for occupancy by at least one individual fifty-five years of age or older in each unit to publish and adhere to policies and procedures reflecting that intent. In addition, the rules also require a housing facility or community that intends to qualify for the exemption to verify compliance through reliable surveys and affidavits.

5. Was exemption of small entities from all or any part of the requirement in the proposed rule considered? To what result?

Yes, but as noted above, this particular exemption is not based on size of an entity, as the North Dakota Housing Discrimination Act prohibits discriminatory practices by any person, which could include a small entity.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

1. Which small entities are subject to the proposed rule?

Any entity that wants to qualify for the exemption for housing for the elderly for housing intended for individuals fifty-five years of age and older set forth in N.D.C.C. § 14-02.5-11.

2. What are the administrative and other costs required for compliance with the proposed rule?

There should be no additional cost, as the proposed administrative rules do not put any new additional burdens on small entities or entities of any size, because they are already subject to these requirements under federal fair housing laws for housing for older persons. I would note that the Secretary of HUD approved the federal equivalent of this rule, and in doing so certified that the federal rule would not have a significant impact on a substantial number of small entities.

3. What is the probable cost and benefit to private persons and consumers who are affected by the proposed rule?

The cost to private citizens and consumers would be of nominal or no cost. The benefit of having the proposed rules in place ensures that requirements of N.D.C.C. § 14-02.5-11 are met but do not create any additional burdens because the proposed rules are based on under federal fair housing laws and rules for housing for older persons. Any cost to a private citizen or consumer would be the same, regardless of whether the rules are promulgated or not.

4. What is the probable effect of the proposed rule on state revenues?

None.

5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

No.

## TAKINGS ASSESSMENT

- 1) It is not likely that the proposed rules may result in a taking or regulatory taking because the proposed rules do not relate to the taking of real property as defined under N.D.C.C. § 28-32-09(3).
- 2) The purpose of the proposed rules is to implement N.D.C.C. § 14-02.5-11, which requires the department to adopt rules setting forth procedures to determine whether housing qualifies as housing for elderly because it is intended and operated for occupancy by at least one individual fifty-five years of age or older in each unit. The rules are necessary to fulfill the requirements of N.D.C.C. § 14-02.5-11 and will have no effect on private property owners in the context of a possible taking.
- 3) The estimated cost would be nothing, as the rules could not possibly be viewed as resulting in a taking as defined.
- 4) There is no source in the agency's budget for any compensation which may be ordered, but as noted above, no such order is likely.
- 5) The benefits of the proposed rule exceed the estimated compensation costs because the estimated compensation cost is zero.

The North Dakota Department of Labor has reviewed the definition of a "taking" as set forth in N.D.C.C. § 28-32-09(3), assessed whether the proposed rule implicate a possible taking, and has determined that nothing in the proposed rules would result in a taking.