



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: June 17, 2014

Agenda Item 11C(1)

Approvals:

City Manager PH
Dept. Head JSH
Attorney JO
Finance JV

Department: Community Development
Prepared By: James Holloway, Community Development Director
Jeff Oderman, City Attorney

Subject: *SHOULD THE CITY COUNCIL AUTHORIZE THE CITY ATTORNEY TO HAVE THE CITY'S NAME PLACED ON A FRIEND-OF-THE-COURT (AMICUS CURIAE) BRIEF TO BE FILED IN THE US SUPREME COURT IN SUPPORT OF NEWPORT BEACH'S PENDING PETITION FOR A WRIT OF CERTIORARI THAT ASKS THE SUPREME COURT TO TAKE UP AND CONSIDER THE RECENT ADVERSE NINTH CIRCUIT COURT OF APPEALS RULING IN NEWPORT BEACH'S GROUP HOME CASE?*

Fiscal Impact: Yes. \$5,000 is being requested from the FY 2014 Council Contingency budget.

Summary: The San Clemente City Council is being asked by the City of Newport Beach to authorize the City Attorney to have the City's name placed on a Friend-of-the-Court (Amicus Curiae) Brief. The brief will be filed with the US Supreme Court in support of Newport Beach's pending petition that asks the Supreme Court to take up and consider the recent adverse Ninth Circuit Court of Appeals ruling in Newport Beach's Group Home Case. The Newport Beach case involves a City of Newport Beach Ordinance which was adopted about six years ago, that had as its goal a new way to ensure that group residential uses fit well within existing residential neighborhoods. A summary of that ordinance is attached, along with a history of the court case which has progressed over the past six years. The filing of an Amicus Brief would not require any significant expenditure by the City of San Clemente. However, the City of Newport Beach is asking for financial support for their efforts (\$5,000 to \$10,000).

Background: Newport Beach Efforts

Balancing the rights of residential recovery groups and disabled individual rights with the rights of individuals and families living in residential neighborhoods has been a challenging topic for many Cities. Ultimately, those rights are defined in the Americans with Disabilities Act and the Fair Housing Act, both of which are federal law. The attached summation of Newport Beach's Group Residential Uses Ordinance and memo from Newport Beach City Manager Dave Kiff summarizes the goals of the ordinance and the long history of legal proceedings associated with the ordinance.

San Clemente Efforts

The City has dealt with this problem from time to time. Most recently, and illustrative of our approach, City staff and the Sherriff's department have been dealing with problems at 1901 S. Ola Vista. Typically, City staff takes a team approach to

addressing group home, or sober living sites that have become a problem to the surrounding residential neighbors. In the particular case of 1901 S. Ola Vista, Chief Moodie and Code Compliance Supervisor Brent Panas have been working with the Group Home owners and surrounding residents. Chief Moodie and Mr. Panas organized a community meeting in mid May and over 50 members of the neighborhood showed up to voice their concerns over the issues at 1901 S. Ola Vista. Out of that meeting came a mediation agreement between the neighbors and the owners of the property. The owner has yet to sign the agreement.

In the meantime, the Sherriff's Department has stepped up its presence in the area. Since mid May, the Sherriff's Department has increased the number of patrol visits to the site. Additionally, they have responded to four service calls to this address, one of which resulted in an arrest.

In recent talks with the neighborhood representatives, Mr. Panas informed the neighborhood representatives of the Safe Streets Now option. What this program provides is the guidance for the neighborhood to file multiple small claims actions against the property owner who is causing the nuisance. Each member of the residential community affected by this property can sue for the maximum small claims amount and then combine that amount with a judgment against the property owner. If the property owner fails to pay that judgment, the home is then foreclosed upon by the County. This has been an effective tool in California for situations involving problem properties which are diminishing the values and quality of life of surrounding properties. Linda Hamm from the Sherriff's Department and Mr. Panas are coordinating with the residential community and plan on attending meetings with them in the future to provide them with necessary materials and direction to pursue this process.

Discussion: If some other city (Newport Beach, Costa Mesa, or other city) is the "pioneer" and is able to make good law that San Clemente can rely upon, then that makes San Clemente's implementation of a similar land use regulatory code much simpler to adopt. Therefore, at the very least, the ability of local government to adopt balanced codes to address issues while respecting the rights of group homes and individuals seem desirable. However, the details of a local ordinance would have to be carefully worked out through a public hearing process. Staff has no opinion regarding the exact details regarding Newport Beach's ordinance at this time.

Recommended

Action: STAFF RECOMMENDS THAT the City Council:

- 1) Authorize the City Attorney to have the City's name placed on a Friend-of-the-Court (Amicus Brief) to be filed with the US Supreme Court in support of Newport Beach's pending petition for a writ of certiorari that asks the Supreme Court to take up and consider the recent adverse Ninth Circuit Court of Appeals ruling in Newport Beach's Group Home Code.
- 2) Authorize a transfer of \$5,000 from City Council Contingency Funds to Account # 001-441-43640, to be paid to The City of Newport Beach in support of their efforts.

Attachments: 1) Summary of Newport Beach's Group Residential Uses Ordinance
2) History of Litigation

Notification: 1) Mr. Jim Miklich
2) City of Newport Beach

What did Newport Beach's Group Residential Uses Ordinance Do?

1. It affirmed that a State-licensed treatment home serving 6 or fewer persons is allowed by right in all residential districts. Newport Beach today has 13 of these homes, serving 78 persons.
2. It said that State-licensed homes with 7 or more persons and any unlicensed "sober living" homes that existed at the time the ordinance was adopted could remain in R-1 and R-2 zones if the home secured a Use Permit, and complied with its conditions. They had a year to do so. Today, 9 of these homes have secured use permits, serving 73 persons.
3. It said that new "7 and over" homes (licensed or unlicensed) and all new unlicensed homes which do not operate as single housekeeping units (regardless of size) could be placed only in multi-family residential zones (R-3 and above), and only with a Use Permit.
4. If a series of small licensed homes are linked together in management, it said that these homes created one larger "integral" facility and limited these facilities to multi-family residential zones with a Use Permit.
5. It allowed for a person or the operator of any group residential use to apply for and receive reasonable accommodation from Items 2 and 3 following a determination by an independent hearing officer. As of 2014, 6 homes have received reasonable accommodation in this manner, serving 46 persons.

Our ordinance's **definitions** include:

- (1) A "Single Housekeeping Unit" - the functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit;
- (2) A "Group Residential Unit" - shared living quarters, occupied by two or more persons *not* living together as a single housekeeping unit; and
- (3) "Residential Care Facilities – Large" - Any place, site or building, or groups of places, sites or buildings, whether licensed or not, in which seven or more individuals with a disability reside who are not living together as a single housekeeping unit and in which every person (excluding the operator's employees and the employees' family members) residing in the facility is an individual with a disability. The primary distinction between this use and a "group residential unit" is that the residents of residential care facilities are disabled.

Like a State-licensed treatment facility serving 6 or fewer, any people living as "single housekeeping units" are allowed in all residential zones. For example, if individuals recovering from alcoholism or drug addiction decide to live together, they may sign a lease together and live as a "single housekeeping unit" anywhere in the city.

"Group residential units" (akin to Boarding Houses or Parolee-Probationer homes) are prohibited in all residential zones.

For more information, contact:

Michael Torres, Assistant City Attorney

949-644-3131 or MTorres@newportbeachca.gov

From: "Kiff, Dave" <DKiff@newportbeachca.gov>
Date: May 6, 2014 at 10:41:44 AM PDT
To: Undisclosed recipients::

Dear Friend:

About six years ago, the City of Newport Beach looked at a new way to ensure that group residential uses fit in well with residential neighborhoods. We brought in outside legal counsel to adopt an ordinance which respected the rights of disabled persons to residential recovery but attempted to limit or eliminate some of the secondary impacts of group homes in areas where lots are small and homes sit 6' from each other. A summary of our ordinance is attached to this email.

Six years later, our ordinance has achieved a balance respecting residential recovery and disabled individuals' rights, while also respecting neighborhoods. I know that several other cities with group residential uses have watched our ordinance and its challenges, wondering how it will fare. Past interest in this issue from your city leads me to send this e-mail to you.

We're at a point in time where you can help.

The road indeed has been challenging. After our ordinance was adopted in 2008, many group homes successfully complied with the ordinance. About thirty homes with nearly 200 beds remain in place today in Newport Beach, operating well within our neighborhoods. In fact, our largest group home operator, having previously received numerous complaints from neighboring residences related to secondary effects, has fully complied with the ordinance. The complaints have all but stopped, and the group home operator successfully and collaboratively operates here. Group homes that decided not to bring their activities into conformance with the law have left. Three operators sued in US District Court to overturn the ordinance.

The US District Court judge, in determining our motion for summary judgment, largely sided with the City. Following that action, the three operators appealed the motion to the 9th Circuit Court of Appeals. A three-judge panel there largely sided against the City in November 2013, and this causes the case to be re-set for trial in US District Court. The appellate panel also gave specific instructions to the District Court as to how to hear the case.

But then five of the 9th Circuit's judges dissented from a refusal of the full 9th Circuit to rehear the case. The five noted that the three judge panel's decision opened up cities to a new theory of liability whereby cities could be found liable for enacting facially neutral laws when people allege discriminatory legislative intent. As a result, we believe that the five judges have written a path to bring us to the US Supreme Court, and have significantly increased our odds of having the US Supreme Court hear the case. Based upon our discussions with experts in the field, we believe our odds went from 3-4% to 20-25%. Not great, but better.

Our City Council is willing to take that step, and has authorized a petition seeking U.S. Supreme Court review. We have retained former United States Solicitor General **Ted Olson** of Gibson, Dunn & Crutcher LLP to file a petition for certiorari asking the U.S. Supreme Court to review the case.

We expect that the petition will focus on the 9th Circuit's misapplication of the Americans with Disabilities Act and Fair Housing Act to invalidate a facially neutral zoning ordinance that does not single out residential-treatment facilities for disparate treatment and that has been enforced in a non-discriminatory manner. The 9th

Circuit's decision is inconsistent with settled principles of anti-discrimination law established by the U.S. Supreme Court and with the approach that other lower courts have taken when confronted with similar cases.

To bolster the chances of obtaining U.S. Supreme Court review, we are working to enlist "friend of the court" (*amicus curiae*) briefs from cities and other institutions and individuals with an interest in the issues presented in the case. These briefs carry a lot of weight with the Court, and are especially valuable in demonstrating that an issue presented for review transcends the parties to the case. This is an important factor that the Court considers when deciding whether to grant review. One particular avenue of support we are exploring is assembling a brief from one or more law professors well-known for their scholarship regarding anti-discrimination laws, property rights, and/or municipal governance issues.

Given the significant restrictions that the 9th Circuit's decision imposes on our cities' ability to enact facially neutral laws, I am hopeful your city will consider joining with us by supporting and/or making a financial contribution to fund an *amicus* brief. The brief would come from one or more law professors urging the Court to grant review of the Ninth Circuit's decision. That support would give a tremendous boost to our efforts to secure U.S. Supreme Court review.

If you would like a copy of the 9th Circuit's decision and/or the five judge dissent, please contact me or Michael Torres of our City Attorney's office – mtorres@newportbeachca.gov. The City's petition for certiorari will likely be due on August 1, 2014, and *amicus* briefs will be due thirty days thereafter. Given the short timelines associated with this matter, if you could let me know by **May 31, 2014**, if your city would consider supporting this effort and, if so, the amount of financial support, I would appreciate it. We anticipate *amicus* brief costing approximately \$100,000 and are hopeful of donations of \$5,000 or \$10,000 to offset that cost and to show strong statewide interest in this case.

Please do not hesitate to contact me if you would like to discuss the case or the potential *amicus* brief.

On behalf of the City of Newport Beach, thank you in advance for considering this request.

Dave Kiff
City Manager
City of Newport Beach, CA
949-644-3001